



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT KISUMU**

**PETITION NO. 56 OF 2018**

**(Before Hon. Justice Mathews N. Nduma)**

KENNEDY ONGIRO MOGIRE.....1<sup>ST</sup> PETITIONER  
PETER JIM MOMANYI.....2<sup>ND</sup> PETITIONER  
MACKATHON MASIBA MBAYE.....3<sup>RD</sup> PETITIONER  
VINCENT MOSE GEKONE.....4<sup>TH</sup> PETITIONER

**VERSUS**

**JAMES ELVIS OMARIBA ONGWAE GOVERNOR,**

KISII COUNTY..... 1<sup>ST</sup> RESPONDENT  
THE COUNTY GOVERNMENT OF KISII.....2<sup>ND</sup> RESPONDENT  
DAVID ONDIMU KOMBO, SPEAKER KISII COUNTY ASSEMBLY....3<sup>RD</sup> RESPONDENT  
PUBLIC SERVICE BOARD, KISII COUNTY.....4<sup>TH</sup> RESPONDENT  
THE KISII COUNTY ASSEMBLY.....5<sup>TH</sup> RESPONDENT  
MR. PATRICK LUMUMBA.....6<sup>TH</sup> RESPONDENT  
MR. MOGIRE GEOFFREY NYANUSI.....7<sup>TH</sup> RESPONDENT  
DR. NYOKANGI DORIS NYANGOSE.....8<sup>TH</sup> RESPONDENT  
OCHOKI BEATRICE MORAA.....9<sup>TH</sup> RESPONDENT  
MOKAYA NAOMI NYANCHAMA.....10<sup>TH</sup> RESPONDENT  
NYASETI CAROLYNE MOSOBA.....11<sup>TH</sup> RESPONDENT  
MOGAKA BILIAH.....12<sup>TH</sup> RESPONDENT  
NJOGA CRISPUS NYAOKO.....13<sup>TH</sup> RESPONDENT  
OSORO NICODEMUS COSMAS OKONDO.....14<sup>TH</sup> RESPONDENT

SAGINI ABEL ONDIMU.....	15 <sup>TH</sup> RESPONDENT
ZABLON ONGORI.....	16 <sup>TH</sup> RESPONDENT
WILFRED OCHENGO AUMA.....	17 <sup>TH</sup> RESPONDENT
DR. ALFANUS MOKAYA.....	18 <sup>TH</sup> RESPONDENT
ALICE MANYANGE ABUKI.....	19 <sup>TH</sup> RESPONDENT
MENGO OCHWANG'I OCHWANG'I.....	20 <sup>TH</sup> RESPONDENT
BENARD OMOSA.....	21 <sup>ST</sup> RESPONDENT
LUKIO OBWOGE.....	22 <sup>ND</sup> RESPONDENT
NYARANGI ONSOMU.....	23 <sup>RD</sup> RESPONDENT

### JUDGMENT

1. The claimant filed the petition on 9<sup>th</sup> August 2018 praying for the following orders:
  - a. A declaration be and is hereby made that the recruitment and subsequent appointments of the 6<sup>th</sup> to 23<sup>rd</sup> Respondents was illegal, null and void.
  - b. An order of a permanent injunction do issue restraining the 6<sup>th</sup> to 23<sup>rd</sup> respondents from performing any function in the Kisii Public Service as County Secretary, Chief Officers and Directors respectively.
  - c. An order of a permanent injunction do issue directed at 2<sup>nd</sup> and 4<sup>th</sup> Respondents from advertising, recruiting and/or appointing any person and/or officer to the Kisii County Public Service until there is in office a secretary and Chairman of the Kisii County Public Service.
2. The petition is grounded on facts set out under paragraphs 23 to 26 of the petition that may be summarized thus:
3. That sometimes in September 2017, the Chairman of the Kisii County Public Service Board resigned from office and up to the time of filing the petition, the Governor of Kisii County had failed and/or neglected to appoint a Chairman of the board.
4. That the County Government has despite the vacancy of Chairman of the County Public Service Board gone ahead to recruit and fill the position of County Secretary, Chief Officers and Directors without competitive sourcing conducted by a competent County Public Service Board. That there was no public participation during the vetting and eventual approval of the County Secretary and Chief Officers by the Kisii County Assembly.
5. That the Kisii County Government has also announced vacancies for Chairperson of the Public Service Board, Member of the County Public Service Board and County Attorney among other positions in the Daily Nation issue of Wednesday 25<sup>th</sup> April 2018.
6. No interim orders were granted and Counsel for the petitioners on 4<sup>th</sup> December 2018, informed the court that the application to injunct the appointments was spent ad the matter proceeded to the hearing and determination of the petition.
7. The petitioners allege violation of *section 58(1) of the County Governments Act* which provides:
 

“[58] composition of the County Public Service Board

(1)The County Public Service Board shall comprise-

  - (a) A chairperson nominated and approved by the County Governor with the approval of the County Assembly.
  - (b) Not less than three but not more than five other members nominated and appointed by the County Governor, with the approval of the County assembly; and
  - (c) A certified Public Secretary of good professional standing nominated and appointed by the Governor, with the approval of the County Assembly, who shall be the secretary to the Board”
8. The petitioners alleges that the appointments violated *Articles 10, 47, 175 and 196 of the constitution of Kenya 2010*. That *section 5(1) of*

the Fair Administrative Action Act NO. 4 of 2015 was also violated by the appointments in the absence of a fully constituted Public Service Board and public participation.

9. The respondents filed grounds of opposition to the petition on 15<sup>th</sup> August 2018 that may be summarized as follows:

10. That the petition is an abuse of court process and lacks merit. That the County Public Service Board is properly constituted and has the required quorum. Further the 6<sup>th</sup> to 23<sup>rd</sup> Respondents have been in office since December 2017 and the positions were advertised and recruitment done as per the law. The appointed officers have now served, lawfully for more than one year.

11. That the County Public Service Board as constituted has four (4) substantive appointees and as the Board sits, the requirement as to quorum is properly met.

12. That the Chairperson of the board is holding the position in acting capacity and her appointment was properly made. That she currently holds the substantive position as vice-chair to the Board.

13. That the acting Chairperson is qualified to be appointed member of the board. That the Board was in the process of recruiting a substantive Board Chairperson.

14. That in ***Kericho Employment and Labour Relations Court Cause NO. 10 of 2017: Charles B. Nyaka vs The County Government of Kisii and another*** an interim injunction was granted stopping the recruitment for the position of board Secretary. That the substantive holder of the office is under suspension. That at the time of recruitment of the Chief Officers, the substantive holder of the position of Secretary to the board was in office and properly received the documents and all procedures under the law were complied with.

15. That under Section 22 of the interpretation and General Provisions Act, there is no provision for a '*Lecuna in Law*'. That the Board has six (6) members and the quorum provided by the law is three (3).

16. The Board has appointed an acting board Secretary who has the qualification for appointment as Board Secretary and is legally in office.

17. That the petitioner is a disgruntled former employee of the County. That the petitioner has not demonstrated any violation of the relevant statutes and provisions of the constitution as alleged or at all.

18. That the petition has been filed inordinately late in the hour after the respondents have assumed office for more than a year. That equity does not aid the indolent. That the petition be dismissed with costs.

19. The petitioners filed their submissions on 17<sup>th</sup> January 2019. The respondents were served and were given last opportunity to file their submissions within 14 days on 5<sup>th</sup> February 2019. The matter was reserved for judgment on 18<sup>th</sup> September 2019.

20. The respondents belatedly purported to sneak in their submissions filed on 20<sup>th</sup> February 2020 without leave of court on 20<sup>th</sup> February 2020 through the Court Registry whilst the file was in the custody of the judge pending judgment.

### **Determination**

21. The issues for determination are:

- a. Whether the petitioners have disclosed a case on a balance of probabilities to warrant grant of the reliefs sought.

The complaints by the petitioners against the appointed officers is general in nature and no specifics are given on the actual recruitment process of each and every respondent who the petitioners allege were not lawfully appointed to the respective county positions.

22. Secondly, the court is not satisfied with the general allegations by the petitioners that the Kisii County Public Service Board was not properly constituted at the time the recruitment of the named respondents was done and the subsequent advertisement for the position of substantive secretary of the Board amongst other positions.

23. Kisii Public Service Board had at all material times sufficient number of officers to constitute quorum of three (3) members provided by law.

24. Furthermore, a member of the Board sat at all material times as acting chairperson of the Board, pending recruitment of the substantive holder of the position after the chairman of the Board resigned from the office.

25. If the arguments by the petitioners were to be upheld, the County Government would be completely unable to fill up the positions of the substantive Chairman and Secretary to the Board if the process could not be conducted using qualified members in acting capacity during the recruitment process. The argument by the petitioners has no sound basis in fact or law and is defeated by the provision of Section 22 of the interpretation and general provisions Act that does not allow a *Lucuna in Law* and in the institutions of government, including County Governments.

26. It is not contested that at the material time, the Kisii County Public Service Board had four (4) members and the Board met requirements of quorum every time it sat in the impugned process.

27. It is the courts finding that the petitioners have fell short of establishing any violation of the named statutory and constitutional provisions to warrant issuance of the declarations and mandatory injunction, sought by the petitioners to remove the named respondents from office and or stop recruitment process in respect of the vacant positions.

28. The petition therefore lacks merit and is dismissed with costs in favour of the 6<sup>th</sup> to 23<sup>rd</sup> respondents who comprise individual officers recruited lawfully by the Kisii County Government and brought to court by the petitioners without any justifiable cause.

**Judgment Dated, Signed and delivered this 10<sup>th</sup> day of March, 2020**

**Mathews N. Nduma**

**Judge**

**Appearances**

Petitioners in person

Mr. Wanyama for the respondents

Chrispo – Court Clerk