



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

PETITION NO. 14 OF 2017

(Before Hon. Justice Mathews N. Nduma)

JULIUS MASIVA OBUGA.....PETITIONER

VERSUS

COUNTY ASSEMBLY

SERVICE BOARD OF VIHIGA.....1ST RESPONDENT

COUNTY ASSEMBLY OF VIHIGA.....2ND RESPONDENT

KILINGA AMBAKA.....3RD RESPONDENT

NAHASHON KUSINA OPANGA4TH RESPONDENT

J U D G M E N T

1. In this Petition, the appointment of the 4th Respondent Nahashon Kisina Opanga as the County Assembly Clerk is challenged by the Petitioner on the grounds that the 4th Respondent –

(a) Has never before worked as a Senior clerk Assistant; Hansard Editor; or Senior Research Officer in the National Assembly or in a similar capacity with relevant experience in public or the private sector;

(b) Has never attended a Senior Management Course from a recognized institution;

(c) The appointment of the 4th Respondent initially as a Legal Counsel and Deputy Clerk of the Assembly prior was improper in that the 4th Respondent did not have a post graduate diploma in law from Kenya School of Law; was not admitted to the Roll of Advocates of the High court of Kenya and had no valid practicing certificate.

2. The Petitioner prays the court to find that:-

(i) Under section 13(1) and 14(3) (a) (b) of the County Government act, the County Assembly Service Board of Vihiga, had the mandate to submit only one name of the appointed candidate, and not three as it did to the County Assembly for approval.

(ii) That in the present case the County Assembly Board had appointed one James Oyundi Mukabi and only his name ought to have been submitted to the County Assembly for approval.

(iii) That by appointing the 4th Respondent, the Respondents breached Article 10(2) (c) and 232(1)(a) of the Constitution of Kenya 2010 which set high professional standards to be adhered to in appointments to public office.

(iv) Make a finding that the 4th Respondent is engaged in professional misconduct in acting as an ‘Advocate’ when he is not qualified.

(v) That the action by the 4th Respondent render him unfit to hold the position of clerk and Deputy Clerk of the Assembly.

And order

(a) The appointments of the 3rd and 4th Respondents as the Clerk and Deputy Clerk of the County Assembly of Vihiga respectively is null and void.

(b) That the 1st Respondent is directed to submit only the name of James Oyundi Mukabi, who had been appointed as the clerk of the County Assembly of Vihiga for approval by the County Assembly of Vihiga in terms of sections 13(1) and 14(3)(a)(b) and (c) of the County Government Act, 2012.

3. The Petition is supported by an Affidavit of the Petitioner, who deposes that he is the chair, Vihiga County Budget, Environmental and Human Rights Oversight Forum which monitor and Public Finance spending good governance and ensure organs of the County Governments adhere to the tenets of the constitution and the laws of Kenya.

4. The Petitioner relies on the advertisement of the positions of Clerk and Deputy Clerk of the County Assembly of Vihiga.

5. The advertisement has the job requirements for the two positions set out therein.

6. The Petitioner also relies on the report of the County Assembly Service Board on the consideration of the position of the clerk of the county Assembly.

7. According to the report following the advertisement made on 12th August, 2015, 46 persons applied for the position of clerk, and 13 candidates were shortlisted.

8. The shortlisted candidates were interviewed on 4th and 5th January, 2016 for both the position of Clerk and Deputy Clerk, if the person had applied for both positions. Qualification of each candidates are set out at page 6 of the report.

9. The 3rd Respondent Kilinga Ambaka, Linet Busieka Mugalitsi, Tom Sharisa and James Mukobi were interviewed for the positions.

10. From page 7 of the report, James Mukabi was ranked the best candidate followed by Linet Busieka Mugalitsi who was ranked 2nd. Tom Shavis ws ranked 3rd and Kilinga Ambaka was ranked 5th.

11. The County Assembly Service Board recommended at page 7 that Mr. James Oyundi Mukabi is appointed to the position of clerk of the County Assembly.

12. In the alternative, if Mr. Mukabi is not approved by the assembly the board presented the names of Linet Busieka Mugalitsi the 2nd ranked and Mr. Tom Shavisa, the third ranked for consideration. The name of the 3rd Respondent Kilinga Ambaka was not presented for approval.

13. The recommendations were made unanimously by the board members who appended their signatures to the report on 16th January, 2016.

14. A complaint to the Law Society against the 4th Respondent for practicing without a certificate is annexed to the petition and a letter by the secretary of the Law Society of Kenya dated 31st March, 2016 is attached confirming that the 4th Respondent is not a registered practicing advocate of the High Court of Kenya.

Answer to Petition

15. Paragraphs 1, 2, 4, 5, 6, 7, 8, 9, 10 of the Petition are admitted. It is therefore admitted that one Kilinga Ambaka, the 3rd Respondent is the clerk of the County Assembly of Vihiga and Nahashon Kusina Opanga, the 4th Respondent is the Deputy Clerk of the County Assembly of Vihiga. It was also admitted that the Board is the appointing authority.

16. The advertisement of the two positions is admitted. It is admitted that interviews were conducted by the Board and the Board appointed one James Oyundi Mukabi as the Clerk of the Assembly subject to approval by the Assembly.

17. It is also admitted that the Board forwarded the names of Lined Busieka Mugalitsi and Tom Shavisa as alternative appointees for consideration by the Assembly.

18. It is not in dispute that the Assembly approved the 3rd Respondent, Kilinga Ambaka as the clerk to the Assembly and the 4th Respondent as the Deputy Clerk of the Assembly.

Determination

19. The issues for determination are as follows:-

(i) Could the Assembly appoint a person to the position of clerk of the County Assembly of Vihiga, who has not been appointed or recommended for approval by the County Assembly, Public Service Board?

(ii) Is it mandatory that a person appointed to the position of Deputy County Clerk of the Assembly of Vihiga is an admitted,

Advocate of the High Court of Kenya, with a valid practicing certificate.

(iii) If the answers to (i) & (ii) above are in the affirmative, what reliefs are applicable in the circumstances of the case.

Issue 1

20. In the reply to the petition, the 1st Respondent states that it lawfully conducted the recruitment of the 4th Respondent to the position of Deputy Clerk in terms of section 13(1) of the County Government Act. The 1st Respondent further states that the 4th Respondent had all the qualifications to be appointed Deputy Clerk. However, the 1st Respondent is silent on the recruitment process followed and the qualifications of the 3rd Respondent whose name they did not submit to the Assembly for approval.

21. There is no explanation at all as to how the 3rd Respondent whose name had not been submitted to the Assembly for approval was appointed the clerk to the Assembly. Section 13(1) of the County Governments Act, provides –

“13(1) There shall be a clerk of the County Assembly, appointed by the County Assembly Service Board with the approval of the County Assembly.”

(emphasis mine)

22. Section 13(2) provides the qualifications of the clerk as follows:-

“13(2) A person shall not be qualified for appointment as a clerk of the County Assembly unless such person –

(a) Is a citizen of Kenya;

(b) Holds a degree from a University recognized in Kenya or its equivalent;

(c) Has had at least five years relevant professional experience.

(d) Meets the requirements of leadership and integrity set out in chapter six of the constitution.”

23. Furthermore, under sub-section 13(5) is provided –

“The office of the clerk of the County Assembly and the offices of members of the staff of the clerk of the County Assembly shall be offices in the County Assembly Service Board.”

24. Under section 14(3) (a) to (c) is provided the procedure the Assembly is to follow in considering any appointment for which the approval of the County Assembly is required.

25. This is to be done first by a committee; committee’s recommendation are tabled before the assembly for approval and the proceedings of the committee and county assembly shall be open to the public.

26. The court notes at this point no hansard records of the proceedings before the committee and the Assembly for the approval of the appointment of the clerk and Deputy Clerk were presented before the court.

27. The 3rd Respondent responded to the Petition in an answer filed on 25th January, 2018 about two years from the date of filing the petition. From the court record, no leave was sought by the 3rd Respondent to file the response to the petition after such an inordinate delay. However the court has considered the answer and notes that the 3rd Respondent states that he attended the interview for the position of clerk to the County Assembly of Vihiga following his application and short listing on 4th January, 2016.

28. That on 3rd March 2016, he received a letter of appointment signed by the speaker of the County Assembly who is also chairman of the County Assembly Service Board.

29. The 3rd Respondent does not state that his name was recommended for approval by the County Assembly Public Service Board nor does he indicate whether he appeared before any committee of the Assembly for vetting prior to his appointment as the clerk of the County assembly of Vihiga.

30. The fact of the matter is that the 3rd Respondent was ranked 5th by the County Assembly Public Service Board and his name was not submitted for approval to the County Assembly of Vihiga.

31. This being the case, it is apparent and finding of the court that the appointment of the 3rd Respondent as the Clerk of the County Assembly of Vihiga, was done in blatant violation of section 13(1) as read with section 14(3)(a)(b) and (c) of the County Government Act, 2012.

32. The appointment grossly undermined the decision of the County Assembly Public Service Board which had unanimously appointed for approval Mr. James Oyundi Mukabi. The Board had also presented the names of the 2nd and 3rd ranked candidates M/s Linet Busieka Mugalitsi and Mr. Tom Shiva for consideration in the event the appointment of James Oyundi Mukabi was not approved.

33. There cannot be a better example of how, certain persons, and in this case, the speaker of the County Assembly of Vihiga, conduct themselves with extreme impunity and total disregard of the law that govern the offices they were entrusted to by the Public. A Kenyan with equal right to employment presents himself before the Board. The Board appoints him and presents his name for approval by the assembly with two other names of persons ranked 2nd and 3rd by the board for consideration in the alternative. But the speaker of the County Assembly of Vihiga, single handedly appoints a person whose name was not submitted by the board for approval as the clerk of the County Assembly of Vihiga.

34. This conduct by the speaker deserves censure as was in total disregard of the organs of the County government, the County Government Act and Chapter 6 of the Constitution of Kenya 2010.

35. The process lacked transparency and integrity and bordered on criminal conduct by persons who subverted the appointment process so blatantly.

36. This if not capped, will completely kill the morale of our youth who faithfully attend school, and higher institutions of learning with the hope, that their hard earned qualification means something to the potential employers in Kenya.

37. It is without hesitation that I find that the appointment of the 3rd Respondent to the position of speaker of the County Assembly of Vihiga was unlawful, null and void and he is directed to vacate the position forthwith.

38. The 2nd Respondent County assembly of Vihiga is directed to consider the appointment of James Oyundi Mukabi by the 1st Respondent for approval. If there is any reason not to approve the appointment of James Oyundi mukabi, the 2nd Respondent is to only consider the 2nd and 3rd ranked candidates submitted to it by the Board being Linet Busieka Mugalitsi and Tom Shiva respectively for approval.

Issue (ii)

39. With regard to the appointment of Nahashon Kusina Opanga, the 4th Respondent to the position of Deputy Clerk of the County Assembly of Vihiga, the Petitioner has failed to prove its case on a balance of probabilities that due process was not followed in his appointment.

40. The 4th Respondent met the requirements of appointment to the position of clerk to the County Assembly set out under section 13(2) of the County Government Act, 2012. There is no requirement that the Clerk or Deputy Clerk to the County Assembly be an admitted Advocate of the High Court of Kenya with a valid practicing certificate.

41. The attempt to impugne the appointment of the 4th Respondent therefore has failed and the petition is dismissed in this respect.

Remedies

42. In the final analysis judgment is entered in favour of the Petitioner as against the 1st, 2nd and 3rd Respondents as follows:-

(i) The appointment of the 3rd Respondent Kilinga Ambaka as the clerk of the County Assembly of Vihiga is unlawful, null and void.

(ii) The 1st Respondent is directed to submit the name of James Oyundi Mukabi who it had appointed to the position of clerk of the County Assembly of Vihiga for approval by the 2nd Respondent in terms of sections 13(1) and 14(3)(a)(b) and (c) of the County Governments Act as read with standing order 42 of the County Assembly standing orders.

(iii) In the event, the appointment of James Oyundi Mukabi is not approved by the County Assembly, the 2nd Respondent to only consider the two other names of the 2nd and 3rd ranked candidates presented to it by the board being Linet Busieka Mugalitsi and Tom Shavisa respectively.

(iv) The case against the 4th Respondent Nahashon Kusina Opanga, Deputy Clerk, Vihiga County Assembly is dismissed.

43. The 1st, 2nd and 3rd Respondents to pay the costs of the petition.

Judgment Dated, Signed and delivered this 13th day of December, 2018

Mathews N. Nduma

Judge

Appearances

Petitioner in person

Mr. Ombima Edward for 1st & 2nd Respondents

Mr. Musiega for 3rd Respondent

Chrispo – Court Clerk