



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT KISUMU**

**ELRC PETITION NO. 3 OF 2018**

*(Before Hon. Justice Mathews N. Nduma)*

VINCENT MARIITA OMAO.....PETITIONER

VERSUS

THE CHIEF EXECUTIVE OFFICER NATIONAL

GOVERNMENT AFFIRMATIVE ACTION FUND.....1<sup>ST</sup> RESPONDENT

HON. JERUSA MOMANYI WOMEN

REPRESENTATIVE, NYAMIRA COUNTY.....2<sup>ND</sup> RESPONDENT

THE DIRECTOR GENERAL

KENYA SCHOOL OF GOVERNMENT.....3<sup>RD</sup> RESPONDENT

**JUDGMENT**

1. The petition dated 5<sup>th</sup> February 2018 and filed on even-date seeks to nullify re-advertisement of six (6) positions in the Notice Board of the County Commissioner's offices at Nyamira after a recruitment exercise had been concluded following an advertisement in the standard newspaper of 3<sup>rd</sup> October 2018.
2. The petitioner states that one Jared Ogecha Ongiri emerged the best candidate and his name was forwarded to the 1<sup>st</sup> respondent's Board to be issued with appointment letter. Jared Ogecha Ongiri formerly held position of County Coordinator.
3. The petitioner states that failure to appoint Mr. Jared Ogecha Ongiri and arbitrarily re-advertising the position amounted to unfair administrative action in violation of *Article 47 of the constitution*. That the re-advertisement after a suitable candidate had been selected following a competitive, open recruitment exercise amounted to misuse of public funds. The petitioner filed a public interest suit on behalf of the affected persons under *Articles 22 and 258 of the constitution*.
4. The first respondent filed a replying affidavit dated 13<sup>th</sup> June 2018 on 5<sup>th</sup> July 2018 in which the 1<sup>st</sup> respondent contends that it made a decision to re-advertise for the said position after queries emerged regarding the audit record during the period Mr. Jared Ogecha Ongiri former County Coordinator was in office.
5. That former coordinator was asked to make a response to some items that internal auditors had highlighted and his response was not satisfactory thus prompting the 1<sup>st</sup> respondent to re-advertise the position despite that the former county coordinator had emerged the successful candidate.
6. The 2<sup>nd</sup> respondent filed a replying affidavit on 20<sup>th</sup> May 2018.
7. The respondent states that the position of county coordinator for eight (8) counties including Nyamira county were advertised afresh on internal advertisement on 30<sup>th</sup> January 2018 following the decision of the Board of National Government Affirmative Action Fund (NGAAF). That this was prompted by audit concerns raised through internal audit carried out for the year 2016/2017 on the affected

counties while the then Nyamira county coordinator Mr. Jared Ongiri Ogeche was in office. The queries regarded expenditure of Kshs. 16,377,447 and Kshs. 12,128,948 that had not been accounted for various projects and procurement of projects without compliance with the written law respectively in Nyamira County.

8. That Mr. Jared Ogecha Ongiri gave unsatisfactory answer to the internal Audit queries vide a letter dated 29<sup>th</sup> October 2017. That the 2<sup>nd</sup> best candidate for Nyamira County for the recruitment concluded in the year 2017 did not meet the minimum pass mark during the interview hence the decision by the Board to carry out the second recruitment exercise. The report of the interview and shortlist dated December 2017 was attached to the replying affidavit.

9. That the eight (8) copies of the internal advertisement dated 30<sup>th</sup> January 2018 were forwarded to the affected counties for placement in the County Commissioner's Notice Board including Nyamira for transparency.

10. That the recruitment was concluded in February 2018 and letter of offer for appointment issued to the successful candidates and acceptance received on 9<sup>th</sup> March 2018. The offer and acceptance letters were produced as exhibits "TLA"

11. That the 2<sup>nd</sup> respondent collaborates with the 1<sup>st</sup> respondent in serving different affirmative groups including women groups, persons with disabilities and vulnerable children in the respective county. That she serves as a women representative in Nyamira County. That the 2<sup>nd</sup> respondent was never involved in the recruitment exercise. That the 3<sup>rd</sup> respondent was a recruitment agent for the 1<sup>st</sup> respondent. That the petitioner has not violated any constitutional rights or derogation from any law. That the petition lacks merit and it be dismissed with costs.

### **Determination**

12. The only real issue for determination is whether the 1<sup>st</sup> respondent violated Article 47 of the constitution by denying one Mr. Jared Ongiri fair administrative action.

13. Article 47 of the constitution provides:

*"(1) every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.*

*(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administration action, the person has the right to be given written reasons for the action".*

14. In the **Industrial Court of Kenya of Kisumu. Petition number 248 of 2014, Wilfred Otieno Okoth vs County Government of Kisumu and others**, Hon. Wasilwa J. had this to say whilst discussing nullification of a concluded recruitment exercise followed by a re-advertisement as in this case:

*"Of course the re-advertising of the position was going to adversely affect those previously interviewed for the positions. They had a right to know why they were not picked for the job. They were not given any written reasons as to why the position was being re-advertised after they had been interviewed. They were also not informed that they had not met the requirements of the job after the interview. This flouts the provisions of Article 47 and coupled with Article 35(1) of the constitution which provide that:*

*"Every citizen has the right of access to*

*(a) Information held by the state and*

*(b) Information held by another person required for the exercise or protection of any right or fundamental freedom"*

It is therefore the judgment of this court that the actions of the respondents amounted to unfair administrative action under *Article 47 of the constitution*"

15. I fully agree with the analysis and logic expressed by Wasilwa J. above. In the present case the candidate had already been found to be suitable and his name forwarded to the board for appointment before the 1<sup>st</sup> respondent decided to re-advertise the position internally. There is no contention by the 1<sup>st</sup> respondent that any communication was made to the selected candidate Mr. Jared Ongiri Ogecha giving him reasons why his selection as the best candidate had been reversed and a re-advertisement of the position he had been picked to occupy done.

16. It is the court's considered view and finding that the action by the 1<sup>st</sup> respondent violated Mr. Jared Ongiri Ogecha's right to fair administrative action under *Article 47 of the constitution*. The contention that re-advertisement resulted in misuse of public funds is not supported by any tangible evidence and therefore lacks merit.

17. In the final analysis, the court makes the following orders:

(a) The internal re-advertisement of the position of County Coordinator Nyamira County is declared un-procedural and in breach of *Article 47 of the constitution of Kenya 2010*.

(b) The conduct by the 1<sup>st</sup> respondent violated the right of Mr. Jared Ongiri Ogecha protected under *Article 47 of the constitution of Kenya 2010*.

(c) The 1<sup>st</sup> respondent is directed to cancel the said re-advertisement of the position of the County Coordinator, Nyamira County and proceed to issue the selected candidate Mr. Jared Ongiri Ogecha with the letter of appointment.

(d) The 1<sup>st</sup> respondent to pay the costs of the petition.

**Judgment Dated, Signed and delivered this 11<sup>th</sup> day of July, 2019**

**Mathews N. Nduma**

**Judge**

**Appearances**

Mr. Ochoki for the petitioner

Mr. Mutahi for 1<sup>st</sup> and 3<sup>rd</sup> respondents.

M/S Bagwasi for 2<sup>nd</sup> respondent

Chrispo – Court Clerk