



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT KERICHO

PETITION NO.3 OF 2019

NICHOLAS RONO ..... PETITIONER

VERSUS

COUNTY SECRETARY COUNTY GOVERNMENT OF BOMET..... 1<sup>ST</sup> RESPONDENT

BOMET COUNTY ASSEMBLY SERVICE BOARD .....2<sup>ND</sup> RESPONDENT

COUNTY GOVERNMENT OF BOMET..... 3<sup>RD</sup> RESPONDENT

JOEL KIPKORIR SIGEI.....4<sup>TH</sup> RESPONDENT

JUDGEMENT

The petitioner is seeking the following orders;

- a. A declaration that the appointment of Joel Kipkorir Sigei as a member of the *Bomet Municipal Board (Municipal Manager) vide letter dated 10<sup>th</sup> September, 2018 by the 1<sup>st</sup> respondent is unconstitutional therefore null and void ab initio.*
- b. A declaration that the appointment of Joel Kipkorir Sigei as a member of Bomet County Assembly Service Board vide Gazette Notice Number 10671 dated 11<sup>th</sup> October, 2018 is unconstitutional therefore null and void ab initio.
- c. Upon granting prayers a) and b) above, an order of refund of all the salaries *and or allowances received by Joel Kipkorir Sigei (4<sup>th</sup> respondent) as a result of his appointment to the position of Municipal Manager (Bomet Municipal Board) and Member County Assembly Service Board.*
- d. A declaration be and is hereby issued that the actions of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents, their representatives or assigns contravenes the Constitution of Kenya, county Government Act, 2012, Employment Act, 2007, Leadership and Integrity Act, 2002 and therefore prohibited by law.
- e. A declaration that Joel Kipkorir Sigei (4<sup>th</sup> respondent) is not fit to hold any public office as his actions are contrary to the provisions of chapter six of the Kenyan constitution.
- f. That the respondents to pay costs of this petition.
- g. Any other relief that the court may deem just to grant.

**The petition**

The petitioner has filed the petition against the 1<sup>st</sup> respondent as head of the public service board, Bomet County, the 2<sup>nd</sup> respondent as established under section 12 of the County Government Act, the 3<sup>rd</sup> respondent created under Article 176(1) of the Constitution and the 4<sup>th</sup> respondent a person working for gain within the Republic.

The petition is that the constitution is founded on values and principles of ethical conduct, integrity, transparency and accountability and which bind the respondents pursuant to articles 1, 2, 3, 10, 19 and the spectrum of the Bill of Rights under article 20 on human dignity, article 159(2) on the mandate of courts, article 2 on the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been violated or infringed or is threatened.

The petition is also premised on the provisions of chapter six of the constitution and article 77(1) which requires that a full time state officer shall not participate in any other gainful employment and article 259 on the promotion of the purposes, values and principles of the constitution so as to advance good governance. Also article 35 on the right to access information, article 232 on values and principles of public service and chapter four on the fundamental freedoms.

The petition is also that the 1<sup>st</sup> respondents without any proper justification unlawfully appointed the 4<sup>th</sup> respondent to the position of a Municipal manager on a 5 year renewable contract vide an appointment letter dated 10<sup>th</sup> September, 2018. Then vide Gazette Notice No.10671 dated 11<sup>th</sup> October, 2018 he was appointed as a Board Member of the County Assembly Service Board Bomet without any lawful justification and such was in contravention of article 77(1) of the Constitution.

These appointments were all targeted and aimed at 4<sup>th</sup> respondent and no advertisement was done. These appointments are unlawful as the 4<sup>th</sup> respondent's conduct is short of the provisions of chapter six of the constitution. The conduct of the respondents has grossly violated the petitioner's rights under article 27, 28, 29, 40, 47, 48, 159 and 232 of the constitution which violations are likely to continue unabated unless the court intervenes.

The violations are that the petitioner has filed the instant petition pursuant to the provisions of article 22 of the constitution on the violation of fundamental rights, article 27 on the right to equal protection and equal benefit of the law, article 28 on human dignity, article 29 on protection against all forms of violence, and article 47 on the right to fair administrative action.

The violation to the right to human dignity and to have that dignity protected. The conduct of the respondents as addressed in the petition has grossly undermined the rights of the petitioner with regard to access to justice and fair administrative action. The orders sought should be issued.

The petition is supported by the petitioner's affidavit and the grounds that he has filed the instant petition on behalf of person resident within and outside of Bomet County. The 1<sup>st</sup> respondent without any proper justification unlawfully appointed the 4<sup>th</sup> respondent to the position of a Municipal Manger on a 5 year renewable contract vide an appointment letter dated 10<sup>th</sup> September, 2018. After this appointment, vide Gazette Notice No.10671 dated 11<sup>th</sup> October, 2018 he was appointed as a board member of the County Assembly Service Board Bomet without any lawful justification.

The 4<sup>th</sup> respondent was earning two separate salaries and entitled to several other allowances inclusive of travels. The 4<sup>th</sup> respondent is not fit to hold any public office as his conduct is short of the provisions of chapter six of the constitution. The 4<sup>th</sup> respondent accepted both appointments and resumed work without fail and many residents inclusive of the petitioner in Bomet and wonders how the 4<sup>th</sup> respondent was undertaking his duties in the dual appointments while majority of people remained unemployed.

The petitioner raised these matters with various officers of the county government but there was no response. The 4<sup>th</sup> respondent continued to serve as a public servant who occupied two offices.

The respondents are in collusion so as to encourage the illegalities to continue. This is contrary to article 77(1) of the constitution. The employment of the 4<sup>th</sup> respondent is contrary to the law and discriminatory in nature. Such has caused loss and harm and irreparable damage.

The petitioner also avers that the petition is filed on the basis that the respondents have caused the employment of the 4<sup>th</sup> respondent in two different positions whereas there are many people qualified to occupy such positions within the County of Bomet. There was no proper advertisement for these positions to allow other interested persons to apply and be competitively recruited and be employed and the petition should be allowed as prayed.

#### 1<sup>st</sup> respondent

The 1<sup>st</sup> respondent in reply filed the Replying Affidavit of Evalyne Rono the County Secretary, 1<sup>st</sup> respondent and who avers that the 4<sup>th</sup> respondent was appointed as Municipal manager of Bomet Municipal on 10<sup>th</sup> September, 2018. The 4<sup>th</sup> respondent was not gainfully employed on full time basis by any state or public institution at the time of his appointment. While the 4<sup>th</sup> respondent may have held office as a member of Bomet County Assembly Service Board, 2<sup>nd</sup> respondent Board, such membership is only held on part time basis as per section 12(3A) of the County government Act, 2012.

Ms Rono also avers that a Kenyan in the public service and on part-time member of a statutory board is not entitled to compensation in terms of salary and the averments by the petitioner that the 4<sup>th</sup> respondent has been earning two salaries is without basis and only meant to add spice to his unsubstantiated allegations against the 4<sup>th</sup> respondent.

Article 260 of the constitution is unambiguous on the fact that a state office is a person holding a state office and the petitioner has not disclosed which state office the 4<sup>th</sup> respondent is alleged to have held. The 4<sup>th</sup> respondent has not held any *state office* with the County

Government of Bomet.

Article 77(1) of the constitution makes exclusion of *state officers* and not other *public servants*. The petition is made without foundation and should be dismissed.

#### 2<sup>nd</sup> respondent

The 2<sup>nd</sup> respondent filed a Replying Affidavit sworn by Isaac Kitur the clerk and secretary to the Board, 2<sup>nd</sup> respondent and who avers that on 10<sup>th</sup> September, 2018 the 2<sup>nd</sup> respondent appointed the 4<sup>th</sup> respondent to the position of Municipal manger on a 5 years renewable contract. On 11<sup>th</sup> October, 2018 through a regrettable oversight caused by misrepresentation and concealment of information by the 4<sup>th</sup> respondent, the 4<sup>th</sup> respondent was further appointed as a member of the 2<sup>nd</sup> respondent Board vide gazette Notice Number 10671.

Mr Kitur also avers that the appointment of the 4<sup>th</sup> respondent as member of the 2<sup>nd</sup> respondent was a culmination of a thorough legal process followed by board so as to ensure that the appointment met all the laid down legal requirements, save the 4<sup>th</sup> respondent was deceitful and failed to disclose the fact that he was already employed by the County government of Bomet as a Municipal manager.

Immediately the issue of the 4<sup>th</sup> respondent occupying two public offices at the same time came to the attention of the 2<sup>nd</sup> respondent and guided by the constitution barring a state officer from participating in any other gainful employment the 2<sup>nd</sup> respondent convened an urgent sitting on 22<sup>nd</sup> February, 2019 and resolved to suspend the 4<sup>th</sup> respondent as a member of the Board and stopped any benefits due to him. The 4<sup>th</sup> respondent was notified of this position and given reasons thereof.

The petition has not proved ulterior motive on the part of the 2<sup>nd</sup> respondent in appointing and addressing the 4<sup>th</sup> respondent's case. There is no evidence that the 2<sup>nd</sup> respondent acted contrary to due process save for the misrepresentation by the 4<sup>th</sup> respondent and as such the petition is *mala fides* and should not be allowed.

#### 4<sup>th</sup> respondent

The 4<sup>th</sup> respondent filed his Replying Affidavit and avers that on 9<sup>th</sup> October, 2018 he was nominated to be member of the County Assembly Service Board vide Gazette Notice No.10671 dated 11<sup>th</sup> October, 2018. The nomination was a part time responsibility and at no times a paid salary for the nomination.

Later a vacancy of municipal manager was advertised on print and County Government of Bomet website and he applied. On 24<sup>th</sup> August, 2018 the shortlisted candidates were notified of interviews and by letter dated 23<sup>rd</sup> November, 2018 being the successful candidate was appointed to the position of Municipal manager on contract terms.

The 4<sup>th</sup> respondent also avers that at the time of appointment to Municipal Manager he was not in any other gainful employment as alleged by the petitioner. He has never been earning two salaries and such assertions are without evidence.

The 4<sup>th</sup> respondent further avers that on 22<sup>nd</sup> February, 2019 due to job dissatisfaction he handed in his notice to terminate contract as municipal manager and which notice was accepted on 1<sup>st</sup> March, 2019 and thus ceased to hold such position. The petition is hence meant to tannish his name. He was never a state officer in the county government of Bomet or anywhere as alleged and the petition should be dismissed.

The parties addressed the petition by way of written submissions.

The petitioner submitted that the 1<sup>st</sup> respondent without any justification appointed unlawfully appointed the 4<sup>th</sup> respondent to the position of a municipal manager on a 5 years contract by letter dated 10<sup>th</sup> September, 2018 and by Gazette Notice No.10671 dated 11<sup>th</sup> October, 2018 he was appointed as board Member of the County Assembly Service Board Bomet without lawful justification and in contravention of article 77(1) of the Constitution which outlaw the gainful employment of a state officer. Such conduct is short of chapter 6 of the constitution with regard to leadership and integrity.

The actions of the respondents contravened sections 11, 13, and 26 of the Leadership and integrity Act, section 22 of the Public Officer Ethics Act and Article 232 of the Constitution.

The orders sought in the petition should be issued on the grounds that the respondents have failed to meet the threshold set out under Article 10 of the Constitution, section 87 of the County Government Act by denying the people of Bomet County a platform for citizens' participation when they appointed the 4<sup>th</sup> respondent to two public positions. Such defeats the objects of devolution as **required under Article 174** and the proper conduct of County Assembly of Bomet business as required under Article 196 of the Constitution.

The petitioner relied on the case of **Doctors for Life International versus Speaker of the National Assembly & Others (CCT12/05) [2006] ZACC**.

The 2<sup>nd</sup> respondent submitted that the appointment of the 4<sup>th</sup> respondent as a member of Bomet County Assembly Service Board vide

Gazette Notice No.10671 followed a thorough legal process followed by board so as to ensure the appointment met all the laid down legal requirements save that the 4<sup>th</sup> respondent was deceitful and failed to disclose the fact that he was already employed by the County Government of Bomet as Municipal Manager.

The issue of the 4<sup>th</sup> respondent was addressed by the 2<sup>nd</sup> respondent at its sitting on 22<sup>nd</sup> February, 2019 with a resolution to suspend the 4<sup>th</sup> respondent as a member of the board.

After the appointment was revoked on 22<sup>nd</sup> February, 2019 the petitioner filed the instant petition on 25<sup>th</sup> February, 2019 without proper facts.

The 2<sup>nd</sup> respondent submitted that the petitioner's rights have not been violated to justify the instant petition and as required under Rule 7 of the Employment and Labour Relations Court (Procedure) Rules, 2016. A party who wishes to file a petition should do so in accordance with the constitution rules. In this regard a party alleging violation of the constitution and who is seeking the enforcement of any constitutional rights and freedoms must meet the threshold set in the case of **Anarita Karimi Njeru versus Republic [1979] KLR**.

The matter at hand is not a constitutional petition in all respects. Despite citing the various provisions of the constitution, the petitioner has failed to specify the manner in which the respondents have violated those provisions. The failure to follow the laid down procedures of law, unlawful appointment of the 4<sup>th</sup> respondent as a board member of the county assembly service board of Bomet are matters of evidential facts requiring proof which has not been provided as held in the case of **Mumo Matemu**.

The 2<sup>nd</sup> respondent submitted that the petition has been overtaken by events pursuant to section 12(5) of the County Government Act. The petition was filed on 25<sup>th</sup> February, 2019 after a sitting and decision of the 2<sup>nd</sup> respondent on 22<sup>nd</sup> February, 2019 when the appointment of the 4<sup>th</sup> respondent stood suspended. He was no longer a member of the board. The substratum of the petition was spent. The court cannot issue orders in vain as held in **Nicholas Mahimu versus Ndima Tea Factory Limited & another [2009] eKLR** and on that basis the petition should be dismissed with costs.

The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents submitted that the 4<sup>th</sup> respondent was not a full time state officer in his capacity as Bomet Municipal manager as defined under article 260 of the constitution as held in **Samuel Muigai Ng'ang'a versus the Minister for**

**Justice, National Cohesion & 2 other Petition No.354 of 2012.**

The 4<sup>th</sup> respondent was appointed as municipal manager pursuant to section 29 of the Urban Areas and Cities Act on 10<sup>th</sup> September, 2018. He was then gazetted as member of Bomet County Assembly on 11<sup>th</sup> October, 2018. The position of municipal manager is an office in the county public service and thus the occupant is a public office and not a state office as contemplated under article 260 of the constitution.

The respondents also submitted that section 12(3) (d) of the County Government Act, the membership of the County Assembly Service Board was open to any member of the public with experience in public service and a position held on part time basis. The 4<sup>th</sup> respondent was not on two salaries as alleged and in any event he was not a state officer contemplated under article 260 of the Constitution.

The constitution does not stop the gainful employment of any person. The threshold of article 77(1) was addressed in the case of **Bhutt versus Haroon Bhutt [2014] eKLR** and does not address *gainful employment* as an area of contravening the constitution. Similarly the Leadership and Integrity act has not contemplated such area of gainful employment as being in contravention of the law. in **Felix Kiprono Matagei versus Attorney General & 3 others [2016] eKLR** the court held that the party objecting to the engagement of a state officer in another employment must demonstrate that the employment inherently is incompatible with the responsibility of the state officer and will result in the impairment of the judgement of the state officer.

In this regard, the allegations made in the petition are not proved and it has not been shown that the membership of the 4<sup>th</sup> respondent in the Bomet County Assembly Service Board would impair his judgement in consideration of matters before the Municipal Board and the petition should be dismissed.

#### Determination

On the petition, the responses thereof and written submissions, the issues which emerge for determination can be summarised as follows;

Whether the petition meets the threshold of a constitutional case;

Whether the appointment of the 4<sup>th</sup> respondent by the 1<sup>st</sup> and 2<sup>nd</sup> respondents is unconstitutional and therefore null and void *ab initio*;

Whether the remedies sought should issue; and

Who should pay costs.

On whether the instant petition meet the threshold of a constitutional case and the threshold set out in the case of **Anarita Karimi Njeru versus Republic (1976-1980) KLR 1272** that a person seeking redress from the court on a matter which involves a reference to the Constitution, should set out with reasonable degree of precision in particular how the alleged acts amount to infringement of the person's constitutional rights. These principles were reiterated in the case of **Mumo Matemu versus Trusted Society of Human Rights alliance**

[2014] eKLR that;

if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.

The petition is premised on the alleged contravention of rights and fundamental freedoms under articles 10, 21, 22, 23, 27, 28, 35, 41, 48, 50 and 77(1) of the Constitution, 2010. The petition is also that there is a contravention of the Fair Administrative Act, the Employment Act, the Leadership and Integrity Act and the Public Officers Ethics Act.

In the body of the petition, the petitioner has enumerated the various articles of the constitution which are said to have been contravened by the actions and conduct of the respondents and giving particulars thereof. The foundation of each contravention is addressed with details.

At the core of the petition is the appointment of the 4<sup>th</sup> respondent. The court as well as the Respondents could, and indeed did, appreciate and understand the exact nature of the Petitioner's case of public officers holding two public service jobs.

The petition is properly before the court pursuant to Rule 7 of the Employment and Labour Relations Court (Procedure) Rules, 2016 read together with the Constitution, 2010 and the Rules thereto.

On whether the appointment of the 4<sup>th</sup> respondent by the 1<sup>st</sup> and 2<sup>nd</sup> respondents is unconstitutional, the respondents and including the 4<sup>th</sup> respondent admit to the facts that on 10<sup>th</sup> September, 2018 the 4<sup>th</sup> respondent was appointed as municipal manager by the County Government of Bomet on a 5 years contract and on 11<sup>th</sup> October, 2018 vide Gazette Notice No.10671 he was appointed as a member of the Bomet County Assembly Public Service Board.

The petitioner's case is that the appointments of the 4<sup>th</sup> respondent by the 1<sup>st</sup> and 2<sup>nd</sup> respondents has placed him on two separate positions and earning two salaries and several allowances contrary to Article 77(1) of the Constitution, he falls short of the of integrity provisions and thus unfit to hold public office and such appointments place him against the provisions of the Leadership and Integrity Act and the Public Officer Ethics Act. That he should be made to refund the monies paid and found unfit to hold public office.

The 2<sup>nd</sup> respondent's case is that the 4<sup>th</sup> respondent was appointed following a thorough legal process save the 4<sup>th</sup> respondent was deceitful and failed to disclose the fact that he was already in the employment of the County Government of Bomet as municipal manager. The 2<sup>nd</sup> respondent at its sitting on 22<sup>nd</sup> February, 2019 passed a resolution to suspend the 4<sup>th</sup> respondent as a member of the board and stopped any benefits due to him.

The 1<sup>st</sup> respondent's case is that the 4<sup>th</sup> respondent was appointed as municipal manager on 10<sup>th</sup> September, 2018 while he was not gainfully employed elsewhere on full time basis and in any event his appointment to the 2<sup>nd</sup> respondent was only part time per section 12(3A) of the County Government Act and such appointment did not attract a salary. That the 4<sup>th</sup> respondent while in the service of the 1<sup>st</sup> respondent was not a state officer as defined under article 260 of the constitution so as to have article 77(1) of the Constitution apply to him.

It was the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondent's case that the 4<sup>th</sup> respondent was a *public officer* and not a *state officer* and hence not bound by the provisions of Article 77(1) of the Constitution and was hence not barred from holding and being in gainful employment while in the service of the County Government of Bomet. That article 260 of the Constitution relating to *state officers* did not apply to him.

The 4<sup>th</sup> respondent admitted to the averments in the petition to the extent that he was appointed as municipal manager by the 1<sup>st</sup> respondent on a 5 years contract. That on 9<sup>th</sup> October, 2018 vide Gazette Notice No.10671 he was nominated to be member of county assembly service board. Such nomination was on part time basis without a salary. That on 22<sup>nd</sup> February, 2019 due to job dissatisfaction he issued notice to terminate his contract as municipal manager.

In this regard, while the 4<sup>th</sup> respondent was holding the position of municipal manager on a 5 years contract from 10<sup>th</sup> September, 2018 with the County Government of Bomet, he was nominated as member of the 2<sup>nd</sup> respondent on 9<sup>th</sup> October, 2018 vide Gazette Notice No.10671 dated 11<sup>th</sup> October, 2018.

Was the 4<sup>th</sup> respondent then covered under article 77(1) of the Constitution, 2010 and does the Leadership and Integrity Act read together with the Public Officer Ethics Act apply to him?

Article 10 of the Constitution requires as follows;

The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them—

Who then is a public officer? Article 260 of the Constitution, 2010 defines a public officer to be;

?public officer? means—

a. any State officer; or

b. any person, other than a State Officer, who holds a public office;

In this regard, Article 10 of the Constitution binds all State organs, State officers, public officers and all persons whenever they apply or interpret the Constitution; enact, apply or interpret any law; make or implement any public policy decision, to national values and principles of governance which include *participation of the people, human dignity, equity, social justice*, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised; good governance, integrity, transparency and accountability and sustainable development. See **Republic versus Cabinet Secretary Ministry of Transport and Infrastructure & 3 others ex parte Francis N. Kiboro & 198 Others [2015] eKLR**, also in the case of **Olum & Another versus Attorney General (2) [1995-1998] 1 E**; the court held that;

*...although the national values and principles of governance enshrined in Article 10 of the Constitution are not on their own justiciable, they and the preamble of the Constitution should be given effect wherever it is fairly possible to do so without violating the meaning of the words used.*

The court reading of article 260, 77 and 10 of the Constitution, 2010 all are reinforcing. Whereas under article 260 a public officer is any person other than a state officer who holds public office, the fundamental connection is that of a person holding such an office, being sustained in terms of remuneration and benefits from the public exchequer. Being a public officer is all inclusive. For Article 10 of the constitution, 2010 to bear fruit and have its full force, the provisions of article 260 and 77(1) of the Constitution cannot be read alone.

This is aptly captured in the case of **Fredrick Otieno Outa versus Jared Odoyo Okello Supreme Court of Kenya, Petition No. 6 of 2014 [2014]eKLR**, the

Supreme Court having considered some of the statutory definitions of 'public officer' concluded as follows;

**Strictly speaking, the proper meaning of „public officer? ... is that embodied in Article 260 of the Constitution... The different definitions in other statutory provisions, such as those enumerated earlier on, ought not to take precedence over the said constitutional provisions. And thus the proper meaning of “public officer”- currently is ; (i) the person concerned is a state officer; or (ii) any other person who holds “public office” – an office within the National Government, County Government or Public Service; (iii) a person holding such an office, being sustained in terms of remuneration and benefits from the public exchequer .**

The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents relied on the case of **Felix Kiprono Matagei versus Attorney General & 3 others [2016] eKLR** and on the basis that the holding of the party alleging there is double employment must demonstrate that such employment is inherently incompatible with the responsibilities of the officer or will result in the impairment of judgement of the state office in execution of the functions of the state officer or result in a conflict of interest. In the cited case of **Felix Kiprono Matagei**, the court held that;

*...it is possible for a public officer to hold two public offices, where the law allows or where the two offices correlate, I am satisfied that in the circumstances of the instant case the 4<sup>th</sup> Respondent cannot continue to be an employee of Kenyatta University and also be the chair of the CUE. He is likely to be perceived as non-impartial and partisan by most stakeholders in the higher education sector as well as by the public generally. The likelihood that where the CUE in the performance of its duties engages Kenyatta University, the 4<sup>th</sup> Respondent may look the other way is real. ...*

In this case, the 4<sup>th</sup> respondent was appointed under the provisions of section 29 of the Urban Areas and Cities Act and issued with a 5 years contract. The position was full time and with a given salary. Employment commenced on 10<sup>th</sup> September, 2018.

The position of municipal manager was advertised in the print media and there is evidence attached by the 4<sup>th</sup> respondent to support the same. There is no breach to article 35 of the constitution as alleged in the petition.

However, While serving the County Government of Bomet under the 5 years contract, the 4<sup>th</sup> respondent accepted the nomination as member of 2<sup>nd</sup> respondent and taking effect 11th October, 2018 following publication. provisions of section 12 of the County Government Act. duties and functions of a Board member are;

This was pursuant to the under section 12(7) the

(7) The county assembly service board is responsible for—

a. providing services and facilities to ensure the efficient and effective functioning of the county assembly;

b. constituting offices in the county assembly service, and appointing and supervising office holders;

c. preparing annual estimates of expenditure of the county assembly service and submitting them to the county assembly for approval, and exercising budgetary control over the service;

- d. undertaking, singly or jointly with other relevant organizations, programmes to promote the ideals of parliamentary democracy; and
- e. performing other functions—
  - i. necessary for the well-being of the members and staff of the county assembly; or
  - ii. prescribed by national legislation.

The court reading of the duties and functions of a Municipal manager outlined under section 28 and 29 and Second Schedule to the Urban Areas and Cities Act is that this is the principal manager of the municipal pursuant to Article 184 of the Constitution. such office is to provide for the, classification, governance and management of urban areas and cities; to provide for the criteria of establishing urban areas, to provide for the principle of governance and participation of residents and for connected purposes.

The two functions of municipal manager and member of County assembly service board are not reinforcing. Each is an independent office with different functionalities and constituted under different legal regimes.

The respondents in the appointment of the 4<sup>th</sup> respondent as municipal manager and member county assembly service board cannot extricate themselves from the requirements of the constitution and the law. being a public officer carry with it an all overriding duty of integrity in a manner that maintains public confidence and professionalism within the organisation being served whether it be County Government or Public Service. the 4<sup>th</sup> respondent holding the public office of municipal manager held such an office and was being sustained in terms of remuneration and benefits from the public exchequer. He could not hold another public office, being sustained in terms of remuneration and benefits from the public exchequer whether on part time basis or full time. Both offices were hence held in conflict of interest. See the case of **Fredrick Otieno Outa**, and **Felix Kiprono Matagei**, cited above.

What does the Constitution require with regard to appointments to public office? As already observed, public officers must be appointed on the basis of the criteria set out in Chapter 6. They must also, in addition, be appointed in accordance with the national values and principles set out in Article 10 of the Constitution, 2010. The 4<sup>th</sup> respondent well assessed in the instant petition failed the test of the constitution and the law.

To allow the 4<sup>th</sup> respondent to hold both offices was unconstitutional and went contrary to section 26 and 13 of the Leadership and Integrity Act which required the 4<sup>th</sup> respondent not to hold any other office for gainful employment while in the full time service of the Municipal and Bomet County Government.

To hold dual offices with the 1<sup>st</sup> and 2<sup>nd</sup> respondents without disclosure to the 2<sup>nd</sup> respondent was contrary to section 22 of the Public Officer Ethics Act. it has been conceded by the 2<sup>nd</sup> respondent that on 11<sup>th</sup> October, 2018 following misrepresentation and concealment of information they appointed the 4<sup>th</sup> respondent as member of the Bomet County Assembly Service Board vide Gazette Notice No.10671. in his Replying Affidavit dated 5<sup>th</sup> April, 2019 the clerk Mr Isaac Kitur stated that;

6. on the 11<sup>th</sup> day of October, 2018, through a regrettable oversight caused by misrepresentation and concealment of information by the 4<sup>th</sup> respondent, the 4<sup>th</sup> respondent was further appointed as a member of the Bomet County Assembly Public Service Board, vide gazette notice number 10671.

7. he appointment of the 4<sup>th</sup> respondent as a member of Bomet County Assembly Public Service Board vie gazette notice number 10671 dated 11<sup>th</sup> October, 2018 was but the culmination of a thorough legal process followed by board so as to ensure that the appointment met all the laid down legal requirements, save that the 4<sup>th</sup> respondent was deceitful and failed to disclose the fact that he was already employed by the County Government of Bomet as a municipal manager.

This then depicts the 4<sup>th</sup> respondent as a liar, dishonest and person lacking integrity to hold public office. The overt acts of misrepresentation before the 2<sup>nd</sup> respondent, the concealment of relevant information and leading to his holding dual position in the public service placed him in conflict with the provisions of Article 10 of the Constitution read together with article 77(1), the Leadership and Integrity Act and the Public Officer Ethics Act. such conduct places the 4<sup>th</sup> respondent unfit to hold public office.

These matters are exacerbated by the 1<sup>st</sup> respondent.

In the Replying Affidavit of Evalyne Rono the County Secretary sworn on 13<sup>th</sup> May, 2019 avers that;

5. while it may be the case that the 4<sup>th</sup> respondent held office as member of Bomet County Assembly Service Board, I am advised by my advocates on record which advice I believe to be true that such membership is only held on a part time basis as per section 12(3A) of the County Government Act, 2012.

6. to the best of my knowledge the Kenyan public service, a part-time member of a statutory board is not entitled to compensation in terms of salary.

It is regrettable that the 1<sup>st</sup> respondent through the Replying Affidavit of Evalyne Rono dated 13<sup>th</sup> May, 2019 takes such a view. that the 4<sup>th</sup> respondent while in the service of Municipal as manager could hold another position with the 2<sup>nd</sup> respondent since this was part time. This is absurd taking into account the position held by the officer in the administration of County Government of Bomet. To allow the 4<sup>th</sup> respondent hold dual officers remunerated from the exchequer whether directly or indirectly are to place an unnecessary burden on the taxpayer and contrary to Article 226 of the Constitution, 2010.

Allowing such a view to go without mention would be contrary to the rule of law. such position on the face of Article 77 of the Constitution should be frowned at.

I will say no more in this regard.

The 4<sup>th</sup> respondent on his part and in his Replying Affidavit dated 2<sup>nd</sup> July, 2019 reinforces a background of deceit, falsehoods and one not to be trusted and relied upon as a public officer. He avers that;

2. on 9<sup>th</sup> October, 2018 vide letter dated 9<sup>th</sup> October, 2018 I was nominated to be a member of county assembly service board and gazette notice No.10671 dated 11<sup>th</sup> October, 2018.

3. the said nomination was a part time responsibility and at no time was I paid salaries pursuant to this nomination.

The fullness of deceit by the 4<sup>th</sup> respondent is exposed at his paragraph 4, 5, 6 and 9 of his Replying Affidavit where he avers under oath that;

4. later, a vacancy of municipal manager was advertised on both the print media and county government of Bomet website, and being interested on the job I tendered in my application.

.....

6. vide a letter dated 23<sup>rd</sup> November 2018, being the successful [candidate] after the interview, I was appointed to the position of municipal manager, on contract basis.

...

9. On or about 22<sup>nd</sup> February 2019 due to job dissatisfaction I handed in a notice of termination of contract as municipal manager, which notice was *accepted on 15<sup>th</sup> March 2019, and I therefore ceased being the municipal manager from then.*

The appointment as municipal manager came in first. During such appointment, the 4<sup>th</sup> respondent accepted appointed with the 2<sup>nd</sup> respondent. His affidavit is tailored and couched to give an impression that while serving under the 2<sup>nd</sup> respondent he applied for the position of municipal manager and later due to job dissatisfaction he terminated the contract.

The court reading of events is that the 4<sup>th</sup> respondent was aware at all material times that while serving as municipal manager he accepted another appointment and he hence became conflicted. Following a sitting of the 2<sup>nd</sup> respondent on 22<sup>nd</sup> February, 2019 to discuss his conduct, he tendered notice to terminate his contract as municipal manager and taking effect on 15<sup>th</sup> March, 2019. On the date the 4<sup>th</sup> respondent terminated his contract he was issued with letter dated 22<sup>nd</sup> February, 2019 by the 2<sup>nd</sup> respondent to the effect that;

RE: MEMBERSHIP OF COUNTY ASSEMBLY SERVICE BOAR

*In its 94<sup>th</sup> sitting, the County Assembly Service Board of which you are a member was informed that you are a full time employee of the County Government of Bomet as the Municipal Manger. The appointment to the said position was made vide letter dated 23<sup>rd</sup> November 2018 and was to take effect from 1<sup>st</sup> October 2018.*

The Board relying on the advisory from the EACC (vide a letter dated 5<sup>th</sup> October 2018) found that your employment as Municipal Manager of the CASB was illegal and ought to be revoked immediately.

Tat Board further resolved that you be suspended from its membership with immediate effect and that you appear before it on Tuesday 26<sup>th</sup> February 2019 at 10.am at the Assembly Chambers to show cause why your appointment should not be revoked. ...

Regrettably, there are no details offered with regard to the outcome of the meeting held on 26<sup>th</sup> February, 2019. The total removal of the 44<sup>th</sup>

respondent from the 2<sup>nd</sup> respondent and revocation of his appointment vide Gazette Notice No.10671 is not addressed. Being a person unfit to hold public office, this is not addressed.

What is apparent to the court is that even where the 2<sup>nd</sup> respondent held its sittings and up and until 26<sup>th</sup> February, 2019 the 4<sup>th</sup> respondent was still in the service of the 1<sup>st</sup> respondent serving his notice period taking effect on 15<sup>th</sup> March, 2019.

Whereas the 4<sup>th</sup> respondent accepted the appointment as municipal manager on 10<sup>th</sup> September, 2018 while he was not employed elsewhere and this was allowed under the law and pursuant to section 28 and 29 of the Urban Areas and Cities Act, on the same breath his appointment as member of Bomet County Assembly Service Board pursuant to section 12 of the County Government Act read together with articles 10 and 77(1) of the Constitution was null and void *ab initio*.

The court finds the 4<sup>th</sup> Respondent should not have been holding two public offices which do not co-relate.

The consequences of the actions and conduct of the 4<sup>th</sup> respondent are aptly captured in the case of **Felix Kiprono Matagei versus Attorney General & 3 others [2016] eKLR**, cited above and the findings that;

The tax-payers of this country ought not to be unduly burdened by being compelled to shoulder the consequences of people whose actions contravene the Constitution, the social contract between the governors and the governed, and expect the people, the principals of the governors on whose behalf the governors exercise sovereign power, to pay for the governors' sins. That there are cases where public officers may be held personally liable was appreciated by **Kasango, J in Daneva Company Limited vs. Kenya National Highways Authority [2014] eKLR.**

On these findings, the petition is justified and on good foundation to the extent that the appointment of the 4<sup>th</sup> respondent as member of Bomet County Assembly Service board while serving as an employee of the County Government of Bomet as municipal manager was unlawful, unconstitutional and null and void *ab initio*.

Gazette Notice Number 10671 dated 11<sup>th</sup> October, 2018 with regard to the appointment of the 4<sup>th</sup> respondent to serve under the 2<sup>nd</sup> respondent was founded on an illegality and cannot stand. Such Legal Notice No.10671 is hereby revoked. The Clerk, 2<sup>nd</sup> respondent shall report to the court within ninety (90) days in this regard.

The proceeds received from the 2<sup>nd</sup> respondent as remuneration, allowances and benefits shall be quantified and he shall refund the same to the 2<sup>nd</sup> respondent for use and in the public benefit. Such shall be applied in terms of Article 226(5) of the Constitution, 2010 provides as follows:

**If the holder of an office, including a political office, directs or approves the use of public funds contrary to law or instructions, the person is liable for any loss arising from that use and shall make good the loss, whether the person remains the holder of the office or not.**

Mr Isaac Kitur as Clerk, 2<sup>nd</sup> respondent shall address and report to the court within ninety (90) days.

The 4<sup>th</sup> respondent has since issued notice terminating his employment with the County Government of Bomet as Municipal Manager. Such took effect on 15<sup>th</sup> March, 2019.

The 2<sup>nd</sup> respondent by letter dated 22<sup>nd</sup> February, 2019 suspended the 4<sup>th</sup> respondent and was to attend to show cause why his appointment as member should not be revoked on 26<sup>th</sup> February, 2019. The outcome of such process is not addressed save in the Replying Affidavit of the clerk, Isaac Kitur dated 5<sup>th</sup> April, 2019 he avers that upon discovery that the 4<sup>th</sup> respondent was occupying two public offices at the same time contrary to the constitution barring a state officer from participating in any other gainful employment, the 2<sup>nd</sup> respondent suspended the 4<sup>th</sup> respondent on 22<sup>nd</sup> February, 2019 and stopped any benefits to him.

In the circumstances, the misrepresentation and concealment of information by the 4<sup>th</sup> respondent for appointment as a member of Bomet County Assembly public Service Board being in breach of the Leadership and Integrity Act and also the Public Officer Ethics Act places him in bad standing to hold any public office. As set out above, having put public resources and funds into waste by deception and concealment, he does not stand in good stead.

The petition is found with merit to the extent that the 4<sup>th</sup> respondent should refund all monies, allowances and earning received on the findings above and the requirement that the 2<sup>nd</sup> respondent and through the clerk, the 4<sup>th</sup> respondent should refund all monies unlawfully paid, accessed and earned for the period he was member of the 2<sup>nd</sup> respondent Board, such shall be repaid and accounted for.

On the issue of costs, the petitioner moved the court on the grounds that there were constitutional violations by the respondents for allowing the 4<sup>th</sup> respondent to hold two offices remunerated from the exchequer. That The 4<sup>th</sup> respondent is not fit to hold any public office as his conduct is short of the provisions of chapter six of the constitution and by holding two appointments with the County Government of Bomet he denied other qualified persons a fair chance to employment and while majority of people remained unemployed. The petitioner raises fundamental constitutional questions as above addressed. He was bold and forthright in his submissions.

The petition is found with merit and the petitioner should be awarded his costs.

As noted above, the position taken by the 1<sup>st</sup> respondent herein is regretted. Such office/officer should have gone all out to attend and ensure adherence to the constitution and the applicable law. in this regard no costs shall be awarded.

The 2<sup>nd</sup> respondent position is noted and efforts to address the illegality on the appointment of the 4<sup>th</sup> respondent. as noted above, this is not sufficient as the notice to show cause and the outcome therefrom is not addressed. The 2<sup>nd</sup> respondent shall attend as directed. The 4<sup>th</sup> respondent shall meet costs by the 2<sup>nd</sup> respondent.

**For all the reasons stated above, the court finds the Petition has merit and the following orders and terms are hereby issued;**

- a. The Court declares the 4<sup>th</sup> Respondent appointment as member of the Bomet County Assembly Service Board Vide Gazette Notice No.10671 is unlawful and unconstitutional null and void;**
- b. The Court declares the actions of the 4<sup>th</sup> respondent contravened the Constitution of Kenya, 2010 the Leadership and Integrity Act, 2002 and the Public Officer Ethics Act and stands unfit to hold public office;**
- c. on (a) above, Gazette Notice No.10671 dated 11<sup>th</sup> October, 2018 and published on 19<sup>th</sup> October, 2018 appointing the 4<sup>th</sup> respondent as member Bomet County Assembly Service Board is hereby revoked;**
- d. the 4<sup>th</sup> respondent shall refund all monies received from the 2<sup>nd</sup> respondent in form of remuneration, allowances and benefits forthwith for the entire duration he was/is member of Bomet County Assembly Service Board and within ninety (90) days;**
- e. the Clerk, 2<sup>nd</sup> respondent shall quantify all proceeds received from the 2<sup>nd</sup> respondent as remuneration, allowances and benefits for use and benefit of the 4<sup>th</sup> respondent for his refund as (d) above and report to the court within ninety (90) days;**
- f. in default (d) above, the 4<sup>th</sup> respondent shall not hold office in any capacity as a public officer or in any public office;**
- g. The petition allowed, the 4<sup>th</sup> respondent shall pay the petitioner his costs together with costs incurred by the 2<sup>nd</sup> respondent and the attendant costs at (d) above. The 1<sup>st</sup> and 2<sup>nd</sup> respondents shall meet own costs.**

Orders accordingly.

**Dated and delivered electronically this 30<sup>th</sup> July, 2020.**

**M. MBARU**

**JUDGE**