



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

PETITION NO. 26 OF 2019

IN THE MATTER OF ARTICLES 1(1), 2, 3(1), 10, 12(1) (a), 22, & (2) (d), 24, 27(1) and (3) 47, 73(1) & (2) AND 258

OF THE CONSTITUTION

AND

IN THE MATTER OF ARTICLES 1(1), 2, 3(1), 10, 12(1) (A), 22 & (2) (d), 24, 27(1) & (3), 47, 73(1) & (2) AND 258 OF THE CONSTITUTION

AND

IN THE MATTER OF ALLEGED VIOLATION AND THREATS TO SECTION 4 & 5(1) OF FAIR ADMINISTRATION ACTION ACT

AND

IN THE MATTER OF ALLEGED VIOLATION AND THREATS TO SECTIONS 5(1) 5(2), 5(3)(b) & 12(3) OF EMPLOYMENT ACT

AND

IN THE MATTER OF ALLEGED VIOLATION AND THREATS TO SECTIONS 12(3) OF THE EMPLOYMENT AND LABOUR RELATIONS COURT ACT

AND

IN THE MATTER OF VIOLATION AND THREATS TO RULE 7(1) OF THE EMPLOYMENT AND LABOUR RELATIONS COURT (PROCEDURE) RULES, 2016

AND

IN THE MATTER OF BIASED AND IRREGULAR RECRUITMENT/EMPLOYMENT OF ASSISTANT CHIEF II, KATIENO II SUB-LOCATION

AND

IN THE MATTER OF THE ADVERTISEMENT LETTER DATED 10TH SEPTEMBER, 2019 INVITING APPLICANTS FOR THE POST OF ASSISTANT CHIEF II FOR KATIENO II SUBLOCATION

AND

IN THE MATTER OF APPLICATION LETTER DATED 19TH SEPTEMBER, 2018 BY THE PETITIONER FOR THE POST OF ASSISTANT CHIEF II, KATIENO II SUB-LOCATION

IN THE MATTER OF INVITATION LETTER DATED 19TH SEPTEMBER, 2018 BY THE PETITIONER FOR THE POST OF ASSISTANT CHIEF II, KATIENO II SUB-LOCATION

AND

**IN THE MATTER OF THE ILLEGAL CAPTURE AND THE ABUSE OF CONSTITUTIONAL AUTHORITY AND
ABDICATION OF DUTY BY STATE/PUBLIC OFFICERS IN THE RECRUITMENT PROCESS OF THE VACANT POSITION
OF ASSISTANT CHIEF II, KATIENO II SUB-LOCATION**

BETWEEN

LYDIAH VUSAKA ESIGE.....1ST PETITIONER

VERSUS

DEPUTY COUNTY COMMISSIONER URIRI – SUB COUNTY...1ST RESPONDENT

COUNTY COMMISSIONER MIGORI COUNTY.....2ND RESPONDENT

CABINET SECRETARY IN THE MINISTRY OF INTERIOR

AND CO-ORDINATION OF NATIONAL GOVERNMENT.....3RD RESPONDENT

THE HON. ATTORNEY GENERAL.....4TH RESPONDENT

RULING

1. The application dated 26th August, 2019 and filed on 6th September, 2019 seeks for an Order in the following terms:-

(i) That a temporary Order of injunction do issue against the respondents, their agents, representatives or servants stopping them from continuing with the recruitment/employment process of the vacant position of Assistant Chief II, Katieno II sub-location pending the hearing and determination of the petition herein.

2. An interim injunction was granted by Hon. Wasilwa, J. ex parte on 11th September, 2019 pending hearing and determination of this application.

3. The application is founded on grounds set out in the Notice of Motion and in the Supporting Affidavit of the applicant to wit:-

4. That the Petitioner is a female resident of Katieno II sub-location, Uriri -County within Migori County.

5. That on 10th September, 2018, the 1st respondent Deputy County Commissioner, Uriri Sub-County put an advertisement calling for applications from qualified persons to fill the vacant post of Assistant Chief II in Katieno II Sub-location.

6. The applicant applied for the advertised position by a letter dated 19th September, 2018 and was shortlisted for interview which she duly attended on 25th March, 2019.

7. That during the interview the area Member of County Assembly stormed the venue and loudly protested to the 1st respondent that he had failed to shortlist preferred candidates namely one Ooko Odendo and Kevin Gaa.

8. That the interview proceeded to conclusion and the 1st respondent informed the applicant that results would be released later and she would be informed of the winner.

9. That up to and until the time of filing suit no results were communicated to the applicant despite her telephone calls to the 1st respondent enquiring for the results.

10. That the applicant was shocked to learn that another interview for the said position was conducted on 13th August, 2019, when she received a call from one Ogalo Paul Oketch asking her why she did not attend the interview.

11. That the applicant learnt that 8 candidates had attended the said interview to which she was not invited and the two persons named by the area Member of County Assembly had been interviewed together with six others who had attended the interview with her. That the said candidates had received an invitation letter dated 5th August, 2019 and the applicant was the only person left out.

12. That no subsequent advertisement was made by the 1st respondent in respect of the 2nd interview.

13. That the applicant has suffered loss and damage resulting from the biased and discriminatory exclusion.

14. That the Court do move to quash the process resulting from the 2nd interview and mandate the 1st respondent to release the results of the 1st interview. In the meantime, the process be enjoined pending the hearing and determination of the petition.

15. The 2nd, 3rd and 4th respondents filed a replying affidavit sworn to by Dr. (Engineer) Karanja Kibicho, CBS, the Principal Secretary State Department of Interior and Citizen services in the Ministry of Interior and Co-ordination of National Government who depones that he

was the appointing Authority in the matter.

16. The deponent further deposed that he has read the petition and application herein and that the applicant's application for the advertised position was received on 15th September 2019 and she was interviewed on 25th March, 2019 with others.

17. That upon presenting the results of the interview to the County Human Resource Advisory Committee and upon consultations it was noted that the process was flawed and directive to repeat the process was made by the committee.

18. That the applicant was found to be unqualified in that she did not attain mean Grade C- in Kenya Certificate of Secondary Education (KCSE) and above as the minimum qualification required for the said position. The applicant was therefore not invited to attend the repeated interview which was conducted on 13th August, 2019.

19. The deponent attached copy of the advertisement for the post of Assistant Chief II marked "KK1" and a copy of Kenya Certificate of Secondary Education of the applicant marked "KK2".

20. The deponent states that it is not the duty of the panelist to disclose any interview results to any candidate undertaken by an authorised Appointing Authority to the successful candidates.

21. That the Government is not aware of the incident at the District County Commissioner's office as alleged by the applicant and is not privy to alleged communication between the applicant and one Ogalo Paul Oketch who is not authorized to talk to purported candidates.

22. That the application lacks merit and it be dismissed.

23. The Locus Classicus setting the criteria for grant of Conservatory Orders in the Public Sector is the Supreme Court of Kenya decision in ***Gatirau Peter Munya –vs- Dickson Mwenda Kithinji and 2 Others [2014] ECLR*** at page 86 as follows:-

"Conservatory Orders" bear a more decided public law connotation; for these are Orders to facilitate ordered functioning within public agencies as well as to uphold the adjudicatory authority of the Court in the public interest. Conservatory Orders therefore are not much like interlocutory injunctions, linked to such private party such as "the prospects of irreparable harm "occurring during the pendency of a case" or "probability of success" in the Supplicant's case for Orders of stay.

Conservatory Orders therefore should be granted on inherent – merit of a case, bearing in mind the public interest, the Constitutional values and the proportionate magnitudes and priority levels attributable to the relevant causes."

24. In the present case, and without pre-empting determination of the merits of the case during the hearing and determination of the petition itself, the minimum requirement for appointment to the grade of Assistant Chief II, Candidates, in respect of which the applicant had applied, shortlisted and interviewed was **"possession of Kenya Certificate of Secondary Education (KCSE) mean Grade C- (minus) and above or its equivalent from a recognized examining body."**

25. It is apparent from the Kenya Certificate of Secondary Education certificate of the applicant, before Court that she had attained a mean Grade of D+ (plus) in her Kenya Certificate of Secondary Education (KCSE) examinations.

26. The applicant did not file a further affidavit in response to the deposition by the respondent to which the two documents were attached stating that the applicant had not attained the minimum requirements to be invited for interview in respect of the advertised position. That the initial invitations and process were erroneous hence the need of a repeat of the process to which the applicant was not invited for the aforesaid reasons.

27. Accordingly, the applicant has not satisfied the criteria for grant of a conservatory Order pending the hearing and determination of the petition.

28. The application lacks merit and is dismissed with costs in the cause.

Dated and Delivered at Nairobi this 27th day of November, 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 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

Mr. Juro for Petitioner/Applicant

Mr. Mutare for 1st and 4th respondent

Chrispo- Court clerk