



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION NO. E006 OF 2021

IGNATIUS NYKURI FWAMBA.....1ST PETITIONER

MARK ILUKAU BARASA.....2ND PETITIONER

JUMA JANE NASAMBU.....3RD PETITIONER

VERSUS

THE BUNGOMA COUNTY ASSEMBLY SERVICE BOARD AND 6 OTHERS.....RESPONDENTS

R U L I N G

1. The Petitioner by petition dated 12th October 2021 challenged the advertisement, shortlisting, interviews, recruitment and employment of 55 persons vide advertisement dated 2nd September, 2021 stating it was undertaken by the 1st Respondent without adequate budgetary allocation of funds in violation of various provisions of the Constitution of Kenya and the provisions of section 107(1) and 108 of the Public Finance Management Act 2012 and regulation 42 of the Public Finance Management (County government) Regulations 2015 are seeking a permanent injunction to stop the recruitment exercise.

2. At the same time the Petitioners filed a notice of Motion Application of same date seeking the following orders:-

i. That the application be certified urgent, service be dispensed with in the first instance and the same heard ex parte in the first instance.

ii. That pending the hearing and determination of the Application herein and /or until further orders of this court, this Honourable court be pleased to issue a conservatory order stopping and/or restraining the 1st Respondent or anybody acting under them of their instructions from proceeding with the recruitment, whether internally or externally of the implunged 55 vacancies at the 1st Respondent pursuant to the advertisement dated 2nd September, 2021.

iii. That pending the hearing and determination of the petition herein and /or until further orders of this court, this Honourable court be pleased to issue a conservatory order stopping and/or restraining the 1st Respondent or any body acting under them or their instructions from proceeding with the recruitment whether internally or externally of the implunged 55 vacancies at the 1st Respondent pursuant to the advertisement dated 2nd September, 2021.

3. The Application is supported by Affidavit of the 3rd Petitioner Mark Ilakau Barasa sworn on 12th October, 2021. The Application was placed before me under certificate of urgency by Amalemba & Associates Advocates on the 13th October, 2021. I certified the Application as urgent and directed on service and filing of response and ordered for hearing of the Application inter-partes on the 28th October, 2021.

4. On the 28th October, 2021 when parties appeared for inter-partes hearing the Respondent represented by Mr. Makali Advocate told the court that he had just been served hence had not filed response.

5. I gave directions that the Respondent has leave to file response and further issued directions that the parties file written submissions and to highlight on the 15th November, 2021. The Respondent filed response by way of replying affidavit of John. K. O. Mosongo, the clerk of the County Assembly of Bungoma and the Secretary of the 1st Respondent sworn on the 2nd October, 2021.

6. In the instant petition John. K. O. Mosongo said he was the 2nd Respondent and in the said capacity swore the said affidavit in response to

the Application and the Petition. The response in summary states that the petition and application are brought with ulterior motives and plot and/or sustained attempt aimed at frustrating and /or blocking the 1st Respondent from discharging its mandate as set out under the the County Governments 2012, The County Assembly Service Act 2017 and all other enabling statutes and should be dismissed.

7. The 2nd Respondent avers that the Application is filed with ulterior motives to derail the operations of the County Assembly. That Public interest litigation should not be used as *Trojan Horse* to champion selfish private interest disguised as Public interest and relies on the holding of the Court in *Brian Agin & 2 others -vs- Wafula Chebukati & 9 others (2017) eKLR* to buttress the position that the Petition is brought with improper motives.

8. The 2nd Respondent states that whilst the Petition is alleged to have been brought in the names of Ignatius Nyukuri Fwamba, Mark Ilukau Barasa and Juma Jane Nasambu the preamble of the petition reads:- '*The humble Petition of Francis Simiyu Tome and Mark Ilukau Barasa*' and technically therefore Ignatius Nyukuri Barasa and Juma Jane Nasambu are not petitioners.

9. The 2nd Respondent further avers that the said Francis Simiyu Tome had been employed by the County Assemble Service Board and was until interdiction on 18th August 2020 in service of the 1st Respondent and attached the letter of interdiction CJOM 1 (a) and (b). That the said Francis Simiyu Tome (employee) had several cases with the County Assembly Bungoma ranging from a criminal case to judicial review proceedings which are still active and attaches the documents "JOM-2". In the circumstances, the 2nd Respondent avers that he believes these proceedings are fronted by some disgruntled employees who live in fear of recruitment of other persons a case of sour grapes by persons out to settle scores and not in advancing any public interest at all. On this averment the court notes that the Advocate for Petitioners verbally amended the said offending preamble and removed the name of Francis Simiyu Tome pursuant to leave by court which application to amend had not been objected by counsel for the Respondent.

10. In further affidavit by Mark Ilukau Barasa in response to the Replying Affidavit states that Francis Simiyu Tome was not a petitioner and the name was inserted in error or mistake by counsel. The court having issued leave to amend the record finds the issue of the petitioners rested. The Petitioners cannot be blamed for mistake of counsel and in any case the Advocate for the Respondent did not object to the amendment.

11. In further reply to main substance of the application, the 2nd Respondent proceeds to reply to the case by the petitioners and in summary states, the recruitment of new staff was in approved budget by 1st Respondent pursuant to its statutory duties under the County Government Act and this recruitment was budgeted for and produced documents to prove the same. That there was another attempt to stop recruitment by 1st Respondent in Petition No. 2 of 2019 under Public interest litigation leaving to injunctions against the process which was lifted by ruling of court delivered on the 13th April, 2021. The Ruling by my brother Justice Radido Stephen dated 13th April 2021 is annexed 'JOM8'.

12. The 2nd Respondent avers that as a result of shortage of staff, the last recruitment having been done for 74 staff in 2014, before approval of staff establishment of 100, there is shortage of staff in some departments of the County Assembly leading to crippling of services. This prompted them to seek secondment of officers from other independent organs to plug in gaps and annexes secondment letters (JOM 8 'a' 'b' and 'c'),

13. The advocates for the parties appeared before court to highlight their written submissions on the 15th November 2021 which they did as below.

14. The Applicant's counsel submitted that Article 207 (1) of Constitution provides that money from the County Revenue fund can only be withdrawn as authorized by county legislation. That the 55 positions advertised were not authorized by the law and the Constitution. That the Respondents have made reference to Hansard report of County Assembly which indicates there is approved budget for the recruitment but that Hansard report does not mention how many employees are to be recruited. That the Respondents have not demonstrated how the approved budget is sufficient to cater for salaries of existing staff and staff to be recruited. The Respondents admits they have 73 staff. If you look at comparative budgets of last 3 years those allocations were only for 73 employees. The 2020/2021 approved budget was 201,285,496/- which is more than the budget for current financial year. How then can a significantly reduced budget cater for more than 73 employees. On prejudice, the Respondent argue County operation will be paralyzed. In own affidavit in response they have seconded employees who have been carrying out the duties. As we canvass the petition those seconded staff can continue to work on the other hand if conservatory orders are not issued and recruitment will continue and we will have employees in office without a salary. Finally there is submission that the petitioners have not applied for position of Deputy Clerk have no prejudice. The petitioner's only had recourse to court. They did not apply through interested. Counsel states they rely on their written submissions and authorities filed.

Respondents' submissions

15. Counsel for 1st and 2nd Respondent submits that they rely on replying affidavit of John Masongo dated 22nd October, 2021 and submission filed on the 12th November, 2021. We submit on 3 points. One, the petitioner has not explained to this court how a reduction in budget leads to inability by County Assembly to pay the intended recruits. The Respondent has annexed budget for financial year 2018/2019, 2019/2020, 2020/2021 and 2021/2022 and of which all of those budgets show that every year the County Assembly has been budgeting for a number of staff to be recruited with a very elaborative provision for recruitment (paragraph 18 of affidavit in reply). That no law has been cited by petitioner as to whether the qualification of position of Deputy clerk by the County Assembly is contrary to any law. That there is a provision for member of public to petition the County Assembly on the qualification requirements for those positions. The County Assembly Act provides for means of petitioning the County Assembly which can elect a committee to deal with the petition or float it at the floor of the house. That those positions were advertised by the County Assembly Service Board. Counsel told the court they rely on the response and on the submissions filed for Respondent.

Determination

16. This is an application for conservatory orders. The court in determining whether to grant the application will consider whether the Applicant has established a prima facie case on the violation of rights or law or the existences of violation, consider public interest and any prejudice that can be suffered by the Petitioner if the conservatory orders are not granted.

17. The court is guided by the Supreme Court decision cited by the Respondents which established the criteria for grant of *conservatory orders in Gatirau Peter Munya -vs- Dickson Mwenda Kithunji & 2 Others (2014) eKLR*.

18. “86 Conservatory orders bear a more decided Public Law connotation; for those are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudication authority of the court in the public interest. Conservatory orders, therefore, are not unlike interlocutory orders, linked to such private party issues as “the prospects of irreparable harm” occurring during the pendency of a case or high probability of success. The Applicant’s application for conservatory orders, consequently, should be granted on inherent merit of a case, bearing in mind the public interest, the constitutional values and the proportionate magnitudes and priority levels attributable to the relevant causes”.

19. The Applicant submits that the principles to be applied in determination of Application for conservatory orders has been established by law and relies on various authorities to buttress their submissions namely:-

In the case of *Kenyan Association of Manufacturers & 2 others -vs- Cabinet Secretary Ministry of Environment & National Resources & 3 others. (2017) Eklr* where court held:-

“ In an application for conservatory orders the court is not invited to make any definite or conclusive findings of fact or law on the dispute before it because that duty falls within the jurisdiction of the court which will ultimately hear the substantive dispute. The jurisdiction of the court at this point is limited to examining and evaluating the materials placed before it, to determine whether the Applicant has made out prima facie case to warrant grant of conservatory orders. The court is also required to evaluate their materials and determine whether if the conservatory orders are not granted the Applicant will suffer prejudice. Thirdly it is to be born in mind that conservatory order in Public law litigation are meant to facilitate ordered functioning within the Public Sector and to uphold the adjudicatory authority of the court in Public interest”.

20. The Applicant further cites unreported authority by Hon. Justice Korir in *Mount Kenya Breweries Limited - vs- Kenya Revenue Authority* where the court held:-

“ The law that grants grant of conservatory orders is now well established. In determining an application for grant of conservatory orders, the court is not required to go into details of the evidence and the law as those issues fall into the province of the court that will hear and determine the petition. All that the court need to do is to satisfy that a prima facie case has been disclosed and failure to grant the order will jeopardize the rights of the applicant irredeemably.”

21. On the issue of prima facie case in the case cited by the Applicant of *Mrau Ltd -vs First American Bank of Kenya (2013) eKLR* the Court of Appeal held that the evidence must show an infringement of a right and the probability of success of the applicant’s case upon trial.

22. Has the Applicant /Petitioner made out a prima facie case?

The Applicant submits that the Respondent lacks the requisite/sufficient budget allocation to conduct the impugned recruitment exercise. That the approved Bungoma County annual estimates for the financial year 2021/2022 does not support the impugned recruitment exercise as the amount approved is same as previous budgets which catered for existing service to the county comprising of 73 staff, the Speaker and Deputy Speaker and 59 MCAS and in their opinion the 55 recruits are not budgeted for.

23. The Respondent through affidavit of the 2nd Respondent states that the 1st Respondent is a creature of section 12 of the County governments Act 2021 with mandate of inter alia :-

- a. Providing services and facilities to ensure the efficient and effective function of the County Assembly
- b. Constituting offices in the County Assembly service and appointing and supervising officer holders
- c. Preparing annual estimates of expenditure of the County Assembly for approval and exercising budgetary control over the service among other mandate.

24. The 2nd Respondent avers that the 1st Respondent prepared a budget for the financial year 2021/2022 and presented it to the County Assembly which enacted the appropriation Act. That the budget was approved at the floor of the County Assembly and annexes ‘JOM3’ being the budget and extract of the Hansard. It is apparent from the deliberations at page 23 of the Hansard annexed by the 2nd Respondents, that the Assembly approved money for the promotion of employees and employment of new staff as stated on the floor by Hon. Joshua Kipkut who stated he was a member of the Service Board.

25. The Applicant submits the number of new staff to be recruited was not disclosed. The court finds that submissions to be academic. On prima facie basis there is evidence that the budget to recruit new staff in the financial year was approved by the County Assembly of Bungoma on the 19th August, 2021. The Applicant did admit that the 1st Respondent had seconded staff which the 2nd Respondent avers belong to independent organs and demonstrated some have been recalled. That is one of the reasons they are recruiting.

26. In the circumstances, the court is satisfied that the Applicant has not established a prima facie case as the budget was approved by the

County Assembly which has legislative and oversight role. The court will not interfere with the constitutional mandate of the 1st Respondent and the County Assembly which also represents Public Interest through elected members.

27. On the question of Public interest, the court is satisfied that it is not in public interest to stop the recruitment exercise which has already incurred expenses. The only issue raised is on position of Deputy Clerk qualification which were approved by the 1st Respondent. There is no evidence placed before the court of how the proposed qualification contravenes the law. Furthermore, that is just 1 position out of the 55 positions. It would be unreasonable to stop entire exercise on basis of one position.

28. On the question of prejudice to be suffered if the conservatory order are not granted the applicant submits that there is no budgetary allocation. The court has found there was budgetary approval for recruitment of new staff by the County Assembly. On flipside the Applicant submits that the Respondent will not suffer prejudice as it has seconded staff. The court reads the guiding principal to be prejudice to be suffered by the petitioners if the conservatory orders are not granted. They have not demonstrated any prejudice they will suffer if the conservatory orders are not issued. They are not even applicants or indicated they have been locked out of the process. It is in public interest for the recruitment exercise to proceed as approved by the county Assembly exercising its constitutional mandate. So far public funds have been spent as submitted by parties on advertisement and other recruitment exercises like shortlisting.

29. Finally the court in taking this position is guided by the principal of judicial restraint on matters of separation of powers in the Supreme court decision in *Julius Kariuki Mate & Another & Martin Nyaga Wambora & Another 2019 (Eklr)*

In that case the Supreme Court cautioned against courts rushing to issue conservatory orders that hinder other arms of government for exercising their constitutional and statutory roles. The Supreme Court guided the courts to be restrained in interfering in ongoing processes in the National and County Assemblies and only review final outcome if seized with the matter.

30. This court upheld the judicial restraint principle in Constitutional Petition No. 31 of 202 Evans Mswahali Ladtema -vs County Assembly of Vihiga & others a decision by Justice Mathews Nduma.

31. This court has nevertheless found the application to be unmerited of conservatory orders and dismisses the same with costs in the cause.

DATED, DELIVERED AND SIGNED AT BUNGOMA THIS 15TH DAY OF DECEMBER, 2021

J. W. KELL,

JUDGE.

Read In Open Court In The Presence Of :

Court Assistant - Brenda

For Applicant : Absent

For Respondents -Absent