



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

PETITION NO. 17 OF 2019

(Before Hon. Justice Mathews N. Nduma)

JOHN AGUFA1ST PETITIONER
PETER MADEGWA.....2ND PETITIONER
BISHOP ARTHUR BUKACHI.....3RD PETITIONER
ALFRED KEBOKO.....4TH PETITIONER

VERSUS

**THE CHAIRMAN,
SELECTION PANEL FOR RECRUITMENT OF**

CHAIR AND MEMBERS OF

MIGORI COUNTY PUBLIC SERVICE BOARD.....1ST RESPONDENT

MOGORI COUNTY GOVERNMENT.....2ND RESPONDENT

MIGORI COUNTY PUBLIC SERVICE BOARD.....3RD RESPONDENT

JUDGMENT

1. Petition dated 6th June 2019 was filed on 7th June 2019 by the four (4) petitioners against the respondents praying for an order in the following terms inter alia:

- (a) A declaration that the 1st respondent is unknown in law and as such should be declared unlawful in the advertising, shortlisting, interviewing and recruitment process of a County Public Service Board.
- (b) A declaration that the 2nd respondent has no role to play in the appointment of members of the County Public Service Board.
- (c) A declaration that the current recruitment exercise for the positions of Migori County Public Service Board is unlawful, null and void and the recruiting authority be ordered to follow the provisions of *Section 65(1) (e) of the County Governments Act* as read with *Article 56 of the constitution of Kenya*.

2. The petition is based on facts set out in paragraphs 1 to 14 of the petition that may be summarized as follows:

3. On 20th March 2019, the 1st and 2nd respondents advertised through the standard newspaper for positions of the Chairman and members of the Migori County Public Service Board under *Sections 57 and 58 of the County governments Act 2012*.

4. On 31st May 2019, another advertisement was done giving shortlisted candidates who had applied for the advertised positions. Interviews were done from 5th to 13th June 2019.

5. The petitioners are aggrieved by that there is no provision under the law for a body known as “*Selection Panel*” for recruitment of Chair and members of County Public Service Board. The aforesaid advertisement and recruitment done by the said body is therefore unlawful and the product of recruitment null and void.
6. The petitioners further allege that even if the body was lawful, the 1st, 2nd and 3rd respondents contravened *Section 65(1) (e) and 97 (a) (d) and (g) of the County governments Act, 2012* in so far as it relates to the petitioners and the Luhya Community within Migori County.
7. That the rights of the Luhya Community in Migori protected under *Sections 3(1) (a) and (b); 3(2) (b) and (c); 7(1); 10(1) (b) and (11) under part III of the National cohesion and integration Act no. 12 of 2008* were violated.
8. That the shortlisted persons comprised predominantly, Luo community, a factor which violates the rights of the petitioners and the Luhya Community within Migori County.
9. That the process be declared unlawful, null and void. No ex parte interim orders were granted. The interlocutory application was dispensed with and the petition proceeded on the merits.
10. The respondents filed replying affidavit by acting county secretary Migori, Elija Odhiambo dated 15th July 2019. The deponent deposed that the petition had been overtaken by events since interviews were closed on 13th June 2019.
11. There is no facts placed before court to show the identity of the people who were shortlisted for the court to determine their ethnic origin and that no person from Luhya community was shortlisted. There is also no evidence of the ethnic composition of the applicants vis a vis the shortlisted candidates. The respondents pray that the petition be dismissed for complete lack of substance and merit.

Determination

12. From the submissions before court by the petitioners and the respondents, the recruited candidates were rejected by the County Assembly thereby necessitating re-advertisement of the positions of members and Chairperson of the Migori County Public Service Board. New applicants were directed to submit their applications by 17th October 2019. That the impugned process having been nullified, does not exist and therefore the court cannot issue orders in vain.
13. That the current recruitment process after applications were received on 17th October 2019 is not the subject of the petition.
14. That the petition has been overtaken by events following nullification of the process by the County Assembly and the petition be deemed as spent.
15. The respondents submitted that the Migori County Public Service Board, the 3rd respondent is a corporate entity in law with perpetual succession and seal in terms of *Section 57(a) of the County governments Act, 2012*. That since the term of Board members has expired, the Board itself delegated the 2nd respondent, Migori County Government to recruit the Board members hence the need to establish a selection panel for purpose of recruitment of the Board members.
16. That the recruitment is subject to approval by the County Assembly and appointment by the governor of the County. That the process is lawful.
17. The County Public Service Board is established under *Section 57 of the County Governments Act* as a body corporate with perpetual succession and seal and is separate from its members who are appointed under *Section 58* thereof. Appointment follows nomination by the County Governor and approval by the County Assembly under *Section 58(1)*;
18. Section 58(2) provides that:

“The appointment of the members of the board shall be through a competitive process”

Competitive process has been the subject of interpretation by this court in various decisions including by the High Court in **John Mirigi Temoi and another vs Governor of Bungoma County and 17 others (2014) eKLR**. The judge said “*in determining whether an appointment, promotion or re-designation has been undertaken in fair and transparent manner, the overriding factors shall be merit, fair competition and representation of the diversity of the County*”

19. In the present case, the County Government of Migori established a recruitment panel to facilitate the competitive process. The recruitment panel is merely an agency of the appointing authority and need not be a body corporate established by law. The appointing authority is the Governor with the approval of the County Assembly. One would not expect the County Governor to conduct the recruitment exercise personally. The office of the Governor lawfully and rightfully established a panel to assist in the conduct of a fair recruitment process. The body given oversight authority over the recruitment process is the County Assembly. In the present case, the County Assembly rightfully exercised its oversight role and nullified the impugned recruitment process.
20. This petition has been overtaken by events. This is a court of equity and is not given to issuing orders in vain. The court finds that this petition has been overtaken by events and is thus spent.
21. Never the less, the court notes that there is nothing unlawful in the appointing authority putting in place a recruitment mechanism to

ensure the process is transparent, competitive and fair.

22. The facts placed before court did not demonstrate by tangible evidence any discrimination based on tribe in the impugned process the petitioners having not placed before court the tribal composition of the applicants vis a vis the shortlisted candidates. In any event, the petitioners pre-empted the oversight role by the County Assembly before coming to court. The Assembly lawfully exercised its role hence the petition is spent.

23. In the final analysis, the court finds that the petition lacks merit and is dismissed in its entirety.

24. The parties to bear their own costs of the petition.

Judgment Dated, Signed and delivered at Nairobi this 30th day of April, 2020

Mathews N. Nduma

Judge

ORDER

In view of the declaration of measures restricting court of operations due the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th March 2020, this judgment has been delivered to the parties online with their consent. They have waived compliance with **Order 21 rule 1 of the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by **Article 159(2)(d)** of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under **Article 48** of the Constitution and the provisions of **Section 18 of the Civil Procedure Act (chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, *inter alia*, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

Mathews N. Nduma

Judge

Appearances

Mr. Kerario Marwa for the petitioners

Mr. Omende Kisela for respondents

Chrispo – Court Clerk