



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION NO. E010 OF 2020

**IN THE MATTER OF: ARTICLES 2, 3, 10, 19, 20, 22, 23, 25, 27, 28, 35, 41, 47, 50, 165, 258, 259 AND 260 OF THE
CONSTITUTION OF KENYA**

AND

IN THE MATTER OF SECTION 4 OF THE FAIR ADMINISTRATIVE ACTIONS ACT OF 2015

AND

**IN THE MATTER OF RULES 4, 10, 11, 13 AND 20 OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND
FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013**

AND

IN THE MATTER OF SECTIONS 5 AND 45 OF THE EMPLOYMENT ACT, 2007

BETWEEN

YUSSUF ADEN MOHAMEDPETITIONER

V

OSMAN ADEN SALAT.....1ST RESPONDENT

PRINCIPAL SECRETARY, MINISTRY OF INTERIOR AND COORDINATION

OF NATIONAL GOVERNMENT2ND RESPONDENT

PUBLIC SERVICE COMMISSION.....3RD RESPONDENT

ATTORNEY GENERAL4th RESPONDENT

JUDGMENT

1. Yussuf Aden Mohamed (Petitioner) lodged a Petition with the Court on 22 July 2020 alleging that the appointment of Osman Aden Salat (1st Respondent) as the Chief of Alabatiro Location was unconstitutional.
2. Filed together with the Petition was a Motion under a certificate of urgency seeking an interim conservatory order restraining the 1st Respondent from assuming the office of Chief of Alabatiro Location.
3. When the parties appeared in Court on 7 August 2020 for directions, the Court directed that both the Motion and Petition be urged together.
4. The Court further directed the parties to file and exchange affidavits and submissions.

5. The Petitioner did not file an affidavit of service deposing as to how the 1st Respondent was served with the Motion and Petition despite Court order on 7 August 2020.

6. The following documents were filed (are on record)

i. Petitioner's further affidavit on 1 September 2020 (should have been filed/served before 14 August 2020).

ii. Petitioner's submissions on 10 September 2020 (should have been filed/served before 14 August 2020).

iii. 2nd - 4th Respondents replying affidavit on 22 October 2020.

7. In his submissions, the Petitioner identified 4 Issues for the Court's determination

(a) Whether the residents of Alabatiro had a legitimate expectation which was not met when the 1st Respondent was appointed.

(b) Whether the appointment of the 1st Respondent was in violation of the established legal principles provided by both the Constitution and Statute.

(c) Whether the 1st Respondent is suitable and qualified for the position of Chief of Alabatiro.

(d) Costs of the Application and Petition.

8. The Respondents responses and submissions were not on file within the timelines set by the Court (the 2nd – 4th Respondents were represented on 7 August 2020 though there was no formal notice filed by Counsel).

Legitimate expectation

9. In support of the assertion that his legitimate expectation had been violated, the Petitioner contended that the advertisement calling for applications for the position of Chief, Alabatiro Location had set out the qualifications for the position to include being a resident of the Location and that this created a salient expectation that a non-resident of the location would not be appointed to the position.

10. The 1st Respondent, who emerged as successful, the Petitioner asserted, was not a resident of Alabatiro location and thus this violated his and the residents legitimate expectation.

11. The Respondents filed a copy of the advertisement dated 11 April 2019. One of the qualifications was that applicants must be a *local* of the location.

12. The position was re-advertised on 15 May 2019 and 15 July 2019, and the qualifications were maintained.

13. The 1st Respondent was at the material time serving as the Assistant Chief, Alabatiro sub-location. He had also acted as Chief, Alabatiro location according to his application letter.

14. Despite deposing in his affidavits that the 1st Respondent was not a local of Alabatiro location, the Petitioner did not provide any evidence as to the locality of the 1st Respondent.

15. The Petitioner did not deny the assertion in the Respondents replying affidavit (annexure) that the 1st Respondent was at the material time serving as Assistant Chief, Alabatiro sub-location, or that the sub-location was within Alabatiro location. The facts suggest the 1st Respondent met the *locality* qualification.

16. The Court also notes that the Petitioner only attempted to establish the residential background of the 1st Respondent by making a request to the Registrar of Persons after he had moved the Court. The results of the request were not placed before the Court.

17. On the state of the evidence on record, the Court is unable to find that the 1st Respondent, who was successful did not meet the *locality* qualification, thus leading to breach of the Petitioner's (and other residents) legitimate expectation.

Whether the appointment of the 1st Respondent violated the law

18. The Petitioner also challenged the appointment of the 1st Respondent on the ground that the process and result were in breach of Article 232(1)(e), (f) & (g) of the Constitution.

19. The aforesaid Article of the Constitution outlines accountability, transparency, fair competition and merit as values and principles of public service.

20. On this point, the Petitioner asserted that the 1st Respondent did not apply for the position of Chief but was sneaked into the process by a

local politician.

21. The Respondents filed in Court copies of advertisement and 2 re-advertisements for the position of Chief, Alabatiro location. A copy of the 1st Respondent's application letter was also filed, as well as minutes of the recruitment process.

22. A list of those who applied and those who were shortlisted were also put before the Court.

23. Despite making the assertions of violation of values and principles which govern the public service (recruitment, transparency, merit amongst others), the Petitioner did not counter the records/evidence presented by the Respondents before the Court to demonstrate how the values and principles were ignored during the recruitment process.

24. The Courts find no violation of the law on the part of the Respondents.

Suitability of the 1st Respondent

25. The Petitioner further challenged the suitability of the 1st Respondent to hold office of Chief on the ground that he was a beneficiary of a corrupt process which had led to the arraignment of the Deputy County Commissioner in Court. A newspaper clipping was provided as evidence.

26. The Petitioner should know or ought to have known that the probative value and or in any case the admissibility of the extract of the newspaper would not pass evidential muster.

27. With the bare assertions, the Court finds that the Petitioner did not set out a case to establish that the 1st Respondent did not meet the suitability and/or any other integrity qualifications for the position of Chief.

28. The Petition consisted of bare averments not supported by the requisite evidence. It was also casually drafted.

Conclusion and Orders

29. From the foregoing, the Court finds no merit in the Petition and it is dismissed with costs to the Respondents.

Delivered through Microsoft teams, dated and signed in Nairobi on this 29th day of October 2020.

Radido Stephen

Judge

Appearances

For Petitioner Mr. Makori instructed by Musyoki Mogaka & Co. Advocates

1st Respondent did not participate

For 2nd – 4th Respondents Ms. Wangeci, State Counsel, Office of the Attorney General

Court Assistant Lindsey/Judy Maina