



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

ELRC PETITION NO. E047 OF 2021

VINCENT OMAO MARIITAPETITIONER

VERSUS

COUNTY GOVERNMENT OF NYAMIRA.....1ST RESPONDENT

GOVERNOR NYAMIRA COUNTY.....2ND RESPONDENT

COUNTY SECRETARY NYAMIRA COUNTY.....3RD RESPONDENT

CHAIRPERSON, NYAMIRA

COUNTY PUBLIC SERVICE BOARD.....4TH RESPONDENT

SECRETARY, NYAMIRA

COUNTY PUBLIC SERVICE BOARD.....5TH RESPONDENT

GODFREY KIRIAGO NYANGAU.....1ST INTERESTED PARTY

ELMELDA KEMUNTO NYABERI.....2ND INTERESTED PARTY

JUDGMENT

Introduction

1. The Petitioner lodged this petition together with a Notice of Motion Application dated 10th August, 2021. The application was certified urgent and a date given for the interparties hearing. During the hearing of the application, parties agreed that the application and the petition be heard together in the interest of a faster determination of the petition.
2. Parties canvassed both the application and the petition through written submissions.
3. Through the application and Petition dated 10th August, 2021, the Petitioner sought reliefs, including:
 - a) A declaration that the Respondents have jointly and severally violated the 1st Respondents fundamental rights and freedoms as protected under Articles 27, 28, 41 ,47 and 55 of the Constitution.
 - b) A declaration that the appointment of the 1st and 2nd Interested Parties is illegal, discriminatory and any attempt to appoint them is unprocedural, illegal and unconstitutional.
 - c) A declaration that the 2nd, 3rd, 4th and 5th Respondents failed to observe the national values and principles of governance as set out in Article 10 and Article 185(3) of the Constitution in the manner in which they handled the recruitment of the 1st and 2nd Interested Parties.
 - d) An order for the revocation of the Appointment letters for the recruitment/hiring and or secondment of the 1st and 2nd Interested Parties as conveyed.

e) Permanent injunction, restraining the Respondents either by themselves, agents, servants, and/or employees, from admitting the subject employees to the payroll of the County Government of Nyamira and/or making any payments to and/or in favour of the said employees, either on account of remuneration, allowances and/or salaries, without the necessary budgetary approval of the Nyamira County Government, whatsoever and/or howsoever.

f) That costs of the petition be borne by the Respondents

4. The petition was premised on the following grounds:

i. That vide a letter dated 18th January, 2021, the 3rd Respondent initiated a process to recruit staff to fill non-vacant positions, including positions of Director Human Resources and Payroll Manager.

ii. That vide another letter of 19th January, 2021, the 4th Respondent advised that the positions be filled by the County Executive Committee.

iii. That thereafter, the 4th Respondent proceeded to request for the secondment of the Interested Parties herein, fully aware that the positions were not vacant.

iv. That the recruitment is illegal, null and void, as it violated the Public Service Commission Human Resources Manual, for reason that there are substantive office holders to these two positions.

v. That the secondment is a violation of Articles 1, 10, 19(1), 21(1), and 35(1) of the Constitution.

vi. That the action of the Respondent is discriminatory, unfair administrative action and an unfair labour practice contrary to Articles 2(2), 27(1), 47(1), 50(10) and 226 of the Constitution.

5. The Respondents opposed the Petition. They filed a Replying Affidavit sworn by a Mr. Peter Onchari Kereri and submissions in opposition to both the application and the petition herein.

6. The Respondents submitted that the positions subject of this petition were left vacant following redeployment and transfer of officers to other departments within the employ of the Respondents and that it is not true the position were not vacant at the time of secondment of the Interested Parties.

7. The Respondent submitted that they requested the National Government to second the officers/Interested Parties herein to work for the Respondent for a limited period. It is further submitted that the interested Parties were seconded by their parent Ministries, upon approval by the Public Service Commission.

8. It is submitted that the 3rd Respondent initiated the secondment of the Interested Parties from the National Government. It is further submitted that the secondment is not a recruitment as alleged by the Petitioner and further that the Interested Parties holding the positions on secondment, do so within the law, policies and Regulations governing secondment of employees within public service.

9. The Respondents further submitted, that it is not true that the positions now held by the Interested Parties on secondment, had substantive office holders. It is submitted that the two employees work with the 1st Respondent on permanent and pensionable basis.

10. It is submitted that the Interested Parties have since their secondment been executing their mandate and that at no time have they been a stumbling block in the delivery of services by the Respondents. It is submitted that the Petitioner has not demonstrated how the secondment of the Interested Parties has violated the provisions of the Constitution and the law.

11. It is submitted for the Respondents, that the Interested Parties herein, are employed on secondment terms and that the only issue for the court to determine is whether the secondment was procedural. It is submitted that the petitioner has failed to demonstrate the specific secondment procedure which the Respondents failed to adhere to in seeking to second the Interested Parties to their employment.

12. The Respondents submitted that they complied with the general terms and conditions applicable to secondment within the public service. It is their submission that they sought approval from the 5th Respondent to initiate secondment and thereafter sought the secondment of the Interested Parties from their parent ministries and who in turn, sought approval from the Public Service Commission, which approval was granted.

Determination

13. The issues for determination are:

i. Whether the secondment of the interested Parties was procedural

ii. Whether the Petitioner is entitled to the orders sought

Whether the secondment of the Interested Parties was procedural

14. To determine whether or not the Secondment of the Interested Parties herein was procedural, the court will begin by an analysis of the rationale for secondment. The Public Service Commission Act, 2017, defines Secondment as:

" means an arrangement in which a pensionable employee is temporarily released from an organisation within the public service to another organisation which does not have reciprocal pension arrangements, to provide critical skills or acquire new skills while preserving the pension rights of the employee."

15. Section 73 of the County Government Act, provides as follows in regard to secondment:

"73. Secondments

(1) The national government shall put in place measures to protect its public officers on secondment to the counties from loss or disadvantage with respect to pension benefits, gratuity or other terminal benefits."

16. Arising from these provisions, it is clear that the purpose for which secondment is intended, is to preserve the pension rights of an employee. This happens where an employee has been appointed to a position in another organization within the public service that does not have reciprocal pensions arrangements.

17. The next question for this court is whether the Interested Parties herein were recruited to their respective positions. The Black's Law Dictionary defines recruit to mean ***"a new member of an organization, team, or group of people, especially as a result of formally joining."***

18. The Interested Parties herein were coming to the employment of the Respondents and in the subject positions for the first time. They were issued with letters of offer, which offers they accepted. The question becomes whether this was in itself a recruitment; the answer is yes. They had to be appointed first and the appointments accepted before they could request to be seconded.

19. The next question is whether the way in which the Interested Parties were appointed was procedural. To my mind, there are three reasons or occasions that would trigger secondment. The first being where an employee is appointed to a position in an organization without reciprocal pension arrangement. Usually upon this appointment, the employee applies for secondment for the sole purpose of preserving their pension rights. These rights for public entities, would usually be lost where an employee decides to resign.

20. Secondly, secondment would be applied where a public entity intends to build capacity in a certain area within its cadres. The entity would request another public entity to second to it an Officer (s) with specific qualifications and skills for a specified period for purposes of capacity building. This happens mostly between the National Government and the County pursuant to section 32 of the Fourth Schedule to the Constitution, where the National Government is mandated to provide capacity building and technical assistance to County Governments.

21. A third scenario is where government establishes a new entity such as a State Corporation or a Semi-Autonomous Government Agency (SAGA). Officers would be seconded for a specified period to start off the entity and once the entity recruits its own staff, the seconded officers would be sent back to the seconding ministry/department or choose to be absorbed as employees of that entity and transfer their services.

22. This then begs the question of where the secondment of the Interested Parties herein falls? It is not clear how the Respondents identified the two officers. They did not seek a specific skill or qualification from the ministries/government departments that seconded them, leading to them being identified as the persons with the skills the Respondents were looking for. The positions were also not advertised leading to the identification of the Interested Parties, following a competitive recruitment process.

23. Section 65 of the County Government Act states as follows:

"(1) In selecting candidates for appointment, the County Public Service Board shall consider—

(a) the standards, values and principles set out in Articles 10, 27(4), 56(c) and 232(1) of the Constitution"

24. The instructions to the 5th Respondent according to the evidence before this court, was that the positions be filled competitively. The Respondents proceeded to cherry pick candidates and purport to appoint them to the positions devoid of competition. If the Respondents required specialized qualification from the National Government, they would have written to the ministries/departments, stating the special skills, experience and/or qualification they required and asked that officers with such skills, qualifications and/or experiences be seconded to them. Forwarding names without attributing any reasons or special skills to them, is a violation of Article 232(1)(g)(i) (i-ii) of the Constitution on values and principles of public service.

25. The recruitment was neither fairly competitive nor did it afford adequate and equal opportunities for appointment to all the potential applicants, within or outside the county government. This court was not told of anything special about the two officers who were handpicked to fill the two positions.

26. Although the Respondents wrote to the Interested Parties' parent ministries to seek approval from the Public Service Commission to second them to their service, the procedure adopted in their recruitment did not satisfy the standards, values and principles set out in Articles 10, 27(4), 56(c) and 232(1) of the Constitution.

27. The court finds and holds the recruitment and secondment procedure violated Constitutional tenets on fair competition and merit as a

basis for appointment in the public service, hence unconstitutional.

28. Arising from the holding herein, I make the following orders:

- i. A declaration that the appointment and secondment of the 1st and 2nd Interested Parties is illegal, discriminatory and unconstitutional.
- ii. An order for the revocation of the Appointment and secondment of the 1st and 2nd Interested Parties to the service of the Respondents.
- iii. The costs of this petition shall be borne by the Respondents.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 16TH DAY OF DECEMBER, 2021.

CHRISTINE N. BAARI

JUDGE

Appearance:

Mr. Vincent Marita Omao Petitioner present in person

Mr. Oange present for the Respondents

Christine Omollo- C/A