



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

MISC. APPLICATION NO. 6 OF 2017

(Before Hon. Justice Mathews N. Nduma)

ALOICE AGER.....APPLICANT

VERSUS

KISUMU COUNTY PUBLIC SERVICE BOARD.....RESPONDENT

J U D G M E N T

1. The Exparte Applicant brought this Application seeking the following reliefs:-

i) THAT this Application be certified urgent and service thereof be dispensed with in the first instance.

ii) THAT this Honourable court be pleased to recall, review or set aside the Order issued on 10th July, 2017 staying the ongoing recruitment by the Respondents pending the hearing and determination of this suit.

2. Leave to bring the suit was ordered to operate or stay on 10th July, 2017 by Hon. Maureen Onyango.

3. The Application is supported by an affidavit of Aloice Ager, in which he set out various grounds why the reliefs sought ought to be granted.

4. The gravamen of the opposition is that the positions created by the Respondents, are unnecessary, and unlawful financial burden on the County Government. The suit was brought in public interest.

5. The decision is said to be contrary to Articles 10(1); 10(2); 201(d); 232(1) and 255(2) of the constitution of Kenya 2010 in that –

On or about 30th June 2016, the 2nd Respondent presented its budget for the 2016/2017 financial year to the Kisumu County assembly which budget was approved by the County Assembly. The approved allocations were –

Personnel Emoluments 3,462,734,371 (40.91%)

Operations and Maintenance 2,462,616,813 (29.09 %)

Development 2,539,751,962 (30.00%)

6. The budgetary allocation for Personnel Emoluments was predicated on an existing payroll, within the period of July 2016, and March 2017. The 1st Respondent established new offices and advertised for about 500 new job vacancies in Kisumu County Public Service.

7. In taking the impugned decision, the Respondent violated section 60(1)(g) of County Governments Act, 2012 by failing to ensure that funding for the offices were duly provided for prior to their establishment.

8. From March 2017, the 1st Respondent started inviting candidate for interviews and recruitment pursuant of the adverts placed and produced in court.

9. The ongoing process of recruitment of new employees is certain to seriously impair the budgetary provisions in the current vote as it would raise personnel emoluments allocation by about Kshs.600,000,000. That this would affect all other operations of the County Government and shall be detrimental to public interest hence the suit. The Respondent did not follow statutory procedure and constitutional

principles in taking the adverse decision. That the decision shall prejudice the legal rights of the residents of Kisumu County and must be stopped.

10. The recruitment was interdicted by the court pending the hearing and determination of the suit.

Preliminary Objection and Replying Affidavit

11. The Respondent raised a Preliminary Objection to the Exparte application on 27th February, 2018 that the Exparte applicant has now been appointed the director of the governor's press unit, is now an employee of the Respondent and cannot now have the Locus Standi to urge the application on the basis of the public interest when he has a personal private employment contract with the Respondent.

12. That there is an apparent conflict of interest that unclashes the applicant with the requisite power to advance the case herein and the case should be dismissed with costs.

13. From the outset, following the provisions of Article 22(1) as read with Article 22(2)(c), the court is of the view that the Preliminary Objection that the Applicant lacks Locus Standi in judicio to bring the application is neither here nor there and is lacking in merit.

14. Article 22(1) provides –

“Every person has the right to institute court proceedings claiming that a right on fundamental freedom in the Bill of Rights has been denied violated or infringed, or is threatened.

(2) In addition to a person acting in their own interest court proceedings under clause (1) may be instituted by –

(c) a person acting in the public interest.”

15. There is no conflict of interest in one person bringing a suit in both their personal and public interest. Personal interest does not necessarily detract from public interest. Indeed both necessarily coincide at some point if the purpose of the litigation is to usher in good to society. That which is good to an individual is not necessarily adverse to public interest. This is definitely not the case in the present matter.

16. The decision of the High Court in **Republic v Machakos County Government & 2 others Exparte Johnstone Muthama (2016) Eklr** relying on the case of **Priscilla Nyakobi Kanyua vs Attorney General & Interim Independent Electoral Commission, Nairobi HCCP No. 1 of 2010** is on point.

17. The decision jettisoned the outdated rules of Locus Standi as a bar to pressure groups or even a single spirited tax payer from going to court to vindicate the rule of law.

18. For these reasons the Preliminary Objection is dismissed.

19. The Respondent rely on a Replying Affidavit sworn on 26th February, 2018 by Mr. Nashon W. O. Oguya, the Chairman of the Kisumu County Public Service Board in which he deposes as follows:-

A total of 411 and not 500 vacant positions were advertised in 2016. The advertisement was based on individual requests from the various departments of the County Government of Kisumu for new staff.

20. That the Respondent duly followed the procedure of recruitment of new staff as enshrined under sections 59 and 60 of the County Government act 2012. That is to say, upon request by each department, each department confirmed that there was a budget for emoluments for persons to be recruited. The Board carried out due diligence with regard to available vacancies, level of positions, job description and competency requirements.

21. Upon confirmation of availability of budgets, the Respondent advertised for filling of the vacancies contrary to the gross misrepresentation by the applicant that the process was shrouded in secrecy. Adverts were put in the County website and two local -daily newspapers. Shortlisting was then done upon receipt of applications and the candidates shortlisted were published.

22. That not all positions were to be filled in the financial year 2016/2017 but the recruitment was phased. Other positions were to be filled in the financial year 2017/2018.

23. Eighty four (84) Kenyans were issued with appointment letters pursuant to the interviews conducted by the Respondent and are presently in the employ of the County Government of Kisumu. That the application is meant to terminate employment of the said new staff for no lawful cause and in violation of their rights to be employed.

24. That the application is premised on material misrepresentation and same should be dismissed with costs. The deponent has given details of departmental requirements and the budgetary allocations made in respect thereof. The Respondent in conclusion submits that the Applicant has grossly misrepresented facts to the court.

25. That indeed failure to conclude the recruitment will deny the people of Kisumu County Service delivery to their loss and detriment. It is therefore in public interest that the recruitments be concluded.

No Further Affidavit

26. The Applicant did not file any further affidavit to contradict, the mass of facts, which contradict the Applicant's assertion that the positions to be filled were not budgeted for. Indeed the Applicant does not address at all the evidence by the Respondents on the various requests and budgetary allocations made by the various departments of the County Government of Kisumu.

Determination

27. The issue for determination is whether the Exparte Applicant has proved on a balance of probabilities that the Respondent acted in excess of jurisdiction or breached rules of natural justice to warrant grant of the writs of certiorari and prohibition sought.

28. In **Republic vs The Minister for Lands and settlement Exparte Narankaik & Another [1988] KLR 693**, Tunoi (as he then was) held that certiorari lies on the application of a person aggrieved to bring the proceedings of an inferior tribunal before the High Court for review so that the court can determine whether they should be quashed, or to quash such proceedings. It will issue to quash a determination for excess or lack of jurisdiction, error of law on the face of the record or breach of the rules of natural justice or where the determination was procured by fraud, collusion or perjury.

29. In **Republic Exparte Chudasama vs The Chief Magistrates Court Nairobi and Another [2008]2EA 311**, Rawal J stated –

“In Kenya, the functions and remedies of orders of certiorari mandamus and prohibition by way of judicial review found roots in 1956 by the enactment of the Law Reform Act (Chapter 26 Laws of Kenya) and thereafter by the Constitution of Kenya itself: Simply stated these remedies are in our Judicial System to uphold and protest and defend the rule of Law, that is, to supervise the acts of Government Powers and authorities which affect the right or duties or liberty of any person. The affected person may always resort to the courts of law and if the Legal pedigree is not found to be perfectly in order the court will invalidate the act which can be safely disregarded. The government is a government of laws and not a mess and will certainly cease to deserve this high appellation if the laws furnish no remedy for the violation of a vested Legal right.”

“In exercise of Judicial Review, the court is exercising supervisory jurisdiction pursuant to Article 165(6) of the constitution which is neither civil nor criminal jurisdiction in the strict sense of the word. It is exercising jurisdiction sui generis “

Per Odunga J. in Republic v Machakos County Government.

(Supra)

30. The County Public Service Board is the organ mandated by County Governments Act, to staff County Governments pursuant to Article 235(1) of the Constitution of Kenya 2010.

31. Article 235(1) provides –

“A County Government is responsible within a frame work of uniform, norms and standards prescribed by an Act of parliament, for –

a) Establishing and abolishing offices in its public service;

b) Appointing persons to hold or act in those offices, and confirming appoints.”

32. Pursuant to this provision the Respondent is mandated under section 59 and 60 of the County Government Act, 2012 to recruit staff in terms of a procedure set therein.

33. The exparte applicant bears the onus in terms of sections 107, 108 and 109 of the Evidence Act, Cap 80 Laws of Kenya, to show that the Respondent acted in excess of the mandate given to it by the Act, and the Constitution.

34. In the alternative, the Exparte Applicant has the onus to show that in conducting the proposed recruitment of staff, the Respondent flaunted the Rules of natural justice.

35. The exparte Applicant has dismally failed in these two respects. The Application is completely devoid of merit in Law and in fact.

36. In contrast, the Respondent in its rebuttal has provided blow by blow facts which depict the recruitment process to have been fully founded in Law, conducted in a transparent manner and no complaint made by those who participated in the exercise itself.

37. Accordingly, the Application is dismissed in its entirety with costs to be borne by the Exparte Applicant who has persisted in this application even after he himself was employed by the Respondent and therefore became a beneficiary of the process he sought to impugn

Judgment Dated, Signed and delivered this 18TH day of October, 2018

Mathews N. Nduma

Judge

Appearances

Nyamwea for the Exparte Applicant

M/s. Asuna for Respondent

Chrispo – Court Clerk