



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

PETITION NO. 47 OF 2017

(Before Hon. Justice Mathews N. Nduma)

JACKSON N. MASIKA.....PETITIONER/APPLICANT

VERSUS

THE GOVERNOR BUNGOMA COUNTY.....1ST RESPONDENT

THE COUNTY ASSEMBLY OF BUNGOMA.....2ND RESPONDENT

RULING

1. A Preliminary Objection has been raised in this matter to the effect that the court lacks jurisdiction to entertain this petition and the High Court is the right forum to determine the same. That in fact a similar petition has been filed by the petitioner in the High Court of Kenya at Bungoma being Petition No. 25 of 2017. That the court should lay down its tools and strike out this petition for want of jurisdiction.

2. Reliance is made on the decision of the court of appeal in **Owners of Motor Vessel ‘Lilian S’ Vs Caltex Oil (Kenya) Limited [1989]KLR 1**

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity the court seized of the matter is then obliged to decide the issue right away on the material before its Jurisdiction is everything, without it, a court has no power to make one more step.”

3. That under Article 165(3)(b) of the constitution of Kenya 2010 is provided –

“The High Court shall have jurisdiction to determine question whether a right or fundamental freedom in the bill of rights has been denied, violated, infringed or threatened.”

This court as established under Article 162(2) has the same status as the High Court and has jurisdiction to entertain such questions touching on rights and fundamental freedoms in relation to employment and labour matters. Reliance is placed on the decision in **Industrial Court cause no. 1161 of 2010 VMK Vs Catholic University of Eastern Africa (CUEA)**.

4. That this petition as pleaded does not fall within the confines of the provisions of section 12 of the Employment and Labour Relations Court Act 2011 (as amended) as read with Article 162(2) of the constitution.

5. The main relief sought in the petition is a declaration be issued under Article 54, 55 and 81 of the constitution that the 1st Respondent has failed to ensure fair representation of persons with disabilities and the youth and the progressive implementation of the principle that at least five percent (5%) of the members appointed as members of the County Executive Committee are persons with disabilities and the youth.

6. Chapter seven of the Constitution of Kenya titled representation of the people and in particular part 1 which deal with Electoral System and Process guides formation of national and county governments and the General Principles for the electoral system.

7. Article 81 in particular which the petitioner enjoins the court to interpret and implement provides –

“81, The electoral system shall comply with the following principles;

(a) Freedom of Citizens to exercise their political rights under Article 38.

(b) Not more than two-thirds of members of elective public bodies shall be of the same gender.

(c) Fair representation of persons with disabilities.

(d) Universal suffrage based on the aspiration for fair representation and equality of vote;”

8. The court is further called upon to determine whether the Respondent has violated the right of persons with disabilities under Article 54(2) of the Constitution which provides –

“The state shall ensure the progressive implementation of the principle that at least five percent of the members of the public in elective and appointive bodies are persons with disabilities”

And Article 55 which provides –

“The state shall take measures, including affirmative action programmes, to ensure that the youth –

(b) have opportunities to associate, be represented and participate in political, social economic and other spheres of life;

(c) access employment;

Constitution of governments through election and nomination processes involve positioning of the persons in the organs of government. The process may be equated and at times confused with employment processes of competitive recruitment of persons to public service organs and positions. In this respect there is a very thin line between matters of purely employment and labour related activities and establishment of political institutions by election and nomination of political leaders in both the National and County Governments.

10. It is the court’s considered view that placement of political leaders in the political organs of national and county government through election and nomination processes do not fall within the purview of employment and labour related matters within the meaning of section 12 of the Employment and Labour Relations Court Act, as read with Article 162(2) of the Constitution of Kenya 2010.

11. It is my considered view and finding this matter falls within the jurisdiction of the High Court in terms of section 165(2)(b) of the constitution. The decision by Meoli J. **Republic v Tana River County Assembly & another Ex parte Ibrahim Bocha [2014] eKLR**, is supportive of the decision in which the court entertained a dispute regarding the list submitted by the Government to the County Assembly to approve nomination of the Executive committee Members, under section 35(2) of the County Government Act.

12. In the final analysis, the court finds that it has no jurisdiction over this matter and transfers the same to the High court at Bungoma. The matter to be mentioned before the presiding judge Bungoma for directions.

Ruling Dated, Signed and delivered this 20th day of September, 2018

Mathews N. Nduma

Judge

Appearances

Murunga & associates for the Petitioner

Makokha Wattanga & Luyali Associates for Respondent/Objectors

Chrispo – Court Clerk