



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

PETITION NO. 35 OF 2016

(Originally Eldoret High Court Petition No. 19 of 2015)

IN THE MATTER OF PETITION UNDER ARTICLES 10, 19, 20, 21, 22, 23, 24, 27, 35, 47, 56, 232(1), 258, CHAPTER 6 (ARTICLE 73), ARTICLE 165 OF THE CONSTITUTION OF KENYA, 2010 AND SECTION 44, 45, 57 AND 65 OF THE COUNTY GOVERNMENTS ACT NO. 17 OF 2012

AND

IN THE MATTER OF VIOLATION AND/OR INFRINGEMENT OF THE FUNDAMENTAL FREEDOMS AND RIGHTS OF THE PETITIONER UNDER ARTICLE 10, 19, 20, 21, 22, 23, 24, 27, 35, 47, 56, 232(1), CHAPTER 6 (ARTICLE 73) 165 AND 232 OF THE CONSTITUTION OF KENYA, 2010 AND SECTION 44, 45, 57 AND 65 OF THE COUNTY GOVERNMENTS ACT NO. 17 OF 2012

AND

IN THE MATTER OF THE BARINGO COUNTY GOVERNMENT, BARINGO PUBLIC SERVICE BOARD, BARINGO COUNTY GOVERNMENT ADVERTISEMENT, SHORT-LISTING, INTERVIEWING DECISION AND APPOINTMENT FOR THE POSITION OF THE COUNTY HEAD OF TOURISM REF: BCPSB/07/2015, BARINGO COUNTY

BETWEEN

LAWRENCE KIBII TOROITICH

PETITIONER

AND

BARINGO COUNTY GOVERNMENT

1ST RESPONDENT

BARINGO PUBLIC SERVICE BOARD

2ND RESPONDENT

HON. BENJAMIN CHEBOI

GOVERNOR BARINGO COUNTY

3RD RESPONDENT

COUNTY SECRETARY BARINGO

COUNTY

4TH RESPONDENT

SPEAKER OF THE COUNTY ASSEMBLY

BARINGO COUNTY

5TH RESPONDENT

AND

EVANS KANDIE KIPTURGO

INTERESTED PARTY

JUDGMENT

1. Lawrence Kibii Toroitich (Petitioner) moved the High Court in Eldoret on 29 September 2015 alleging that the appointment of Evans Kandie Kipturgo (Interested Party) as the County Head of Tourism Baringo was contrary to the Constitution and the County Governments Act.
2. Together with the Petition was a motion under certificate of urgency seeking 2 substantive orders whose impact would have been to restrain the taking of office by the Interested Party.
3. Kimondo J before whom the motion was placed at the first instance declined to certify the motion as urgent or issue any substantive order and directed that the motion be served for *inter partes* hearing.
4. The Respondents in response to the motion filed a Notice of Preliminary Objection on 13 October 2015.
5. When the motion came up for *inter partes* hearing before Githua J on 14 October 2015, Mr. Arusei for the Petitioner applied successfully to have the motion withdrawn on the ground that the orders sought had been overtaken by events.
6. At the same time, Mr. Arusei sought to have the Petition to be heard on a priority basis, but because the Respondents had not filed substantive responses the Court gave directions as to the filing of the responses.
7. The Respondents filed a Response to Petition on 28 October 2015, and this prompted the Petitioner to file a Response to the Response on 5 November 2015.
8. On the same day, Mr. Kibii sought to have the Petition transferred to the High Court sitting in Kabarnet for hearing and determination, a request which the Court granted.
9. The firm of Tarus & Co. Advocates filed a Notice of Appointment of Advocate on 19 January 2016 to come on record for the Interested Party.
10. Because there was no judge in Kabarnet, the Petitioner moved Court on 26 April 2016 to have the file recalled from the High Court sitting in Kabarnet to the High Court sitting in Eldoret and the order of recall was granted.
11. On 22 September 2016, the Petitioner moved Court again under certificate of urgency seeking an expedited hearing and determination of the Petition.
12. Githua J after considering the motion and with the consent of the parties' legal representatives on 6 October 2016 ordered that the Petition be transferred to this Court because of jurisdictional concerns.
13. The Petition was thus placed before this Court on 24 October 2016 wherein directions as to the *inter partes* hearing of the motion filed in Court on 29 September 2015 were given but which directions were vacated when the Court was informed that the motion had been withdrawn on 14 October 2015.
14. The Interested Party filed a Response to the Petition on 15 November 2016.

15. The Court thereafter gave directions as to the filing of submissions and set mention for 16 December 2016 to confirm compliance.

16. The Petitioner filed his written submissions on 7 December 2016, the Respondents on 14 December 2016, while the Interested Party was directed to file his submissions before 16 January 2017 and judgment was scheduled for today. Those submissions were not on record by this morning.

17. On 20 January 2017, the Petitioner wrote to the Court requesting that the file be transferred to the High Court in Kabarnet and the Deputy Registrar replied to the letter on 25 January 2017.

18. The Petitioner identified some 4 Issues as arising for determination in his written submissions and the Court has keenly perused them and identified the real issue(s) in dispute as three broad ones, to wit, *whether the Petition contravened the provisions of section 77(2) of the County Governments Act, whether the Interested Party was qualified for the position of County Head of Tourism and whether there was breach of the applicable constitutional and statutory principles/provisions by the Respondents.*

Violation of section 77(2) of the County Governments Act

19. The Respondents had at the very onset of the proceedings raised a preliminary objection on 3 grounds which were collapsed into one in the written submissions.

20. The objection was to the effect that in terms of section 77(2) of the County Governments Act, the Petitioner should have first exhausted the appeal process contemplated for resolution of disputes regarding appointments within a county public service.

21. In my view and in regard to the conclusion reached on the other issues, it is not prudent for the Court to reach a decision on this objection.

Whether Interested Party was qualified

22. A public advertisement for the position of County Head of Tourism was published in a newspaper of 10 July 2015 and the interested applicants were directed to a website www.baringo.co.ke for more details.

23. According to the Petitioner, in terms of academic qualifications, interested applicants ought to have obtained a Bachelor's degree in Tourism Management, which qualifications the Interested Party did not meet.

24. The copies of curriculum vitae(s) produced in Court show that the Interested Party had a Bachelor's degree in *Hotel and Hospitality Management* while the other leading applicant, one Diana J. Chebotibin had a Bachelor's degree in *Science Tourism Management*.

25. The Petitioner did not lead any evidence that there were any substantial differences between the degrees of *Hotel and Hospitality Management* and *Science Tourism Management*.

26. Further and unfortunately, the Petitioner did not provide the Court with the qualifications and eligibility criteria (academic and/or professional) as was set out in the website and the Court has considered whether it should have browsed the said website to elicit the qualifications and eligibility criteria and decided that would not have been prudent since the question of qualifications/eligibility was evidential in nature and the Petitioner ought to have placed the same before the Court.

27. With the material placed before Court, it is not possible for the Court to determine whether the Interested Party was not academically or professionally qualified or eligible for the post of Head of Tourism.

Breach of constitutional and statutory principles/provisions

Breach of Constitutional principles/provisions during recruitment process

28. The Petitioner contended that the recruitment of the Interested Party was in breach of Articles 10, 27(4), 56(c) and 232(1) of the Constitution because it lacked public participation, was shrouded in secrecy and lacked transparency and accountability.

29. It is not disputed that a vacancy announcement was made public and that a total of 19 interested applicants expressed an intention to be considered.

30. Out of the 19 Applicants, 5 were shortlisted and were invited for an interview and the public was notified of the shortlisted candidates on the website of the County Government.

31. It is also not disputed that the Interested Party and one other applicant tied with a score of 79% and that the names of both were forwarded to the 2nd Respondent who then made the appointment.

32. The Court in consideration of the process is unable to agree with the Petitioner that the Respondents violated constitutional principles or values.

Statutory provisions

33. Section 65 of the County Governments Act has outlined the matters which a county public service board ought to consider in making appointments to the county public service.

34. These include the *standards, values and principles set out in Articles 10, 27(4), 56(c) and 232(1) of the Constitution; the prescribed qualifications for holding or acting in the office; the experience and achievements attained by the candidate; the conduct of the candidate in view of any relevant code of conduct, ethics and integrity; the need to ensure that at least thirty percent of the vacant posts at entry level are filled by candidates who are not from the dominant ethnic community in the county; the need for open and transparent recruitment of public servants; and individual performance.*

35. It is not in dispute that the position of Head of Tourism was advertised in the Daily Nation newspaper which has nationwide reach and also on the website of the County Government. This was in consonance with the requirements of section 66 of the County Governments Act.

36. Regarding the other considerations, the Petitioner has not disputed or brought forth evidence to show the Interested Party did not meet the academic or professional requirements for the position, lacked experience or had no prior achievements, breached any prescribed relevant code of conduct or that the 30% rule on ethnic composition was breached by the Respondent.

37. Therefore, even on this question, the Court finds that there were no breaches by the Respondents, or eligibility on the part of the Interested Party.

38. Before concluding the Court wishes to observe that both the Petition and submissions were verbose and did not clearly set out the Petitioner's case.

Conclusion and Orders

39. The upshot of the foregoing is that the Court finds no merit in the Petition and orders that it be dismissed with costs to the Respondents and Interested Party.

Delivered, dated and signed in Nakuru on this 10th day of March 2017.

Radido Stephen

Judge

Appearances

For Petitioner

Arusei & Co. Advocates

1st to 5th Respondents

Limo R.K. & Co. Advocates

Interested Party

Tarus & Co. Advocates

Court Assistant

Nixon/Daisy