



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

PETITION NO. 12 OF 2017

IN THE MATTER OF ARTICLES 1, 10, 20(1), 23(1), 35, 73, 74, 174, 175, 179(2)(B), ARTICLE 201 AND 258 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF SECTIONS 65, 66, 71, 87 AND 88 OF THE COUNTY GOVERNMENTS ACT NO. 17 OF 2012

AND

IN THE MATTER OF CONTRAVENTION OF ARTICLES 2(1), (2), 10, 20(1), 22(1), 73, 174, AND 179 OF THE CONSTITUTION OF KENYA, 2010

BETWEEN

JOSEPH DANIEL GITAHU MAINA.....PETITIONER

AND

THE COUNTY ASSEMBLY

OF NYERI SERVICE BOARD.....1ST RESPONDENT

THE CLERK OF THE

COUNTY ASSEMBLY OF NYERI..... 2ND RESPONDENT

JUDGMENT

1. The County Assembly of Nyeri Service Board and the Clerk of the County Assembly of Nyeri were sued by the Petitioner who sought the suspension of the advertisement various vacant positions as set out in an advert by the Respondent. The Petitioner was of the view that on account of the public participation being absent in the advertisement of these vacant positions, and because the public did not get a forum to vet applicants will present their views in ascertaining the suitability of applicants to hold the portfolios assigned, the advertisement should be suspended. It was the Petitioner’s position that the recruitment process to the vacant positions lacked integrity, transparency and accountability and that it offended various provisions of the Constitution, Acts of Parliament, and as such, was null and void. The Petitioner supported the petition by way of affidavit and the fact that the 1st Respondent had previously in September 2015 advertised similar positions and never informed the public of what transpired out of the said recruitment process. It was his position that the Respondents cannot apply the law partially to favour sectarian interests by advertising the positions and not allowing participation of the public in the recruitment and receiving opinions on the shortlisted candidates and that this infarction ought to be stopped. The Petitioner indicated that he had applied for position as a chief driver but was never shortlisted and that it was never disclosed what transpired subsequent to the advertisement in 2015. He stated that the fact that the positions that were advertised for in June 2017 were similar to those in 2015 and it was his position and he was of the view that because due process was not followed, the 1st Respondent may have recruited staff without following the law or the Public Service Commission manual. In his notice of motion application filed on 11th July 2017, the Petitioner sought for injunction to bar the advertising on the positions and a declaration that the Respondents conduct infringed Articles 10, 35 and 232 of the Constitution of Kenya.

2. The respondent filed a replying affidavit sworn by the Clerk of the County Assembly of Nyeri. He stated that he was aware that the role of the County Assembly is clearly stipulated by law and Article 185 of the Constitution as read together with section 8 of the County Government Act, No. 17 of 2012, and the role includes *inter alia* exercising oversight with the County Executive in the county executive organs must ensure there is accountability and transparency in the execution of the functions of the County Executive and in the application

of the resources of county government. He stated that the functions of the Clerk of the County Assembly include:-

- i. The functions and powers of a clerk of the National Assembly as provided in the Parliamentary Service Act
- ii. an authorised officer. As county governments act with regard to the county assembly
- iii. an accounting officer of the county assembly is provided under the provisions of section 148(5) Public Finance Management Act, 2012.
- iv. Such other functions as may be prescribed in law from time to time by the Respondent

He further stated as County Assembly Accounting Officer he was aware that in the discharge of his responsibilities in monitoring, evaluation and oversight of the functions of the County Assembly was to be guided by the law. He stated the Petition as well as the application for conservatory orders has no merit whatsoever and was intended to frustrate legitimate hiring and recruitment process that was still on going and had not been concluded. He argued that in judicial review proceedings, the petitioner could not therefore impugn the process whose results are still not yet out and to this extent, the Petition and the application were speculative, purely malicious and intended to achieve an ulterior motive. He stated that it was clear what the intent was because the Petitioner had applied previously and had not been hired by the Respondent. He surmised that the Petitioner's intent was to manipulate the Respondent to hire him without following due process. The Respondents opine that the Petitioner seeks to exert undue influence upon the 1st Respondent to hire particular persons. The deponent stated that the Petitioner had admitted that he had not made an application to the positions advertised on 7th June 2017 and therefore cannot therefore have any basis for thwarting the present recruitment which is in response to the said specific advertisement. He stated the Petitioner cannot dictate to the 1st Respondent on the recruitment as it is a process intended to address specific issues of technical personnel and staff recommended to be recruited for purposes of achieving efficiency. He further went on to state the Petitioner's lament is purely malicious and not based on any demonstrable facts. He stated that the Petitioner's request for information was never received by the Respondents and it is neither stated to whom it was served and in what manner and extent and that it had no evidence of transmission or acknowledgement, which is clear that the letter was never sent as alleged. It was therefore surmised that the application and petition are an abuse of the court process because they did not provide any specific violations of the Petitioner's rights. He thus held that there is no basis to find any grant of the order sought.

3. The parties opted to have the matter determined by way of written submissions. The Petitioner's submissions were filed on 13th February 2018 whereas the Respondent filed submissions on 23rd February 2018. It was the Petitioner's submission that there was no meaningful vision given by the Respondent why they abandoned the first exercise advertised in September 2015 and what prompted the second advertisement. It was in his view, the corrupt schemes to reward relatives, friends for fear of change of guard in the government come 8th August 2017. He submitted that the respondent had indicated the first recruitment never took place!!! He wondered then what took place? He asked that if it was cancelled, by whom and what were the reasons for the cancellation, when was it cancelled and was the same communicated to the hundreds of applicants? He pointed out that the position of chief driver was not advertised in 2017 and he wondered where the position went. He submitted that the proper course would be to stop the recruitment as the same was marred and tainted with a lot of irregularities which this court ought not to entertain. He thus sought that the Petition be granted with costs.

4. The Respondent submitted that in the record of all applications received for the advertisement in 2015, there was no proof the Petitioner applied for the position he asserts he applied for. The Respondents submitted they were not able to proceed with any recruitment based on the advertisement made on 8th September 2015 because of budgetary constraints that resulted from a stalemate that ensued from the budget making process in the financial year 2015 – 2016 and which was well within the public domain. The Respondents submitted that the Petitioner has set out to deceive this court on a speculative course of action intended to achieve an ulterior motive. They stated that this court must not lend its processes to abuse and must reject this action at its threshold. Reliance was placed on the Court of Appeal decision in **Mumo Matemu v Trusted Society of Human Rights [2013] eKLR** where the court stated that *however, we must hasten to add that the person who moves the court for judicial redress in cases of this kind must be acting bona fide with a view to vindicating the course of justice. Where a person acts for personal gain or private profit or out of political motivation or at all bleak consideration, the court should not allow itself to be seized at the instance of such person and must reject the application at the threshold.* The Respondents were of the view that the Petition herein is essentially a collateral challenge to the 1st Respondent's role and processes in the recruitment of staff within the County Assembly establishment and that this must be understood within the context of the constitutional role of the County Assembly as provided under Article 185 of the Constitution as read with section 8 of the County Government's Act. This role is stratified into three principal imperatives namely legislation, representation at county level and oversight over the county executive. Article 185(3) specifically provides that in executing these functions, the County Assembly must regard and apply the principle of separation of powers and thereby act independently of the executive arm of the county government. It was an appreciation of this context of the law specifically created a County Assembly Service Board at section 12 of the County Government's Act, 2012 as a separate autonomous entity from the County Public Service Board established under sections 56 and 57 of the County Government's Act. The board is separate and apart from the County Public Service Board both in composition, purview of its mandate and its specific roles. Section 12(7) of the County Government's Act, 2012 provides thus

The county public service board is responsible for inter alia

(a) ...

(b) *Constituting offices in the county assembly service in appointing and supervising officeholders*

It was the Respondent's view that the 1st Respondent has statutory mandate and power to create offices within the County Assembly Service, appoint officeholders and so on. This power is not subject to or conditional upon approval of any other statutory or constitutional body but it is the exclusive prerogative of the 1st Respondent subject only to the observance of due process. The Respondents cited the case of the **County Assembly of Kisumu & 2 Others v Kisumu County Assembly Service Board & 6 Others [2015] eKLR** where the Court of

Appeal stated *having considered the rival submissions on this issue, we agree with counsel for the respondents that county assembly service boards do not exist at the pleasure of the County assembly or any other state organ. County assembly service boards are autonomous state corporations established under section 12 of the County Government's Act. Although as is clear from section 12(7) of the County Government's Act, then established to provide services and facilities with efficient and effective functioning of county assemblies and not subordinate to county assemblies or any other state organ.* The Respondent stated that having established that the 1st Respondent is clothed with statutory power to create offices within the County Assembly and appoint officers thereto, it was their submission that the Petition does not disclose any breach of process, bias, malpractice or unlawfulness in the on going recruitment exercise as to found a basis for setting aside as sought by the Petitioner. The Respondent surmised the entire presentation is founded on generalised speculations of fact, blatant lies and conjecture which are not sufficient basis for the grant of orders sought. The Respondent was of the firm view that the law that informs activation of this court's jurisdiction to review administrative action of other state organs, is now well settled. A party seeking such review must not only allege but demonstrate factual basis for his or her quest in that regard. Justice Odunga in **Republic v Secretary County Public Service Board & Another ex-parte Hulbal Gedi Abdille [2015] eKLR** stated that *at this stage it is important to revisit the parameters of the judicial review jurisdiction. The said parameters were settled by the Court of Appeal in Municipal Council of Mombasa v Republic and Umoja Consultants Ltd Civil Appeal no. 185 of 2001 in which it was held that: judicial review is concerned with the decision-making process, not to the merits of the decision itself the court should concern itself with such issues as to whether the decision makers at the jurisdiction, whether the persons affected by the decision or heard before it was made and whether in making the decision the decision-maker took into account relevant matters or did take into account irrelevant matters... The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself such as whether there was or there was not sufficient evidence to support the decision.* The Respondent submitted that the public interest in the matter would be better served if the Petition is dismissed and the recruitment process is allowed to proceed. Reliance was placed on the Supreme Court **Advisory Opinion No. 2 of 2014, In the Matter of the National Land Commission [2015] eKLR** where the Supreme Court held the *Constitution provides as a guide as to how it is to be interpreted. Article 259 (1) states that these constitutional provisions shall be interpreted in a manner that a) promotes its purposes, values and principles; b) advances the law, in human rights and fundamental freedoms in the Bill of Rights; c) permit the development of the law; and d) contributes to good governance. This court has previously held the constitutional interpretation is its distinct features, as compared to ordinary statutory interpretation: the former consistently exhorting substance and intent, rather than form.* The Respondents thus urge the petition be dismissed with costs.

5. The Court is grateful for the research undertaken by the Respondents in bringing to the fore the critical areas of focus in judicial review and for the cases cited. The Petitioner seeks redress for infringement of various cited Articles of the Constitution. In the case of **Kenya Human Rights Commission v Non-Governmental Organisations Co-ordination Board [2016] eKLR** Onguto J. held as follows:

I would state that it now appears that the court, effectively has a duty to look into not only the merits and legality of the decision made due to the requirement of 'reasonable' action under article 47, but also the process and procedures adopted due to the requirements of following all precepts of natural justice under both articles 47 and 50(1) of the Constitution. The court proceeding under article 47 of the Constitution is expected not only to pore over the process but also ensure that in substance there is justice to the petitioner. The traditional common law principles of judicial review are, in other words, not the only decisive factor.

It may sound like stretching the precincts of traditional judicial review, but clearly by the Constitution providing for 'reasonable' administrative action and also enjoining decision-makers to provide reasons, the constitutional scheme was to entrench the blazing trend where courts were already going into merits of decisions by innovatively applying such principles like proportionality and legitimate expectation. I must however confess that the line appears pretty thin and, perhaps, more discourse is required on the subject of traditional judicial review in the now entrenched substantive constitutional judicial review.

6. In the case before me, I must look at proportionality and the legitimate expectation of the petitioner. The Petitioner asserts that he was one of the applicants for the jobs advertised in 2015. On perusal of the applicants for those positions the Respondent asserts the Petitioner was not one of them. In the present petition there is challenge to an advertisement for various cadres of employees in 2017. The Petitioner himself states clearly that he is not an applicant because he did not apply for any of the positions that are on offer. It is clear the reason why the Petitioner did not or could not apply was because the position of a driver was not part of the advertisement that he challenges. It would seem that this petition is supposed to be articulating certain rights allegedly infringed upon and citing various Articles of the Constitution, is one which lacks specificity. In my view it is never the intention of Parliament to throw a line to every fish in the sea where a petitioner comes to court and states vaguely that certain rights have been infringed. He must indicate with clarity which rights have been infringed, which articles have been impacted and demonstrate with sufficient precision why the court should intervene and call to account the public body's decision or action subject of the judicial review. **Black's Law Dictionary** 9th Edition at page 1026 defines *locus standi* thus:- *the right to bring an action or to be heard in a given forum.* Clearly, from the foregoing, the Petitioner lacks *locus standi* to initiate this matter as his right to initiate an action for the infringement of his rights must be predicated on action that would jeopardize his enjoyment of those rights asserted to be so infringed. No evidence was placed before the court of any such infringement despite the assertions of the Petitioner. He did not participate in the exercise of applying for a job after the advertisement in July 2017 which would have been a precursor of the action herein. It would therefore seem that this petition was merely a speculative, fishing expedition and an attempt to stymie or postulate on aspects or issues that find ventilation at a political rally but not before a court of law. This petition and the motion are therefore wholly devoid of any merit and I dismiss them with costs to the Respondents.

It is so ordered.

Dated and delivered at Nyeri this 16th day of March 2018

Nzioki wa Makau

JUDGE