



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT BUNGOMA**

**PETITION NO. 2 OF 2019**

**PUBLIC INTEREST LITIGATION/PETITION**

**IN THE MATTER OF UNCONSTITUTIONAL, ILLEGAL, IRREGULAR  
AND DISCRIMINATORY DECISION OF THE COUNTY ASSEMBLY OF  
BUNGOMA SERVICE BOARD TO PROMOTE SOME MEMBERS OF STAFF**

**AND**

**IN THE MATTER OF ABUSE OF OFFICE AND NON-ADHERENCE TO THE RULE OF  
LAW AND DUE PROCESS BY THE COUNTY ASSEMBLY SERVICE BOARD IN  
ADVERTISEMENT OF POSITIONS FOR EMPLOYMENT CONTRARY TO THE  
CONSTITUTION OF KENYA, 2010, EMPLOYMENT ACT, 2007, COUNTY  
GOVERNMENTS ACT, 2012, COUNTY ASSEMBLIES SERVICES ACT, 2017,  
PUBLIC OFFICERS ETHICS ACT, 2003 AND LEADERSHIP AND INTEGRITY ACT, 2012**

**BETWEEN**

**BARASA KUNDU NYUKURI.....PETITIONER**

**VERSUS**

**COUNTY ASSEMBLY SERVICE BOARD.....1<sup>st</sup> RESPONDENT**

**SPEAKER/CHAIRMAN OF CASB.....2<sup>nd</sup> RESPONDENT**

**CLERK/SECRETARY OF THE CASB.....3<sup>rd</sup> RESPONDENT**

**LEADER MAJORITY.....4<sup>th</sup> RESPONDENT**

**LEADER OF MINORITY.....5<sup>th</sup> RESPONDENT**

**RAEL KHISA, MEMBER CASB.....6<sup>th</sup> RESPONDENT**

**ANTHONY SIMIYU, MEMBER CAS.....7<sup>th</sup> RESPONDENT**

**ANNE NANGONI WEKESA, HEAD OF HR.....8<sup>th</sup> RESPONDENT**

## JUDGMENT

1. In a Ruling delivered on 13th April 2021, the Court directed that the Petition herein be heard on an accelerated basis as it had been pending for nearly 2 years.
2. To facilitate the hearing, the Court directed the parties to file and submissions within set timelines.
3. As a result, Barasa Kundu Nyukuri (the Petitioner) filed his submissions on 7th May 2021, while the County Assembly Service Board (the Board), Speaker of the County Assembly, Clerk of the County Assembly and Leader of Majority (the 1<sup>st</sup> to 4<sup>th</sup> Respondents) filed their joint submissions on 10th June 2021.

### **Background**

4. Sometime in July 2018, the Board allegedly appointed and/or promoted a section of its employees.
5. A member of the County Assembly felt the appointments and promotions were irregular, and on 25th July 2018, he requested a statement from the Board on the appointments and promotions (copy of response if any was given was not filed in Court).
6. The member was concerned that the appointments and promotions had been made without a scheme of service as demanded by section 25 of the County Assembly Service Act, 2017, as well as the national values and principles of governance and the Employment Act, 2007.
7. Despite the concerns, the Board advertised for several vacancies through various media, including the Daily Nation newspaper, on 25th February 2021.
8. On 5th April 2019, the Petitioner lodged a Petition with the Court in Bungoma alleging that the Board had failed to uphold the constitutional values and principles in the discharge of its mandate, and more so in regard to career development and management of its employees.
9. The Petitioner sought the following reliefs:

(i) Grants stay order in respect to the recently advertised and ongoing recruitment process until this application/Petition is heard and determined by this Honourable Court of law in whichever manner it deems fit.

(ii) THAT grading and remuneration of all officers in the service of the Bungoma County Assembly prior to the purported harmonisation/realignment shall remain in force.

(iii) Declares that the harmonisation, promotion, realignment and grading of officers in the service of the Bungoma County Assembly in the month of July 2018 was unconstitutional, unlawful, irregular, *ultra vires*, and therefore null and void.

(iv) THAT costs of this case be met by the individually and severally by office-bearers in the Bungoma County Assembly Service Board (CASB).

10. On the same day, the Petitioner filed a Motion under a certificate of urgency seeking orders:

(i) ...

(ii)

(iii) THAT the Respondents herein has failed to follow the rule of law and due process in the ongoing recruitment process of County Assembly Service employees contrary to provisions in Articles 3, 10, 27, 28, 41, 47, 48, 50, 73, 232 and 234 of the Constitution of Kenya, 2010, section 12 of the County Governments Act, 2012 read together with section 5 of the Employment Act, 2007, sections 25 and 45 of the County Assemblies Services Act, 2017.

(iv) The 1<sup>st</sup> to 8<sup>th</sup> Respondents have already kicked off the recruitment process as evidenced from the advertisement in the Daily Nation newspapers dated 25<sup>th</sup> February 2019 made by the 3<sup>rd</sup> Respondent herein that is annexed on the verifying affidavit of this application.

(v) Your applicant is apprehensive about the level of impunity, arrogance, partiality and lack of integrity displayed by the 1<sup>st</sup> to 8<sup>th</sup> Respondents in their execution of the said recruitment process.

(vi) THAT your applicant is apprehensive that this application and Petition will be prejudiced if the ongoing recruitment process is allowed to continue, yet this application has sufficient grounds and chances of succeeding.

(vii) THAT the current recruitment exercise by the 1<sup>st</sup> to 8<sup>th</sup> Respondents if permitted to go on, will be tantamount to abuse of the independence, dignity and integrity of this Honourable Court, especially its special and supervisory jurisdiction under Article 162(2) (a) of the Constitution of Kenya, 2010, with regard to all disputes related to employment and labour relations in all state organs

including the Bungoma County Assembly Service Board, represented by the 1<sup>st</sup> to 8<sup>th</sup> Respondents herein.

11. On 5th April 2019, the Deputy Registrar, Bungoma directed that the application be placed before the Duty Judge in Nairobi and on 17th April 2019, the Court issued an order:

Restraining the Respondents from carrying on any shortlisting, interviews, recruitment of staff pending *inter-partes* hearing of the application.

12. The Respondents caused a replying affidavit to the Petition and a Motion which was pending to be filed on 7th June 2019.

13. On 8th February 2021, the Respondents moved the Court seeking the vacation of the injunctive orders issued on 17th April 2019.

14. This Court heard parties on the application and, in a Ruling delivered on 13th April 2021, discharged the injunctive orders.

15. The Petitioner identified 5 Issues in his submissions:

(i) Whether the Honourable Court has jurisdiction to hear and determine the Petition?

(ii) Whether the impugned advocate John O. Makali can be allowed to represent the 1<sup>st</sup> to 4<sup>th</sup> Respondents without being in a conflict of interest having been the immediate Speaker and Chairperson of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents herein?

(iii) Whether the Petitioner has the *locus standi* to file the application and Petition?

(iv) Whether the formulation of CASB Regulations and some policies met the constitutional directive principle of public participation?

(v) Whether the 1<sup>st</sup> to 4<sup>th</sup> Respondents have addressed the issues in the substantive application and Petition to warrant a review of prohibitory orders?

16. The 1<sup>st</sup> to 4<sup>th</sup> Respondents, on their part, understood the Issues for the Courts adjudication as:

(i) Has the Petitioner met the basic threshold for a constitutional Petition to clothe this Court with jurisdiction?

(ii) Is the Petitioner entitled to the order of stay sought?

(iii) Should the harmonisation, promotion, realignment and grading of officers in the service of Bungoma County Assembly in July 2018 be declared unconstitutional, unlawful, irregular, null and void and should therefore the status quo ante remain in force?

(iv) Who should pay the costs of this Petition?

#### **Petitioner's case**

17. The Petitioner's case was first that he had the *locus standi* to present the Petition despite lack of an employee and employer relationship with the Respondents because he was acting in the public interest. He asserted that the issues in dispute were anchored on failure by the Respondents to put in place appropriate policies as required by law.

18. The Petitioner relied on Articles 22 and 258 of the Constitution.

19. On the merits of the Petition, the Petitioner contended that the Board selectively appointed or promoted employees it had absorbed from the defunct local authorities, and this violated the national values and principles as set out in Article 10 of the Constitution as well as the right to fair labour practices provided for in Article 41. Article 232 was also cited.

20. In attacking the appointments and promotions, the Petitioner asserted that the Respondents had not put in place a scheme of service, career progression guidelines or a grading structure.

21. The Petitioner also contended that the Board was not fully constituted in July 2018 because 2 members representing the public were not yet in office.

22. The Petitioner further challenged the representation of some of the Respondents by the John O. Makali, Advocate, on the ground that the Court had on 25th April 2019 allowed him to join the advocate as the 9<sup>th</sup> Respondent because the said advocate had previously served as a Speaker of the Assembly and Chair of the Board, and was a potential witness.

23. The relationship, the Petitioner, urged led to a conflict of interest.

24. On the question of the Regulations and Policies formulated in 2020, the Petitioner was of the persuasion that the same were invalid for

lack of public participation.

### **Respondent's arguments**

25. For the Respondents, an objection was first taken to the locus of the Petitioner on the ground that there was no employee and employer or trade union and employer relationship with the Respondents.

26. Further, the Respondents contended that if there was any real dispute, it was within the realm of private law and rights.

27. The Respondents also urged that the Petition did not meet the threshold set out in *Anarita Karimi Njeru v R* (1979) eKLR.

28. According to the Respondents, the Petitioner was on a fishing expedition.

29. On the issue of lack of Regulations and Policies, the Respondents asserted that the Petitioner had not disclosed the names of the employees who had been appointed or promoted.

30. It was further argued that the Petitioner had failed to join to the Petition the employees who had been appointed or promoted so as to enable them to be heard as demanded by the rules of natural justice.

31. The Respondents also asserted that they had presented material to demonstrate that there is now in place the *Bungoma County Assembly Service Regulations, 2020* made under the County Assembly Services Act. The Regulations were gazetted on August 2020.

32. The Respondents also asserted that the Court had noted in its Ruling of 13th April 2021 that they had now demonstrated that there was in place a *County Assembly of Bungoma Internship Policy, July 2020*, a *County Assembly of Bungoma Staff Training and Development Policy, August 2020* as well as a *County Assembly of Bungoma Industrial Attachment Policy*.

33. The Court has considered the Petition, affidavits on record and the submissions and come to the view that the Petition lacks merit, on the singular evidential issue that the Petitioner did not demonstrate on a balance of probabilities that the Respondents made any appointments or promotions in July 2018.

34. The particulars of any such appointed or promoted employees were not disclosed, nor were they joined to the proceedings as Respondents or Interested Parties, for if indeed such appointments had been made, the orders sought by the Petitioner would have adversely affected them.

35. On the competency objections, the Court finds that since the dispute advanced by the Petitioner related to regulatory and policy issues likely to affect employment within the county assembly service, the Petitioner had the *locus standi* to bring the Petition in the public interest.

36. In this connection, the distinction of employee and employer dispute as envisaged under section 12 of the Employment and Labour Relations Court Act had to give way to the right given to any person under Articles 22 and 258 of the Constitution.

37. On the question of the appearance of Mr John O. Makali for some of the Respondents, the Court declines to make any comments because even without representation, the Court has found the substance of the Petition without merit.

38. The Court will, however, note that the said advocate deposed that he ceased being the Speaker and Chair of the Board around 8th August 2017, while the appointments in contention are said to have been made in July 2018, and the advertisement(s) in February 2019. The depositions were not controverted.

### **Conclusion and Orders**

39. From the foregoing, the Court finds no merit in the Petition, and it is dismissed with no order on costs.

**Delivered through Microsoft teams, dated and signed in Kisumu on this 1<sup>st</sup> day of December 2021.**

**Radido Stephen, MCIArb**

**Judge**

**Appearances**

Petitioner in person

For 1<sup>st</sup> – 4<sup>th</sup> Respondents J.O. Makali & Co. Advocates

For 5<sup>th</sup> – 8<sup>th</sup> Respondents did not file affidavits/responses

Court Assistant Chrispo Aura