



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

PETITION NO. 22 OF 2019

(Before Hon. Justice Mathews N. Nduma)

MICHAEL KOJO OTIENO.....1ST PETITIONER

EVANS OLOO OTIENO GOR.....2ND PETITIONER

JOHN OKAMBO KISIARA.....3RD PETITIONER

ANTONEY GATA TINDI.....4TH PETITIONER

DANIEL OTIENO ONYANGO.....5TH PETITIONER

-VERSUS-

HOMA-BAY COUNTY COMMISSIONER.....1ST RESPONDENT

HOMA-BAY COUNTY STATISTICS OFFICER.....2ND RESPONDENT

THE HON. ATTORNEY GENERAL.....3RD RESPONDENT

KENYA NATIONAL BUREAU OF STATISTICS.....4TH RESPONDENT

JUDGMENT

1. The applications in this matter were abandoned and the party filed submissions with respect to the petition. The substance of the applications had been overtaken by events and thus same were spent. The respondents submitted that even the substance of the petition had been overtaken by events and that the Court was spending valuable time unnecessarily in a matter that is already spent.

2. The petition was filed on 7th August 2019. The petitioner praying for an order in the following terms *inter alia*: -

I. An order prohibiting the respondents from carrying out the census exercise.

II. A declaration that the exercise by the 1st, 2nd and 4th respondents is unconstitutional null and void for lack of public participation.

Facts

3. The facts upon which the petitioners rely on are set out under part 6 paragraphs 6 to 8 of the petition and may be summarized as follows: -

4. The petitioners allege confusion, corruption practice, gross misconduct and nepotism in census recruitment exercise in Homa – Bay County in violation of Articles 10 (2) (), 27 (1), 28, 33 (1) (a), 35 (3), 46 (1) (b) ,8 (3) 47, 73 (2) (d) and 25 (a) of the constitution of Kenya 2010.

5. The petitioners named at least four (4) persons who never applied to be recruited as census officers but were shortlisted.

6. The petitioner, also named two (2) persons who they allege were not residents of Homa Bay County but were employed as officers of the County Government.

7. The petitioners allege due to the aforesaid mal practice the census exercise should not be carried out.
8. Application dated 7/8/2019 that accompanied the petition was heard by Maureen Onyango J. on 15/8/2019 at Nairobi and interim orders were issued to the effect that names of any public servants who had been appointed as census officers as supervisors and/or enumerators be removed from the list.
9. The Hon. Judge, however stayed the orders she had issued on 20th August 2019, pursuant to a counter application filed by the state law office.
10. The matters were heard at Nairobi because it was during Court Vacation in the month of August.
11. The petition is opposed vide a replying affidavit of Zachary Mwangi, Director General of Kenya National Bureau of statistics, the 4th respondent sworn on 13th September 2019 and filed on 16th September 2019.
12. The Director depose that by dint of section II of part I of fourth schedule to the constitution read with section 4 (d) of the Statistics Act No. 4 of 2006 and other applicable laws, it is a legal requirement that the planned census be carried out in August 2019 as scheduled.
13. That the exercise was successfully carried out by the 4th Respondent as scheduled in August 2019.
14. That the events sought to be stopped in the Notice of motion and the petition have since taken place and the application and the petition have been overtaken by events.
15. That the suit is misconceived and an abuse of Court process as it seeks to stop a constitutional requirement that census be conducted after every ten (10) years.
16. That the petitioners have not demonstrated sufficient grounds on which the reliefs sought may be granted.
17. That the KNBS conducted the census preparatory activities including recruitment within Homa – Bay County and all other counties in Kenya within the confines of the law and in particular the provision of the Statistics Act No. 4 of 2006, and the 2018 Census Legal Notice. That the County Commissioner and National Government Administrative officer in Homa – Bay were duly involved in the recruitment of census personnel in Homa – Bay County.
18. That the census jobs are temporary and for a period of not more than 27 days. That the same were advertised and were open to all Kenyans without any discrimination and all the persons appointed to the temporary posts were required to apply, get shortlisted and interviewed.
19. That experienced personnel were required to manage the national exercise but all were subjected to interview and merit was a key consideration.
20. That over 800,000 persons applied for the jobs and about 165 were required.
21. That the personnel recruited have since served their purpose and have been released from the temporary census posts they had been recruited to.
22. That the petition is completely derived of merit and it be dismissed with costs.

Determination

23. The issue for determination in the petition is whether person that were recruited to conduct the already completed census exercise in the County of Homa – Bay were irregularly recruited in violation of statutory and constitutional law.
24. The petitioners alleged that persons who did not come from County of Homa – Bay and specific Sub – counties were recruited. That persons already serving the county Government of permanent positions were recruited and that Public officers employed by Government were irregularly recruited to the loss and detriment of the petitioners.
25. The onus of proof is on he who alleges in terms of sections 107 and 108 of the Evidence Act Cap 90 Laws of Kenya.
26. In the present petition, the petitioners bear the onus of proving that the respondents conducted the recruitment of census officers unlawfully and in violation of the constitution.
27. The petitioners rely on scanty allegations contained in paragraphs 6, 7 and 8 of the petition, in which they named less than 10 persons who they allege were irregularly recruited to conduct the census in the Homa – Bay County.
28. The reasons they relied upon were as follows: -

- I. One person who did not apply and was related to a National Intelligence officer and hails from Suba south was recruited.

II. One person was shortlisted for position of ICT supervisor in two sub – Counties.

III. Another named two persons who did not apply were appointed.

IV. Two employees of Homa – Bay County Government were recruited to conduct the exercise.

29. The petitioners pray the Court to declare the National Census unconstitutional null and void for failure to conduct public participation in the recruitment of the Census officers.

30. The petitioners further sought the court to prohibit the respondents from conducting the national census exercise and/or quash the census exercise for being unconstitutional null and void.

31. **In petition No. 61 of 2016, Felix Kiprono Matagei – VS- Hon. Attorney General and 30 others Onguto** held:

32. *“ My view and I so hold is that holding of two public offices simply does not result in a violation of Articles 10 or 73 or 232 of the Constitution. Each case must be viewed on the basis of its own unique facts. It is possible for a public officer to hold two or even more offices where a statute so allows and roles clearly defined or where there is a clear co – relation between the two offices and no possibility of conflict of interest and or is foreseeable.”*

33. In the present case the Court finds no inhibition or conflict in a Public servant being recruited in a temporary time bound capacity to conduct national census especially in managerial and supervisory capacities where experience gained in civil service gives such public officers a cutting edge over and above non – experienced and mostly young persons who must necessarily be employed in the vanguard roles of the census exercise.

34. The court similarly finds no fault at all in a person from one sub – county who has applied, shortlisted and interviewed being appointed as a census officer in another sub – county.

35. Furthermore, there is no substantial evidence adduced by the petitioners on the bare allegations made against named persons in the petition who the petitioners did not have the courtesy of naming as necessary parties in the petition and/or notifying them by way of service of summons in a suit where the petitioners sought adverse orders against them.

36. The petitioners have merely listed functions of the constitution without any and/or any sufficient evidence as to how the alleged provisions were violated by the respondents.

37. In the case of **Metropolitan Council – VS – Metro Inspection Service Western Cape CC and others (10/99) (2001) ZASCA56** cited in the case of **Nairobi Law Monthly Company LTD – VS- Kenya Electricity Generating Company and 2 others (2013) eKLR**, it was held that: -

38. *“ Information can only be required for the exercise or protection of a right will be of assistance in the exercise or protection of the right. It follows that in order to make out a case for access to information ___ an applicant has to state what the right is that he wishes to exercise or protect, what the information is which is required and how that information would assist him in exercising or protecting that right”.*

39. The court is not satisfied that the demand for information by the petitioners in the circumstances of this case met the criteria above. In any event the petitioners have failed to prove that any of their rights set out in the petition were violated by the respondents.

40. The national census was conducted in all parts of Kenya, peacefully and in the Court’s view successfully by the 4th Respondent in compliance with the law established.

41. The petition lacks merit, is misconceived and is an abuse of the court process.

42. Accordingly, the petition is dismissed in its entirety with no order as to costs.

Ruling Dated, Signed and Delivered at Nairobi this 25th day of June 2020.

Mathew N. Nduma

Judge

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th March 2020, this ruling 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:-

Petitioners in person

M/s Oyugi and Mr. Ogozo for the Respondents.

Chrispo: Court Clerk