



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT

NAKURU

PETITION NO.6 OF 2017

PAUL MWANGI NJAGI.....PETITIONER

VERSUS

NAKURU COUNTY PUBLIC SERVICE BOARD.....RESPONDENT

RULING

1. The petitioner, Paul Mwangi Njagi by application and Notice of Motion dated 29th August, 2017 is seeking for orders that;

Pending the hearing and determination of this petition inter-parties the court be pleased to issue a mandatory injunction compelling the respondents herein either by themselves, servants and/or agents or anybody whomsoever to furnish the appellant with the list of all the applicants who were shortlisted for;

i) The position of Assistant Director of Livestock Production (Job group "P") as advertised by the 1st respondent herein on 18th/1/2017.

ii) The position of Assistant Director of Agriculture (Job group "P") as advertised by the 1st respondent herein on 18/1/2017.

Pending the hearing and determination of this petition inter-parties, the court be pleased to issue a mandatory injunction compelling the respondents herein either by themselves, servants and/or agents to release the results of all the applicants who took part in the interview for the position of Assistant Director of Livestock Production (Job group "P") advertised on 18/1/2017.

Pending the hearing and determination of this petitioner inter-parties, the court be pleased to issue a prohibitory injunction to restrain the respondents herein either by themselves, servants and/or agents from deploying any person to the position of acting County Director of Livestock Production.

The court be pleased to give further directions.

Costs be provided for.

2. The application is supported by the annexed affidavit of the Petitioner and on the grounds that he is an employee of Nakuru County Government deployed to the department of Livestock Production. On 18th January, 2017 the respondent caused to be advertised the position of Assistant Director of Livestock Production but the whole process of shortlisting, interviews was shrouded in secrecy, nepotism, favouritism and discrimination at his expense. There was no fairness towards the appointment and being the best qualified candidate he was not considered for the same. The procedural lapses denied the petitioner an equal opportunity to the advertised position he had applied for.

3. In his affidavit, the petitioner avers that he has worked for the Nakuru County Government since 1997 and promoted through the ranks to the position of Principal Livestock Production Officer in 2012. He holds a Bachelor of Science degree in Range Management and a Master's degree in Environmental Science.

4. On 18th January, 2017 the respondent advertised for the various positions in the Agriculture Livestock and Fisheries Department and

which included the position of Assistant Livestock Production and for which the petitioner applied for. He was listed for the interview where he also saw the name of Stephen Waweru Muriithi included by handwriting. Such Stephen Waweru was not in the same department as the petitioner but in Agriculture Department.

5. On 30th March, 2017 the petitioner attended the interview but was faced with hostility by the panel members. Later he learnt this position was given to Stephen Waweru by letter dated 12th May, 2017. The interview process was marred with secrecy, discrimination and biases and did not uphold the rule of law. This denied the petitioner a fair chance and unless the order sought are granted, grave injustice shall be perpetuated.

6. The respondent, Nakuru County Public Service Board filed a Replying Affidavit sworn by James K. Mbugua the Secretary and who avers that on 18th January, 2017 there was an advertisement for various positions by the respondent. There was a recruitment and selection of candidates in accordance with the County Government Act. There was no secrecy, favouritism, nepotism or discrimination. The petitioner was shortlisted and invited for the interview for the position of Assistant Director of Livestock Production, Job Group "P".

7. Mr Mbugua also avers that at the end of the recruitment, the respondent appointed Stephen Waweru Murithii who had attained the best score and ranking for the position. The appointment was based on merit and upon deliberations by the respondent panellists. The petitioner is dishonest in filing this application and petition in view of having attended the interview and failing to get the position and thus should be dismissed.

8. The petitioner further filed his Supplementary Affidavit and avers that even where he was invited for the interview on 30th March, 2017 the same were marred with irregularities and bias. There was no published list of shortlisted candidates but short text messages were sent out. The interview panel was not properly constituted, was contrary to standard practice which requires a senior officer from the directorate of the interviewees to be present to ask technical questions. The respondent also opted to include an officer from the Agriculture Production instead of Livestock Production so as to favour the selected candidate.

9. The petitioner also avers that while Mr Stephen Waweru was found as the best candidate, he was taken through two interviews where he tied with two others, they were promoted and he was deployed to the directorate of Livestock development. Such person is not qualified for the position advertised. He was working in a different department away from what was advertised. He has no on job training to hold the position advertised.

10. Both parties made oral submissions in open court.

11. It is common because that on 18th January, 2017 the respondent advertised for various positions which included that of Assistant Director of Livestock Production. Various candidates applied including the petitioner and Mr Stephen Waweru.

12. It is also common ground that the respondent via an internal memo dated 18th January, 2017 advertised its employees of an *internal recruitment* process. In the Livestock Production Department there was need for two officers for the Deputy Director of Livestock Production, Job Group "Q" and that of Assistant Director of Livestock Production, Job Group "P". The requirements for appointment for each position were set out in the advertisement. The petitioner applied for the Assistant Director of Livestock Production. He was interviewed on 30th March, 2017. Other candidates including Mr Stephen Waweru were interviewed.

13. On the record and documents filed by the respondent, the following is apparent;

On 12th May, 2017 Mr Stephen Waweru was issued with a letter of promotion to the positions of Assistant Director, Livestock Development at grade "P";

On 25th July, 2017 Mr Stephen Waweru was issued with a letter of deployment as the assistant Director, Livestock Development;

On 2nd August, 2017 the acting Chief Officer Agriculture, Livestock and Fisheries for the respondent made a request to the respondent and noted the deployment of Mr Stephen Waweru;

On 18th August, 2017 the respondent promoted and deployed Mr Stephen Waweru as the acting Director Livestock Production; and

On 7th September, 2017 the respondent appointed Mr Stephen Waweru at the acting County

Director of Livestock Production.

14. From these records as submitted by the respondent, the last communication with regard to the position of Assistant Director of Livestock Production has Mr Stephen Waweru in an acting capacity. I take it that this is not an error or mistake. It is clear and not ambiguous.

15. There is no substantive holder for the position advertised on 18th January, 2017 with regard to the *appointment* of the Assistant Director for Livestock Production by the respondent. To take Mr Stephen Waweru as an acting officer inherently means that such position has no substantive holder for one reason or the other. In this case, there were applicants for the position and various candidates including the petitioner applied. To thus appoint one in an acting capacity entails the process is not closed or there is no candidate appointed yet. The respondent has not *appointed* any of the applicants. In the interim there is one officer, Mr Stephen Waweru acting in the advertised position.

16. The specify of the advertised position cannot be gain stated. The respondent was looking for a candidate who meet various requirements for appointment. By taking in one of the candidates in an acting role, there is no appointment in accordance with the internal notice issued to employees.

17. The approach of the respondent in making a promotion of Mr Stephen Waweru, then a deployment is not similar to making an appointment. In dealing with the question of employee movements within its ranks, the court in the case of **the Public Service Commission versus County Government of Bomet and Bomet County Public Service Board, Petition No.27 of 2016 (Nairobi)** that an employee has the prerogative to deploy and redeploy its employees as reasonably possible so as to meet its needs and demands. However, where appointments are concerned, this is arrived upon after an invitation for a specific position, a recruitment process and followed by a substantive appointment. Once such an appointment is effected, the employee can then be deployed or redeployed as the need may arise.

18. In this case, I find no substantive officer holder for the position advertised by the respondent on 18th January, 2017 with regard to Assistant Director for Livestock Production. By the petitioner seeking to injunct the respondent from appointing an Assistant Director of Livestock Production at Job Group "P" he is only closing his chances from being appointed from among other applicants for this position.

19. As there is no substantive officer holder for the position advertised of Assistant Director for Livestock Production to seek a mandatory injunction compelling the respondent to release the results of all the applicants who took part in the interview for this position is premature. There is no demonstration that there is inordinate delay in processing the interviews and identifying a suitable candidate. It is however imperative from suits such as this that the respondent should expedite the process of appointing a substantive officer holder and without placing the petitioner at a disadvantage.

Accordingly, the application is hereby found as premature on the finding that the respondent has no substantive office holder for the advertised position of Assistant Director for Livestock Production. The orders sought shall not issue.

I find the petition is dealt on the premise of orders sought in the application.

Each party to bear own costs.

Delivered in open court at Nakuru this 30th day of April, 2018.

M. MBARU

JUDGE

In the presence of:

Court Assistant: Nancy Bor

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