



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT BUNGOMA

ELR CAUSE PETITION NO. E012 OF 2021

IN THE MATTER OF ARTICLE 2,10,22,23,47,48,159,165,232,235, AND 258 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF ENFORCEMENT OF THE NATIONAL VALUES AND

PRINCIPLES OF GOOD GOVERNANCE UNDER ARTICLE 10

AND THE PRINCIPLES OF PUBLIC SERVICE UNDER

ARTICLE 232 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF SECTION 52,59,63,65,66,67 AND 68 OF THE COUNTY GOVERNMENT ACT

AND

IN THE MATTER OF SECTION 85,86,87,88 AND 89 OF THE PUBLIC SERVICE COMMISSION ACT

AND

IN THE MATTER OF THE PUBLIC SERVICE (VALUES AND PRINCIPLES) ACT

BETWEEN

OLIVER MUKHEBI AND 26 OTHERS.....PETITIONERS

AND

BUNGOMA COUNTY PUBLIC SERVICE BOARD.....1ST RESPONDENT

COUNTY GOVERNMENT OF BUNGOMA.....2ND RESPONDENT

AND

BARASA KUNDU NYUKURI.....PROPOSED INTERESTED PARTY

RULING

1. The Proposed Interested Party Barasa Kundu Nyukuri by Notice of Motion Application brought under Rule 5 of the Constitution of Kenya (protection of Rights and Fundamental Freedoms and enforcement of the Constitution) Practice and Procedure Rules, 2012 herein after referred to as Mutunga Rules.

2. The Applicant seeks for grant of leave to himself, Barasa Kundu Nyukuri, to be enjoined in these proceedings as an interested party. The

Application is based on grounds:-

- (i) That the proposed party is a resident of Bungoma County who seeks to be enjoined in his capacity as a Public Interest Litigant within the provisions of Article 258(i) (c) of the constitution.
- (ii) The proposed interested party understands the basis of the petition which seeks to protect the subject matter of the various appeals preferred at the public Service Commission against the Bungoma County Public Service Board.
- (iii) That the proposed interested party is well aware of irregularities and illegalities attending the recruitment, selection and appointment of qualified candidates from the said position of village administrators and has submitted a petition dated 3rd November, 2021 to the Bungoma Public Service Board over the same.
- (iv) That the Bungoma County Public Service Board ignored his petition and he is now also in the process of preferring an Appeal to the Public Service Commission .
- (v) That the proposed interested party is fully aware of the activities that the Bungoma County and the County Public Service Board continued and continue to undertake in preparation to assume office in contravention of the injunctive orders issued by this Honourable court in this petition.
- (vi) That the proposed interested party is seized of detailed information pertaining to the irregularities and illegalities attending to the whole exercise of advertising, interviewing, recruiting, selecting and appointing village administrators in Bungoma County and further information of the appointed village administrators who did not meet the minimum requirements and it believes that this information will be available to the court in determining this petition.
- (vii) That the parties will suffer no prejudice if the application is allowed/having been brought with unreasonable delay and it is in the interest of justice.

3. The Applicant also filed supporting affidavit in support of his application sworn on the 3rd December, 2021 by himself and annexed a copy of the petition to the Bungoma County Public Service Board dated 2nd December 2021. The Court is highly disturbed that the interested party swore an affidavit stating he submitted the said petition on 3rd November 2021 yet the annexure "BN-1" is dated 2nd December 2021 a day before he filed this application.

4. This is clearly an act of misleading the court of which the court takes offence and finds the proposed interested party is not acting in good faith. The court notes that the lying scheme of the said Barasa Kundu Nyukuri was unsuccessful attempt as he signs off as 3rd November 2021 allegedly via email address which emailing evidence is not annexed. The letter is also not stamped as received. The court finds the proposed interested party has come to court with dirty hands. Equity frowns at that.

5. The proposed interested party filed a further affidavit and what he calls evidence in Petition No. E12 of 2021 dated 14th December, 2021 without the leave of court. The said further affidavit is struck out.

6. The Respondent are opposed to the joinder of the proposed interested party and filed grounds of opposition dated 15th December, 2021 to effect that the application dated 3rd December 2021 is bad in law, frivolous, unmerited and an abuse of court process therefore ought to be struck off with costs.

7. The Respondent state that the Applicant was neither an Applicant nor a party to the recruitment process of the positions of village administrators and therefore has no interest worth of being protected by court.

8. That the matter before court is an employment relation between the various Applicants and the Respondent and there is no privity of contract between the Applicant and the Respondents.

9. That there is no title in law known or referred to as Public Interest litigant. The Applicant Barasa Kundu Nyukuri is neither a lawyer or trade unionist representing any of the parties.

10. That the Applicant has not disclosed or attached any instrument of authority to act for any of the parties. The counsel for the petitioners said they are not opposed to the joinder as the same was allowable under "Mutunga Rules".

11. The parties on the 15th December 2021 appeared before me and orally submitted on the Application to join proposed interested party.

12. Barasa Kundu Nyukuri the Applicant told the court he represents Public Interest and serves as Executive Director Touch Africa. He said he came as individual in public interest and no party will suffer prejudice if application is allowed. That he has valuable information in terms of irregularities and illegalities in the appointment and recruitment. That he has flagged 81 villages out of the 236 villages. That he had done appeal to the County Public Service and Public Service Commission which has been ignored. The court notes that it had already taken issue with annexure "BN- 1" on this matter and that no evidence under supporting affidavit to the Application of any appeal to the Public Service Commission.

13. The Applicant submitted that he relied on Article 22 (2) (c) of the Constitution which states that any person has a right to seek court redress and Article 258 (2) (c) of the Constitution which states that every one has a right to file claim for violation of right. That his role as

Public Interest Litigant is to ensure enforcement of rights. That his interest is on behalf of the general public.

14. The Petitioners supported the application under Mutunga rules and stated that the supporting affidavit captures the legal interest. The Petitioner relied on further Affidavit of Applicant filed without leave of the court which the court struck out.

DETERMINATION

15. Rule 2 of the Constitution of Kenya (protection of Rights and Fundamental Freedoms) Practice & Procedure Rules 2013 defines interested party as “a person or entity that has an identifiable stake or legal interest or duty in the proceedings before the court but is not a party to the proceedings or may not be directly involved in the litigation”. The Supreme Court in *Francis Kariuki Muruatetu & Another -vs- Republic and 5 others (2016) eKLR* where the court referred to the case of *Trusted Society of Human Rights Alliance -vs Munuru Material & 5 others (2014) eKLR* defined an interested party as “one who has a stake in the proceedings though he or she is not a party to the cause *ab initio*. He or she is one who will be affected by the decision of the court when it is made either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings and champions his or her cause”. In *Kenya Medical Laboratory Technicians and Technologist Board & 6 others -vs Attorney General & 4 others (2017) eKLR* Matino Judge held that *for a interested party to be joined in proceedings, the interest of the party which is apparent must be legal, identifiable and demonstrate a duty*.

16. In determining whether I should grant leave to join the interested party, I am guided by High Court decision in *Mumo Matemu Case (supra)* where the court held “An interested party is one who has a stake in the proceedings. He or she is one who will be affected by the decision of the court when it is made, either way”. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings and champions her/his cause”.

17. The issue before court is an application for conservatory orders pending the hearing and determination of an appeal before Public Service Commission lodged on behalf of the Petitioners who were unsuccessful in concluded recruitment of 234 village administrators by the Respondents. The Interested party was not an applicant in the recruitment process. He has no personal stake in the cause. He says he comes in the name of Public Interest Litigant to protect Public Interest Rights pursuant to Article 258 of the Constitution. Applying the authority in *Mumo Matemu* case then the Applicant fails the test for lack of Personal Stake in the cause before the court. The Applicant states that he has filed appeal before the 1st Respondent which has not been responded to and annexed “BN1” to his supporting affidavit. The said alleged appeal is dated 2nd December, 2021 a day before the filing of his application. No evidence of appeal to Public Service Commission on the cause has been produced and thus the application is based on falsehoods.

18. The Petitioners submitted that the Applicant has evidence of illegalities and irregularities. That does not grant the said Applicant Stake in the cause. In *Mumo Matemu* decision upheld by the Supreme court case in *Francis Muruatetu* case that the interested party is one who will be affected by the decision of the court when the case is decision of court is made either way. The persons wishes to appear to champion his cause.

What is the cause for the proposed interested party in the Petition before the court?

Court Answer - None.

19. The case seeks conservatory order by persons who appealed against the decision of the Respondent in the recruitment exercise. The Applicant has not demonstrated his actual stake in the impugned recruitment exercise. The broad right to petition under Article 258 of the Constitution is in the opinion of this court a right of petitioners not interested parties being enjoined. The position is guided by the decision of the Supreme court in *Francis Kariuki Muruatetu & Another – vs – Republic & 5 others (2016) eKLR* as follows:“(42) therefore, in every case, whether some parties are enjoined as interested parties or not, the issues to be determined by the court will always remain the issues as presented by the principal parties or as framed by the court from the pleadings and submissions of the principal parties. Interested party may not frame its own issues or introduce new issues for determination by court. One of the principles for admission of an interested party is that such a party must demonstrate that he/she has stake in the matter before the court”. The court finds that the Applicant has not done so.

20. Consequently, in view of the foregoing findings of the court and decisions cited to guide the court, the court finds the Application dated 3rd December, 2021 to be without merit and dismisses the same with costs.

DATED, DELIVERED AND SIGNED THIS 20TH DAY OF DECEMBER, 2021 AT BUNGOMA.

J. W. KELI

JUDGE.

IN THE PRESENCE OF :

COURT ASSISTANT – BRENDA WESONGA

PETITIONERS: MS NGANI HOLDING BRIEF FOR BRIAN KHAEMBA ADVOCATE

RESPONDENTS: CYRIL WAYONG’O ADVOCATE

INTENDED INTERESTED PARTY/APPLICANT - ABSENT