



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

PETITION NO.E080 OF 2020

ALI ABDHULAH MURSAL.....PETITIONER

VERSUS

WARDERE KALIHE SHALLE.....1ST RESPONDENT

MINISTRY OF INTERIOR AND COORDINATION

OF NATIONAL GOVERNMENT.....2ND RRESPONDENT

REGIONAL COMMISSIONER,

NORTH EASTERN REGION.....3RD RESPONDENT

COUNTY COMMISSIONER, WAJIR COUNTY.....4TH RESPONDENT

DEPUTY COUNTY COMMISSIONER,

WAJIR WEST SUB COUNTY.....5TH RESPONDENT

THE HON. ATTORNEY GENERAL.....6TH RESPONDENT

PUBLIC SERVICE COMMISSION.....7TH RESPONDENT

RULING

The petitioner filed petition and application under Certificate of Urgency dated 13th November, 2020 and seeking for orders that;

1. Spent.

2. Pending the hearing and determination of this application and petition an order of temporary injunction be issued restraining the 1st respondent from taking up the post of Chief Boji Heri Location in Wajir West Sub-County.

3. Pending hearing and determination of this application the court do issue an order compelling the 5th respondent to file in court minutes of the interview, list of applicants, shortlisted applicants, documents on evaluation and review of applicants, scores for each candidate prior to shortlisting, copies of applications, curriculum vitae, academic certificates and testimonials received

by the 5th respondent from the petitioner and other shortlisted applicants for the position of Chief Boji Heri Location in Wajir West Sub – County as advertised by the office of the 2nd respondent on 27th July 2020 Ref No F.3B VOL II (105).

4. An order issue restraining the respondents from swearing-in or handing over the tools of power/office or continuing to serve in that office of any candidate appointed in the post of Chief Boji Heri Location in Wajir West Sub – County pending the hearing and determination of this application and petition.

5. Costs of this application be provided for.

The application is supported by the petitioner’s affidavit and on the grounds that though the advertised position of Chief requires a mean

grade C (plain) the 1st respondent was picked as the successful candidate despite attaining mean grade D+ which is below the minimum grade set out in the advertisement. The petitioner was the most qualified among the candidates who applied, was shortlisted and indeed participated in the interviews for the post of chief Boji Heri Location.

The 1st respondent had been appointed as an assistant Chief and had served for barely a month before being elevated to the position of chief and before his probation period was over.

The 1st respondent hails from the Degodia community and his elevation thus denies the Ajuran clan an opportunity to have a leadership position. The appointment was influenced by Ahmed Kolosh who is the Member of National Assembly instead of considering inclusivity and merit rendering the entire process an utter scam.

The respondents shall suffer no prejudice should the application be allowed.

In his affidavit, the petitioner avers that he hails and is resident of Wajir County, Boji Heri Location with education at Kenya Certificate of Secondary Education level with grade C plain and Diploma in human resource management.

On 16th April, 2020 and 27th July, 2020 the 2nd respondent advertised for the post of Chief, Boji Heri Location and he applied.

After the advertisement on 16th April, 2020, members of the Ajuran raised complaints and the process of recruitment was halted leading to re-advertisement on 27th July, 2020. The initial advertisement was in disregard to the recommendation of extension of service after retirement of Hussein Osman Abdi by the 5th respondent in a memo dated 27th February, 2020.

The petitioner also avers that he was the most qualified candidate among the candidates who applied for the post of chief, Boji Heri location. He has discovered that the 1st respondent was the successful candidate and who does not meet the minimum qualifications for the position as he hold Grade D+ and thus disqualified. His appointment will be a barrier to the constitutional rights of the people of Boji Heri location and the Ajuran clan as required under article 56 of the Constitution.

The 1st respondent has served as assistant chief for barely one month before being elevated to the position of chief and he was yet to complete the mandatory probation period and hence his elevation is irregular.

There are qualified persons for the post of chief to warrant consideration including application of Public Service Commission Circular dated 12th June, 2014 which granted waiver to North Eastern Region on the requirement of the scheme of service which allows the ministry to recruit persons to the position of chief as long as they have sat KCPE irrespective of grades attained and even if that were the case the 2nd respondent ought to have re-advertised or lowered the academic requirements.

The advertisement created an expectation that only candidates with C plain in addition to being a member of the Ajuran Clan would be considered to ensure inclusivity.

The appointment of the 1st respondent was influenced from Degodia clan in a systematic scheme to marginalise the Ajuran clan by denying them leadership positions and access to resources. Elders from Ajuran clan complained over the flawed recruitment process but no corrective measures have been taken.

Under Article 35 of the Constitution the petitioner is entitled to information held by the respondents regarding the appointment of the chief for Boji Heri location as it is evidence that the process of recruitment was compromised and has been shrouded in mystery and secrecy contrary to the principles of good governance and accountability and where the orders sought are not granted the people of Boji Heri shall be served by an unsuitable candidate.

The 1st respondent did not enter appearance or file any response.

The 2nd to 7th respondents filed Grounds of Opposition and opposed the petitioner's application on the grounds that the appointment of the 1st respondent is legal and proper as the public interest overrides individual interests hence such appointment should not be interfered with for the interests of the people of Boji Heri location. The petitioner will not suffer any irreparable loss or damage if the temporary injunction is not granted and the petition has no automatic chance of success to warrant the issuance of the orders sought.

The position in question is a public office and hence no individual is entitled to it and it is the public at large who will suffer if the office in question is vacant considering it is sensitive public administration office that cannot be held at ransom by an individual.

By granting the orders the court will be usurping the powers and authority of the 2nd and 3rd respondents. The orders sought are discretionary and not guaranteed to an individual and application should be dismissed.

The petitioner's advocate and State Counsel for the 2nd to 7th respondents attended and made oral submissions.

Determination

Whether the court should issue temporary orders restraining the 1st respondent from taking up the post of Chief, Boji Heri Location in Wajir

West Sub-county pending the hearing of this petition;

Whether the court should issue an order compelling the 5th respondent to file records leading to the appointment of the chief, Boji Heri location in Wajir West Sub-County;

Whether the court should stop the swearing – in of the candidate appointed chief, Boji Heri location, Wajir West Sub-County.

The 1st respondent did not enter appearance or file any responses despite being served and returns being filed to confirm service.

The 2nd to 7th respondent opted to file Grounds of Opposition and no Replying Affidavit with regard to the facts deposed by the petitioner and contrary to Rule 17(9) thus;

(9) A party may respond to an application by filing grounds of Opposition verified by an affidavit.

The respondents have thus effectively denied the court important and relevant facts with regard to matters addressed by the petitioner in his affidavit. That the 1st respondent has been appointed as chief, Boji Heri location without the required qualification and that he hails from Degodia community hence denying the Ajuran community to serve in a position of leadership contrary to the constitutional values and principles pursuant to articles 10, 179, 232 and 233 of the Constitution, 2010 and as required under Article 56 of the Constitution.

On the issue as to whether the 1st respondent should be restrained from taking the position of chief, the court is guided by the principles of injunctions as enunciated in the case of **Giella versus Cassman Brown** (1973) EA 358 and which was reiterated in the case of **Nguruman Limited versus Jan Bonde Nielsen & 2 others CA No.77 of 2012 (2014) eKLR** where the Court of Appeal held that;

in an interlocutory injunction application the applicant has to satisfy the triple requirements to a, establishes his case only at a prima facie level, b, demonstrates irreparable injury if a temporary injunction is not granted and c, all any doubts as to b, by showing that the balance of convenience is in his favour.

These are the three pillars on which rest the foundation of any order of injunction interlocutory or permanent. It is established that all the above three conditions and states are to be applied as separate distinct and logical hurdles which the applicant is expected to surmount sequentially.

Counsel for the petitioner submitted that upon the advertisement of the position for chief, Boji Heri location, the respondents appointed the 1st respondent who does not meet the minimum qualifications and which forms a basis for automatic disqualification. That such appointment was void *ab initio*. That the petitioner has sought material leading to the appointment and including applications, interview and returns and which have not been supplied and leading to the infringement of the petitioner's rights.

The court reading of the case of **Giella versus Cassman Brown**, cited above and **Mrao Limited versus First American Bank of Kenya Limited** where the Court of Appeal gave a determination on a prima facie case and held that;

... in civil cases, it is a case in which, on the material presented to the court a tribunal properly directing itself will conclude that there exists a legal right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter. ...

In this regard, on the facts before court, the court finds the petitioner has established a *prima facie* case to justify the grant of the orders sought.

The other limb is that there the petitioner must establish that he shall suffer irreparable loss and damage were the orders sought are not granted. Such matter is defined in the case of **Pius Kipchirchir Kogo versus Frank Kimeli Tenai (2018) eKLR** in which the court stated;

Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury.

In his supporting affidavit, the petitioner avers that the respondents advertised for the position of Chief, Boji Heri location where he hails from and the appointment of the 1st respondent is contrary to article 56 of the constitution as he hails from Degodia community and which denies the people of Boji Heri location a chance to leadership and resources and further places them in marginalisation.

There exists constitutional safeguard with regard to the protection and inclusion of marginalised populations and where these matters are brought to the attention of the court, the court must top all else and address firmly. The potential loss and damage thereof cannot be gain stated.

Equally with regard to the other limb of balance of convenience, as cited above in the case of **Pius Kipchirchir Kogo versus Frank Kimeli Tenai (2018) eKLR** which defined the concept of balance of convenience thus;

The meaning of balance of convenience in favour of the plaintiff is that if an injunction is not granted and the Suit is ultimately decided in favour of the plaintiffs, the inconvenience caused to the plaintiff would be greater than that which would be caused to the

defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the plaintiff's' to show that the inconvenience caused to them be greater than that which may be caused to the defendant's inconvenience be equal, it is the plaintiff who suffer.

In other words, the plaintiff has to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater which is likely to arise from granting”

As set out above, without the respondent giving the court any facts with regard to the matters at hand, the petitioner clear on the injury entailed in the appointment of the 1st respondent to the position of chief, Boji Heri location, there being no evidence to the contrary, the court finds the balance of convenience favours him to justify the orders sought.

On the issue as to whether the 5th respondent should be compelled to submit records with regard to the appointment of chief, Boji Heri location, there being matters addressed and forming the gist of the main petition, it will serve justice to hear both parties on the merit and allow the respondent to file responses/defences with regard to the petition to allow the court be seized with all matters herein and make final orders in this regard.

On whether the court should stop the swearing – in of the 1st respondent as chief, Boji Heri location, Wajir West Sub-County, the first issue addressed in the positive, there exists good grounds for the court to preserve the position of chief, Boji Heri location pending the hearing and determination of the petition herein. On a balance of convenience, and to avoid putting to waste public resources with the appointment and holding of office by any party and particularly the 1st respondent, justice demands that such position be secured and await the outcome of the petition.

For the above reasons, the respondents shall respond to the petition and the same shall be heard on priority basis.

Accordingly, the petitioner's application dated 13th November, 2020 is hereby found with merit and is allowed in the following terms;

- 1. Pending the hearing and determination of the petition an order of injunction is hereby issued restraining the 1st respondent from taking up the post of Chief Boji Heri Location in Wajir West Sub-County;**
- 2. The respondents are hereby jointly and severally restrained from swearing-in or handing over the tools of power/office or allowing the 1st respondent to serve in the office of Chief, Boji Heri location in Wajir West Sub – County pending the hearing and determination of the petition herein;**
- 3. The respondents are allowed 14 days to file responses to the petition and upon which the court shall give hearing directions on priority basis; and**
- 4. Costs shall in in the petition.**

DELIVERED AT NAIROBI THIS 17TH DAY OF DECEMBER, 2020.

M. MBARU

JUDGE