



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT KERICHO

JUDICIAL REVIEW APPLICATION NO.2 OF 2019

REPUBLIC.....APPLICANT

VERSUS

ISAACK KIPYEGON KOECH.....1ST RESPONDENT

PUBLIC SERVICE COMMISSION.....2ND RESPONDENT

DEPUTY COUNTY COMMISSIONER,

BOMET EAST SUB-COUNTY.....3RD RESPONDENT

CABINET SECRETARY, MINISTRY OF INTERIOR &

COORDINATION OF NATIONAL GOVERNMENT.....4TH RESPONDENT

HON. ATTORNEY GENERAL.....5TH RESPONDENT

AND

KIPKIRUI KOECH.....EX PARTE APPLICANT

JUDGEMENT

The *ex parte* applicant, Kipkirui Koech moved the court under these proceedings and seeking judicial review orders of prohibition, mandamus and certiorari to quash the decision of the 5th respondent of appointing the 1st respondent as the Assistant Chief II of Chepkitwal Sub-location, Bomet County.

These orders are sought on the basis that the decision of the 5th respondent through the 3rd respondent of appointing the 1st respondent as the Assistant Chief II of Chepkitwal Sub-location, Bomet County should be quashed to allow for a fresh selection, recruitment and appointment of the Assistant Chief II, Chepkitwal Sub-location, Bomet County.

The proceedings are made on the grounds that on 10th January, 2018 the 3rd respondent invited suitable applicants for the post of Assistant Chief II, Chepkitwal Sub-location, Bomet County. The 3rd respondent arrogated itself a non-existing mandate and illegally and unprocedurally appointed the 1st respondent as the Assistant Chief II, Chepkitwal Sub-location, Bomet County and which appointment is in the public domain. The process of appointing the 1st respondent has been marred with irregularities and lacked transparency and tainted with corruption ideas to warrant taking a whole period of more than a year to conclude.

The advertisement for the position did not meet the requirements of section 37(4) of the Public Service Commission Act since it was not advertised as required in law. the recruitment was not conducted by the authorised person as ought to be done by the 2nd respondent hence the recruitment was illegal, null and void.

The applicant learnt from friends about the silent advert which was not published with intent to deliberately lock out other interested applicants and despite the 1st respondent failing to meet the minimum qualifications as per the advert, he nonetheless was appointed to the position. The 3rd, 4th and 5th respondents are likely to have obtained information from the church, opinion leaders and public administrators with bias for purposes of conferring unfair advantage to the 1st respondent.

The applicant wrote to the 3rd, 4th and 5th respondents complaining over the matters herein without response. The acts of the respondents are unjust, unfair and violate the rules of natural justice and article 47 of the constitution.

The application by the *ex parte* applicant is supported by his affidavit.

In reply, the 2nd, 3rd, 4th, 5th and 6th respondents filed the Replying Affidavit of Dr Eng. Karanja Kibicho and who avers that he is the Principal Secretary, State Department of Interior and Citizen Services in the Ministry of Interior & Co-ordination of National Government as an appointing authority and conversant with the matters herein and hence competent to reply.

Dr Kibicho avers that with regard to the recruitment of Assistant Chief II, Chepkitwal Sub-location, Bomet County his followed a vacancy and advertisement done on 10th January, 2018 and interviews conducted on 17th July, 2018 which was transparent. On 9th March, 2018 the recruiting panel scrutinised all applicants to ensure they met the minimum requirements for the advertised position of assistant chief II job group 'F' in terms of the scheme of service for National Government Administrative Officers.

The application of the applicant was amongst the scrutinised and shortlisted for the interview.

All the candidates who were invited for the interview received their invitation letters personally through respective area chief's office and signed the delivery book. The applicant got his invitation letter at the chief's office and the allegation that he got the information about the interview through a friend is unfounded.

Dr Kibicho also avers that during the interview only 10 candidates turned up for the interviews and who were listed as per performance from the highest to the lowest score.

As a matter of procedure, the recruitment of the chiefs and assistant chiefs, the best three candidates are recommended and forwarded to the appointing authority, and in this case the Principal Secretary and upon advice of the Ministerial Human Resource Advisory Committee after consideration of other factors forwarded one name to the Principal Secretary for appointment. The applicant was not the first on the list as alleged. The source of such information is not disclosed and based on rumour mongering and cannot be trusted as a public office.

The applicant is ignorant of the rules and regulations governing the recruiting processes in public service. his averments are idle speculations.

Article 234 of the Constitution allow Public Service Commission of Kenya to delegate its functions and powers of appointing persons in job group A-N, except graduate entry level, to authorised officers in the Ministries. The appointment of Assistant Chief II is delegated to State Department of Interior, in the Ministry of Interior and Coordination and National Government. The government has different ways of getting confidential information about eligible candidates for various positions in Public Service and the assertion that the 1st respondent did not qualify for shortlisting is proof that the applicant was seeking favours and amounts to disqualification and the application and orders sought should be dismissed.

The parties addressed the application by way of written submissions.

The *ex parte* applicant submitted that the decision of the 5th respondent through the 3rd respondent of appointing the 1st respondent as the Assistant Chief II, Chepkitwal Sub-location, Bomet County should be quashed and the respondents directed to commence fresh recruitment process for the same as the 1st respondent has been appointed with illegality by unauthorised persons.

Section 37(1) of the Public Service Commission Act provides that where a vacancy in a public office exists the Commission should invite applications by advertising in the website and a daily newspaper with national wide circulation, the radio and other modes of communication so as to reach a wide population of potential applicants as possible. In this case the advertisement was not done as required. The recruitment lacked transparency and thus irregular and the 1st respondent was not properly appointed as held in **John Mining Temoi & another versus Governor of Bungoma County & 17 others [2014] eKLR**.

There was a sham process intended to lock out he *ex parte* applicant for the advertised position. this is contrary to article 47(1) and (2) of the constitution. The *ex parte* applicant was not informed that the selection process had not already been conducted and only found out through members of the public that the 1st respondent had already been appointed as Assistant Chief II, Chepkitwal Sub-location, Bomet County. He wrote to the respondents but there was no response.

The *ex parte* applicant also submitted that the recruitment for the position of assistant chief was conducted by unauthorised person, the 3rd respondent who had no mandate and illegally and unprocedurally appointed the 1st respondent. This is contrary to article 234(2)(a)(ii) and 10 of the constitution.

The orders sought be issued as held in **Republic versus Mwangi S Kimenyi ex parte Kenya Institute for Public Policy and Research Analysis (KIPPRA) Civil Appeal No.160 of 2008** that the court has the discretion to consider whether the orders sought are the most efficacious to issue in the circumstances.

The respondents submitted that upon the position of Assistant Chief II, Chepkitwal Sub-location, Bomet County falling vacant an advertisement was circulated within Bomet East Sub-County and Cheptikwal Sub-location since the position fell within that jurisdiction and one of the requirements for the position was that one had to be a resident of the said sub-county. Under article 234(5) of the constitution the Public Service Commission (PSC) is mandated to delegate its functions and powers to anyone or more of its members or to any officer, body or authority in the public service.

In this regard, the PSC delegated its functions of appointing person in job group A to N to authorise officers in the ministries. The appointment of an assistant chief is delegated to the Ministry of Interior and Coordination of National Government. The PSC did not have to place the advertisement in the newspapers but placed the same on the notice board at the County Commissioner, Bomet East Sub-County where the position fell vacant.

The *ex parte* applicant applied for the position, an indication that the advertisement reached him. he has not come to court with clean hands by alleging that there was no proper advertisement.

The shortlisted candidates were taken through interviews by the panel which had a criteria required of the position. there was transparency and the *ex parte* applicant was not the best candidate. The *ex parte* applicant has given the court false information. Of the total 22 applicants the respondents had to ensure the candidates met the requirements for the post of assistant chief. The panel interviewed 10 candidates and only 3 best candidates were recommended to the authorised officer who then had the discretion to make an appointment and the 1st respondent was found the best overall candidate and hence his appointment for Assistant Chief II, Chepkitwal Sub-location, Bomet County.

Under article 234(5) the PSC has power to delegate its mandate are necessary.

The applicant should be dismissed with costs to the respondents.

The *ex parte* applicant made further submissions that section 37(1) of the Public Service Act is couched in mandatory terms that an advertisement for a public position must be advertised as set out under the law. No person should be discriminated against and or placed at a disadvantage. The advert by the respondents did not meet the legal threshold. One candidate Ms Chelangat Patricia was not interviewed for being unmarried.

The 3rd respondent had no authority to conduct the recruitment and appointment of the 1st respondent as required under article 234 of the constitution. there is no written authority to any person by the PSC to conduct the recruitment or recruitment. Section 31(1) of the Public Service Act requires written authority with delegated authority. In the case of **Evans Mumo Mwangangi versus Kitui County Public Service Board & another [2016] eKLR** delegated authority must be in writing. The application by the *ex parte* applicant should be allowed as prayed.

Determination

The *ex parte* applicant is seeking for an order of certiorari to quash the decision of the 5th respondent through the 3rd respondent of appointing the 1st respondent as Assistant Chief II, Chepkitwal Sub-location, Bomet County; and order of prohibition restraining the 3rd, 4th and 5th respondents from acting on the decision of the 5th respondent; and an order of mandamus directing the 2nd respondent to begin fresh selection, recruitment and appointment of Assistant Chief II, Chepkitwal Sub-location, Bomet County.

The *ex parte* applicant's case is that on 10th January, 2018 the 3rd respondent invited applicants for the post of Assistant Chief II, Chepkitwal Sub-location, Bomet County without the legal mandate as such mandate is with the PSC. That the advertisement for the position did not meet the provisions of section 37 of the Public Service Act; the interviewing and appointing persons did not have the required authority and hence the decision to appoint the 1st respondent was null and void and there should be fresh recruitment process.

The *ex parte* applicant has attached the advertisement dated 10th January, 2018 and issued under the auspicious of 5th and 3rd respondents with regard to the post of Assistant Chief II, Chepkitwal Sub Location.

The *ex parte* applicant has also attached his letter of invitation to attend the interview for the advertised position and following his application to attend on 17th July, 2018 at the 3rd respondent's office.

To ensure for impartial and equitable services to the public as required under article 232(1)(c), the constitution vests the appointment of all public officials in the public service commission through an open, competitive, merit-based and inclusive process. Article 234 of the Constitution gives the PSC constitutional mandate over the public service. in the performance of its mandate, the PSC is allowed under article 234(5) to delegate its mandate as follows;

(5) The Commission may delegate, in writing, with or without conditions, any of its functions and powers under this Article to any one or more of its members, or to any officer, body or authority in the public service.

In the Affidavit of Dr Kibicho he averred that there was delegated authority by the PSC to the 5th and 3rd respondents to conduct the process and leading to the appointment of the 1st respondent as Assistant Chief. These averments are made under oath and not challenged. The PSC given such mandate to delegate is constitutional and the operative law can only give effect. see **Republic versus National Police Service Commission ex parte Daniel Chacha [2016] eKLR**.

In the case of **Okiya Omtatah Okoiti versus Attorney General & 2 others; Francis K. Muthaura (AMB) & 5 others (Interested Parties) [2019] eKLR** the court held that;

... by reason of Article 234 (2) (a) Parliament is thereby at liberty to legislate on matters auxiliary or supplementary to establishment and abolition of offices, appointments and confirmation of appointments and which matters would be within the proper function of the Public Service Commission but not specifically mentioned in the Article. Such matters would include recruitment and selection procedures, promotional criteria, transfer and deployment criteria, work load analysis and parameters to

consider in establishment and abolition of offices and generally all matters incidental to establishment and abolition of offices, appointments and confirmation of appointments.

The provisions of Article 234 of the Constitution, 2010 should therefore be read in whole and not in part as to read these provisions in part would lose the reading of the whole and the context and import of the provisions allowing for delegation of mandate where appropriate and allowed by statute.

In this regard, section 37 of the Public Service Commission Act as referenced by the *ex parte* applicant requires that PSC should advertise for vacancies. Section 37(1) requires as follows;

37. (1) Where a vacancy in a public office is to be filled, the Commission or authorized officer shall invite applications by advertising the vacancy in the Commission's website, at least one daily newspaper of nationwide coverage, the radio and other modes of communication, so as to reach as wide a population of potential applicants as possible.

The *Commission or authorised officer* is allowed to invite for applications by advertisement in the followings locations;

Commission's website,

at least one daily newspaper of nationwide coverage,

the radio, and

other modes of communication.

In this regard the *authorised officer* is defined under section 2 of the Public Service Commission Act as follows;

"authorized officer" in relation to the Commission, means any officer, body or authority appointed by the Commission to perform its delegated functions in a Ministry or State department, or any member of the Commission;

The *authorised officer* thus with delegated authority in this case is the 3rd, 4th and 5th respondents. There is mandate under the constitutive Act, the Public Service Commission Act to advertise for the vacant position by placing under the website, daily newspaper, and radio of *other modes of communication*.

The purpose of these modes of notifications is to ensure an outreach to as wide a population of potential applicants as possible.

In this case, the 5th and 3rd respondents caused to be advertised for the position of Assistant Chief II Chepkitwal sub-location, Bomet County and to the effect that;

Applicants are invited from suitably qualified persons to fill the vacant position of assistant chief in the following sub location within Bomet East Sub County.

...

...

So as to reach this office on or before 30TH JANUARY 2018. Civil servants, teachers and other employees should apply through their heads of departments or else their applications will not be considered or acknowledged. ...

It is apparent to the court from the records filed by the *ex parte* applicant that he placed his application as required and this was acknowledged with the 3rd respondent's letter and invitation dated 3rd July, 2018 inviting him to attend at the interviews on 17th July, 2018.

Section 37 of the Public Service Commission Act read together with Article 234(5) of the Constitution allowed the PSC to delegate its mandate to the authorised officer and for any vacant position under such delegated mandate could be advertised through various modes and including *other modes of communication*. The publication of the notice by the 3rd respondent and which the *ex parte* applicant had access and he placed his application and was invited to attend interviews is evidence there was due process, the respondents adhered to the law and the process leading to the appointment of the 1st respondent is found without merit or foundation.

The process leading to the appointment of the 1st respondents by the 3rd, 4th and 5th respondents cannot be faulted as there is compliance with the law; the merits leading to the selection of the 1st respondent as Assistant Chief II, Chepkiwal Sub Location, Bomet County is not a matter for judicial review proceedings which in essence relates to the lawfulness and process of the decision made as held in **Grain Bulk Handlers Limited versus J. B. Maina & Co. Ltd & 2 others [2006] eKLR**.

Judicial review is different from ordinary adversarial litigation between private parties as it does not entail examination of the evidence with a view to making a decision about the substantial merits of a case, but rather an examination as to whether there was compliance with the applicable constitutional, statutory and procedural requirements. See **Republic versus Public Procurement Administrative Review Board**

& Another *ex parte* Gibb Africa Ltd & Another [2012] eKLR and West Kenya Sugar Company Limited versus Kenya Sugar Board & another [2014] eKLR

The orders sought fail to meet the required threshold. Interim orders issued are hereby vacated.

Accordingly, for the reasons above, the proceedings herein by the *ex parte* applicant is found without merit. The application is hereby dismissed. Costs to the 2nd, 3rd, 4th, and 5th respondents.

Dated and delivered electronically this 30th July, 2020.

M. MBARU

JUDGE