



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

PETITION NO. 117 OF 2016

(Before Hon. Justice Hellen S. Wasilwa 9th March, 2020)

KENYA COUNTY GOVERNMENT WORKERS UNION.....PETITIONER

VERSUS

NAIROBI CITYCOUNTY GOVERNMENT.....1ST RESPONDENT

NAIROBI CITY COUNTY

REPUBLIC SERVICE BOARD.....2ND RESPONDENT

JUDGEMENT

1. The Petitioner is a trade union duly registered under the Labour Relations Act, 2007 with a mandate to negotiate and prudently address County Government Workers' interests.
2. The 1st Respondent is a County Government established as such under Article 176 of the Constitution of Kenya, 2010, with the 2nd Respondent being the County Service Board established under the provisions of Section 57 of the County Government Act, 2012.
3. The Petitioner maintains that its members are employees of the 1st and 2nd Respondent herein who hold legitimate expectation that the Respondents shall carry out staff audit, qualification assessment, promotions prior to them advertising vacancies within the County Public Service.
4. The Petitioner further contends that despite this pre-condition the Respondents have been, advertising for vacancies and recruitment.
5. The Petitioner averred that the 2nd Respondent did cause an advertisement to be published in the Daily Nation on the 16th August, 2016 and 25th August 2016 inviting applicants to apply for various positions to be filled in its Public Service.
6. The Petitioner further averred that this advertisement was discriminatory, unfair, unreasonable and the same was made in bad faith as the same was open to all members of public and that the Respondents failed to follow the set pre-conditions to confirm whether internal members of staff can fill the said positions.
7. The Petitioner contends that should the Respondents be allowed to proceed with advertising the positions, recruitment and possible employment of new successful members of staff its members stand to be declared redundant thereby violating their Constitutional right to fair labour practice.
8. The Petitioner maintained that the Respondents' actions as highlighted above are in breach of Article 10, 27, 41, 47 and 232 of the Constitution of Kenya, 2010.
9. Aggrieved by the Respondents' decision the Petitioner filed the instant Petition seeking the following reliefs:
 - a) ***An Order of injunction restraining the Respondents, their agents, officers or persons acting under their instructions from carrying on with the advertisements, interviews, recruitment and/or employment of any new employees without undertaking staff audit, qualifications assessment, right job placements and promotions.***
 - b) ***A declaration that the Petitioner's members legitimate expectation has been infringed by the Respondents.***

c) *A declaration that the actions of the Respondents are in violation of Articles 10, 27, 41, 47, 201 (d) and 232 of the Constitution.*

d) *An Order of Certiorari to bring to this Honourable Court and quash the 2nd Respondent's advertisements of 16th August, 2016 and 25th August, 2016 inviting job applications.*

e) *An Order of prohibition to prohibit the Respondents from advertising any job positions, recruiting and or employing any new employees until they carry out staff audit, promotions, qualifications assessments, promotions and right job placements.*

f) *An Order of mandamus compelling the Respondents to carry out staff audit, promotions, qualification assessment and right job placements of the existing employees.*

g) *Or such other Orders as this Honourable Court shall deem just.*

10. The Respondent did not file a response to the Petition, they only filed a Replying Affidavit deposed by **DR. ROBERT AYISI**, the Acting County Secretary of the 1st Respondent herein in response to the Application dated 30th August, 2016 that was filed together with the Petition herein and sought similar Orders as those in the Petition, in which he admits having advertised for various positions in the Nairobi County Service Board on 26th August, 2016.

11. The Respondent further averred that the said advertisement was done in accordance with the Human Resource Manual that requires the advertising of any positions that had not been previously filled through a competitive process of open interviews.

12. The Respondents further contended that as at the date of the advertisement of the vacancies none of the members of the Petitioner had been taken through the competitive processes and some were in fact holding their positions in an acting capacity.

13. The Respondents maintained that communication of the vacancies was made to members of the Petitioner and they were encouraged to apply for the vacancies as interested members of staff stood a high chance of appointment in accordance with the Human Resource Manual.

14. The Respondents further maintained that the Petitioner has not shown any likelihood of any violation of the Constitutional rights of its respective members. Further that there had been no indication as to any of its members being declared redundant and that there are mandatory provisions on redundancy that the Respondents are bound by in particular the provisions of Section 40 of the Employment Act, 2007.

15. In conclusion, the Respondents urged this Honourable Court to dismiss the Petition with costs.

16. Parties agreed to dispose of the Petition by way of written submissions.

Submissions by the Parties

17. The Petitioner submitted that the Orders of Certiorari, mandamus and prohibition can be sought in a Petition as that filed herein. To buttress this argument the Petitioner relied on the provisions of Article 47 of the Constitution of Kenya, 2010.

18. The Petitioner urged this Court to be guided by the decision in the case of **Okiya Omtatah Okoiti Vs Cabinet Secretary for Water and Irrigation & 6 Others (2016) eKLR** where the Court was of the view that *a Petition can stand where a Petitioner seeks Judicial Review Orders as is the case in the instant Petition.*

19. To further, fortify this argument the Petitioner cited and relied on the case of **John Kipng'eno Koech & 2 Others Vs Nakuru County Assembly & 5 Others (2013) eKLR.**

20. The Petitioner maintained that the Respondent's action of advertising for the vacant positions in the Daily Nation on 16th August, 2016 and 25th August, 2015 inviting members of public to make applications for positions that were currently held by its members was improper and in violation to the provisions of Article 10, 27, 41, 47, 201(d) and 232 of the Constitution of Kenya, 2010.

21. The Petitioner further contended that the Respondents action was in contravention of Section 6.8 of the Guide Book for Governors that provides:-

“County Governments should initially consider the skills of existing staff seconded/deployed to the county government. County governments should also ensure that they adhere to the principles enshrined in the constitution, and employ sound and merit-based recruitment procedures.”

22. To fortify this argument the Petitioner further cited the case of **Kenya County Government Workers Union Vs County Government of Bomet & 3 Others (2016) eKLR** where the Court held that *the advertisements by the 1st and 2nd Respondents were conducted in bad faith and without regard of the interest and job security. The Court went on to hold that this action by the Respondents deemed the positions held by the grievants vacant whereas that was not the position. The legitimate expectation on the grievants is to continue in employment unless and until this is negated on a sound ground based on law.*

23. The Petitioner maintains that the Constitutional rights of its members were infringed by the Respondents herein and that the Respondents failed to observe the rules of natural justice. It is on this basis that the Petitioner submitted that this Court can interfere with the Respondent's

advertisement and recruitment of persons to fill the positions giving rise to the instant suit. To fortify this argument the Petitioner cited and relied on the judicial decision in the case of **Okiya Omtatah Okoiti Vs Attorney General & Another (2018) eKLR**.

24. The Petitioner further maintained that that the intended removal of its members was unconstitutional in terms of Articles 41, 47 and 236 as they were not given an opportunity to respond to the reasons for their removal as required by law. For emphasis the Petitioner cited the case of **Linnet Khasoha Abdalla Vs Vihiga County Public Service Board & Another (2017) eKLR** where the Court held:-

“Advertisement of a position that is not vacant amounts to constructive dismissal of the holder of the position. It also amounts to denial of fair administrative action as envisaged in Article 47 of the Constitution and to Wednesbury unreasonableness.... The Court in that matter went on to find that the actions of the 1st respondent amounted to constructive dismissal and was therefore unlawful.”

25. The Petitioner averred that the intended removal was unconstitutional and in contravention to its member’s rights by proceeding to advertise positions held by the Petitioner’s members.

26. The Petitioner further averred that the Petition is undefended as the Respondent failed to put in a response despite having counsel on record. It is on this basis that the Petitioner urged this Honourable Court to allow its Petition in terms of the reliefs sought therein.

27. In conclusion, the Petitioner urged this Honourable Court to allow its Petition as prayed.

Respondent’s Submissions

28. The Respondent on the other hand submitted that the present Petition does not demonstrate any violation of the Constitutional rights of members of the Petitioner and that the Petition is a hypothetical case that is based on mere speculations of some members being declared redundant and/or demoted from employment yet no evidence was adduced to substantiate the allegations. To buttress this argument the Respondents cited the case of **Communications Commission of Kenya & 4 Others Vs Royal Media Services & 7 Others (2014) eKLR** where the Court held that ***an application that is premised upon mere apprehension and speculation that rights not yet crystallized will be violated is not meritorious and should not be brought before a Court of law in the first place.***

29. The Respondents further submitted that none of the mandatory procedures as set out in Section 40 of the Employment Act has been commenced against any of the Petitioner’s members and therefore the petitioner lacks basis to support the assertion that some of its members would be declared redundant.

30. The Respondents maintained that this Honourable Court cannot interfere with the recruitment process as the same is a Human Resource function of an employer and can only be interfered with where there is a clear violation of rights as enshrined in the Constitution.

31. The Respondent further contended that no reason has been given to the Court to warrant its interference in the recruitment process. To buttress this argument the Respondents cited and relied on the Court findings in the case of **Geoffrey Mworira Vs Water Resources Management Authority & 2 Others (2015) eKLR** where the Court was of the view that ***as a general principle Courts ought not to interfere in an employer’s entitlement to undertake functions of recruitment and selection. The Court in that matter went on to hold that interference by the Court on such matters should be exercised sparingly.***

32. The Respondents further submitted that the Petition as filed does not meet the threshold as set in the case of **Anarita Karimi Njeru Vs Republic (1976 – 1980) KLR 1272**. The Respondents therefore urged this Honourable Court to dismiss the entire Petition in its entirety with costs to the Respondent.

33. The Respondents further maintained that the advertisement and/or invitation for application for vacancies was done in a lawful manner and in accordance with the provisions of the Human Resource Manual and the provisions of the Constitution of Kenya, 2010. For emphasis the Respondents relied on the case of **Wambua Maithya Vs Pharmacy and Poisons Board (2019) eKLR** where the Court held:-

“Therefore, in carrying out recruitment to public officers, the appointing authority is required, inter alia, to adhere to the twin principles of fair competition and merit...”

34. The Respondent maintained that therefore that their actions did not violate nor threaten to violate the rights of any of the purported members of the Petitioner.

35. The Respondents further submitted that the Petitioner has failed to demonstrate that its alleged members had the necessary skills and competences, which were not considered by the Respondents prior to the advertisement of the positions.

36. The Respondent contended that there were no actions intended to disinherit any of the Petitioner’s members their security of employment.

37. The Respondent further submitted granting of the Orders of injunction restraining it from carrying on with advertisement, interviews, recruitment and/or deployment of new employees at this juncture would not be viable as the process has since been completed. On this basis, the Respondents urged this Court to treat this prayer as spent.

38. On the issue of legitimate expectation the Respondents submitted that the Petitioner has failed to demonstrate that its members possessed the expected requirements to fill the advertised position and that as a result the issue of legitimate expectation in the circumstances cannot

arise. The Respondents urged this Court to dismiss this Claim accordingly.

39. It is further submitted that the Petitioner has not in any way justified its Claim on violation of the various provisions of the Constitution of Kenya, 2010. The Respondents urged the Court to be guided by the principles laid down in the South African case of **Mistry Vs Interim National Medical and Dental Council of South Africa (1998) (4) SA 1127** as quoted in the case of **Roshanara Ebrahim Vs Ashley's Kenya Limited & 3 Others (2016) eKLR**.

40. The Respondents further averred that no evidence has been availed by the Petitioner showing that the impugned advertisement was done in excess of the 2nd Respondent's jurisdiction and that as a result thereof the prayer for orders of certiorari to quash the same cannot be issued by this Court.

41. The Respondents urged this Honourable Court to be guided by the decision in the case of **Kenya National Examination Council Vs Republic Ex-parte Geoffrey Gathenji Njoroge Civil Appeal No. 266 of 1996** where the Court held:-

“...Only an Order of certiorari can quash a decision already made and an order of certiorari will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons.”

42. In conclusion, the Respondents urged this Honourable Court to dismiss the entire Petition with costs to the Respondents.

43. I have examined the averments and submissions of both Parties herein. This Petition was filed in 2016 four years ago seeking stoppage of advertisements of certain positions.

44. This Court declined to stop the recruitment process in the interim.

45. From that point, it is not clear what the true position is at the moment. To proceed to make any other orders contrary to orders granted in the interim in 2016, may lead to termination of services of certain employees already recruited pursuant to the said advertisements.

46. In this Court's view, the Petitioner have slept on their rights for too long and the orders being sought may now stand as spent or not tenable.

47. I therefore find the entire Petition not merited and I dismiss it accordingly with no order as to costs.

Dated and delivered in open Court this 9th day of March, 2020.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Naututa holding brief Brian Otieno for Petitioner – Present

Respondents

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Absent