



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT KISUMU
PETITION NO. 271 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

HON. SAMUEL ANGASA ONUKOH PETITIONER

-Versus-

THE SPEAKER, KISII COUNTY ASSEMBLY 1ST RESPONDENT

THE CLERK, KISII COUNTY ASSEMBLY 2ND RESPONDENT

THE COUNTY ASSEMBLY SERVICE BOARD 3RD RESPONDENT

KISII COUNTY GOVERNMENT 4TH RESPONDENT

DANIEL MBAKA OMWOYO 5TH RESPONDENT

AND

GERVASE GIKOBI KAOSA & 12 OTHERS 1ST INTERESTED PARTIES

AND

SILAS OKEMWA & 95 OTHERS 2ND INTERESTED PARTIES

AND

NANCY NYANCHOKA ONGERI & 4 OTHERS 3RD INTERESTED PARTIES

J U D G E M E N T

Introduction

The petitioner herein is an elected member of Kisii County Assembly (MCA) representing Boochi Borabu Ward within Kisii County. He filed this petition against the Respondents seeking the following remedies-

- a) Declaration be issued to the effect that the Petitioner is entitled to Protection under the constitution.
- b) Declaration that the enlisted, recruitment and/or employment of a total of 273 employees to the Kisii County Assembly by the Respondents, jointly and/or severally in excess of and/or beyond the number that was duly advertised for and without regard to the Due process of the Law, was unlawful, illegal, and

illegitimate.

c) Declaration that the Respondents herein were obliged and/or enjoined to advertise all the vacancies and/or portfolios in the Kisii County Assembly and thereby carry out and/or conduct a Transparent and/or Accountable recruitment, in compliance and/or accordance with **Article 10(1), (c) of the Constitution 2010.**

d) An order of Judicial Review in the nature of Certiorari to issue to remove unto the Honourable Court and quash the enlisting, recruitment and employment of the 273 Employees to the Kisii County Assembly, arising from and/or attendant to the non-existent Board Meeting of the 3rd Respondent (sic) held on the 29th day of August 2014 and who were employed without the relevant Advertisement and without due regard to the provisions of the **County Government Act, No. 17 of 2012 and Article 10 of the Constitution, 2010.**

e) Permanent Injunction, restraining the Respondents either by themselves, agents, servants and/or employees, from admitting the subject Employees to the Payroll of the Kisii County Assembly and/or making any payments to and/or in favour of the said employees, either on account of Remuneration, Allowances and/or Salaries, without the necessary budgetary approval of the Kisii County Assembly, whatsoever and/or howsoever.

f) Permanent injunction restraining the Respondents either by themselves, agents, servants and/or employees, from employing, recruiting and/or enlisting employees without complying with the due process of the law and in particular, the provisions of **Article 10(1) of the Constitution, 2010.**

g) Costs of the Petition be borne by the Respondents jointly and/or severally.

h) The Honourable Court be pleased to issue such orders and/or *writs* as the Court may deem fit and/or expedient.

The 1st respondent, the Speaker of the County Assembly of Kisii is sued in his capacity as the chairperson of the County Assembly Service Board charged with the mandate of calling and convening meetings of the said Board for purposes of discharge and/or performance of its statutory duties.

The 2nd respondent, the Clerk to the County Assembly of Kisii, has been sued in his capacity as the authorized officer and accounting officer of the County Assembly with the mandate and/or function of ensuring that the resources are efficiently and lawfully utilized in line with section 149 of the Public Finance Management Act.

The 3rd respondent is sued as the Board bestowed and/or conferred with the mandate to ensure the proper discharge and/or execution of duties and affairs of the County Assembly of Kisii including recruitment of staff on behalf of the Assembly.

The 4th respondent is sued in its capacity as the body charged with the responsibility of running and/or coordinating the affairs of the County of Kisii.

The 5th Respondent, the Deputy Clerk of Kisii County Assembly is sued in his capacity as the person who has appointed and arrogated to himself the position of accounting officer of Kisii County Assembly with mandate to execute various contract documents and also to execute contracts and commit the 3rd respondent to expenses but without statutory authority to do so.

The 1st Interested Party is comprised of 13 persons joined as parties to this petition upon their application dated 12th November 2014. In their application for enjoinder the 1st Interested Parties stated that their appointment is under attack in the petition herein and therefore the petition has serious effect and consequences on their lives as they are likely to be affected by orders sought in the petition.

The 2nd Interested Party is a group of 95 persons who applied to be enjoined as parties herein vide an

application dated 14th July 2015. They describe themselves in the application as residents of Kisii County on whose behalf the petitioner (presumably) commenced these proceedings. They state that their intention to be enjoined is to ensure that their complaints are heard directly and conclusively addressed by the court.

The 3rd Interested Party is a group of 5 members of Kisii County Assembly and state in their application for enjoinder dated 29th October 2015 that they had authorized the petitioner to file this petition on their behalf to challenge the decision of the 3rd respondent to employ certain persons without due process but had learned that the petitioner had taken advantage of the petition to cut deals with the respondents and intended to file a consent order which may compromise the issues in dispute and the greater public interest the petition was intended to serve.

Background

The petition herein was filed together with an application seeking conservatory orders which were granted ex parte in the first instance by Radido J. in Nakuru on 9th October 2014. Upon service the respondents filed replying affidavits in opposition to the application. The application was later argued and a ruling delivered on 24th July 2014 granting interim injunctive orders restraining the respondents from admitting into the payroll or expending public funds on the employees whose employment is impugned in this petition.

The petition was argued by way of affidavit evidence and written submissions. Apart from the petition and affidavits in support thereof the petitioner filed a supplementary affidavit and written submissions.

The Respondents and Interested Parties also filed their respective affidavits and written submissions.

Petitioner's Case

On the **8th day of October 2014**, the Petitioner herein filed the Petition herein seeking a cocktail of Orders, directed against the Respondents herein, and touching on the Employment and/or Recruitment of a host of Employees, whose employment, it alleged, was carried out irregularly and illegally, without adherence to the provisions of the **County Government Act, No.17 of 2012** and **Articles of the Constitution, 2010**.

In the written submissions the petitioner states that there is no evidence that a meeting was convened on 29th August, 2014 as no notice calling for the meeting was produced by the Respondents. It is further submitted that there were no minutes of the meeting. It is therefore the petitioner's submission that no meeting took place on 29th August, 2014 at which the 3rd Respondent sanctioned the recruitment of 273 employees.

It is further the petitioners' submission that the 3rd Respondent was obliged to advertise any vacancies in its employment inviting qualified persons interested to apply. That it was obligated to carry out such advertisement in at least one local daily of wide circulation in the county. It is submitted that the 3rd Respondent failed to do so. It is submitted that the 3rd Respondent was aware of this requirement and indeed did so on 30th March, 2014. The Petitioner submits that the only advertisements were of 10 positions on 11th August, 2014 and could not have been the subject of a meeting on 29th August, 2014 as the deadline for receiving the applications was 25th August, 2014.

The Petitioner submitted that no advertisement was carried out prior to recruitment of the 273 employees, and that the Respondents did not comply with the provisions of Articles 10 and 232 of the Constitution. The Petitioner submitted that no employment and/or recruitment exercise can be carried out and/or undertaken by and/or on behalf of the 3rd Respondent, without a decision having been made to that effect. That in fact such decision can only arise and/or ensue from the Board meeting(s) duly convened and held, in accordance with the provisions of the **County Government Act, No.17 of 2012**.

On the Issue whether the appointments of the 273 employees was regular the petitioner referred to the

affidavit of the 1st Interested Party who alleges to have applied for employment on 8th September 2014 yet his letter of appointment is dated 1st September, 2014. It is further submitted that the 5th Respondent who executed the letters of appointment for the 273 employees had no authority to recruit as he was not an authorised officer of the 3rd Respondent.

The Petitioner referred the court to Article 2(2) of the Constitution which provides that -

2(2) No person may claim or exercise State authority except as authorised under this Constitution.

It is further submitted that it is an established principle of law that before a Court of law can grant an order of Temporary Injunction and/or Conservatory Order, the Applicant must establish and/or prove a Prima Facie Case, against the Respondents. That what amounts to a prima facie case has since been defined MRAO LIMITED -VS- FIRST AMERICAN BANK LIMITED & 2 OTHERS. (2003) KLR, Pages 125 – 139 to mean and/or include:-

"a genuine and arguable case. It is a case which, on the material presented to the Court, a Tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the letter"

It is the Petitioner's submissions that the issues raised and highlighted in the petition and the attendant Notice of Motion, including the recruitment exercise that was carried out and/or conducted without due regard to not only **Section 91(d) of the County Government Act, No.17 of 2012**, but also to the provisions of the **Constitution, 2010** constitutes and/or establishes a Prima-Facie Case.

It was further submitted that the Letters of Appointment, issued and dated on the **1st day of September 2014**, were executed and/or endorsed by an unauthorized person, not conferred and/or bestowed with such mandate. That the person who executed the Letters of Appointment and for clarity, the 5th Respondent herein, has previously been barred by a court of law. Consequently, it is apparent that the execution of the said Letters of Appointment was an act in contempt of the Orders of the Honourable issued on the **23rd day of May 2014** vide **KISUMU INDUSTRIAL COURT PETITION NO.88 OF 2014**.

The Petitioner submitted that the recruitment of the 273 employees having been without regard to section 91 of the Act and the Constitution, amounts to violation of principles of transparency and accountability which are non-negotiable under the new constitutional dispensation.

It is also submitted that once the salaries, remuneration and/or allowances are paid out to the 273 Employees, such payments would not be recoverable from the said Employees as the said Employees, whose employment is the subject of the instance petition, have no known and/or established means, from which any refunds and/or recoveries can be made. In this regard, it is the Petitioner's/Applicant's submissions that the 4th Respondent, who by law is the Paymaster, would suffer Irreparable loss.

It is also the Petitioner's submissions that protection of Public funds is the responsibility of every state organ and/or persons and hence the Petitioner/Applicant has a Constitutional duty to superintend compliance with the Constitution, 2010. That **Article 207 of the Constitution, 2010**, provides the manner in which Public funds may be expended.

In view of the foregoing, the Petitioner contends that a case for issuance of conservatory orders has also been established and/or proved. The Petitioner contends that issuance of conservatory Orders is meant and/or calculated to protect Public Interests as opposed to Private Interests. In this regard, the Petitioner referred to the following quote extracted from the Supreme Court Decision in the case of **GATIRAU PETER MUNYA -VS- DISCKSON MWENDA KITHINJI & 2 OTHERS, (2014) Eklr**, where the Supreme Court held as hereunder:-

"Conservatory Orders bear a more decided Public law connotation; For these are orders to facilitate ordered functioning within Public Agencies, as well as to uphold the adjudicatory

authority of the Court, in the Public Interests. Conservatory Orders, therefore are not, unlike Interlocutory Injunctions, link to such Private Party issues as the prospects of Irreparable harm occurring during the pendency of a case, or high probability of success in the supplicants case for orders of Stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the Public Interest, the Constitutional values and the proportionate magnitudes and priority levels attributable to the relevant causes. (Emphasis supplied)."

The Petitioner submitted that owing to the foregoing and given the magnitude of the issues raised herein, least of which is the amount to be expended on a monthly basis, on account of salary and the Constitutional values that must be vindicated, this is a fit and proper case to grant the conservatory orders sought.

The supporting authorities relied upon by the Claimant are the following-

- a) Section 8 of the County Government Act, No. 17 of 2012.
- b) Articles 207 & 220 (2) of the Constitution, 2010.
- c) **MRAO LIMITED -VS- FIRST AMERICAN BANK LIMITED & 2 OTHERS, (2003) KLR, Pages 125-139**
- d) **HADKINSON -VS- HADKISON (1952) ALL ER, Pages, 567 - 575.**
- e) **THE HON. ATTORNEY GENERAL & ANOTHER -VS- COALITION FOR REFORMS & DEMOCRACY (CORD) & 7 OTHERS, COURT OF APPEAL CIVIL APPLICATION NO.2 OF 2015 (UNREPORTED).**

It is submitted that it was the duty of the Petitioner to show and/or satisfy the court that he has a Prima Facie Case with overwhelming chances of Success. In this regard, the Petitioner contends that he has satisfied the said condition, that the Petitioner has established that the 3rd Respondent herein never either met nor sanctioned the purported recruitment or employment of the offensive employees.

1st, 2nd, 3rd and 5th Respondents case

The 1st, 2nd, 3rd and 5th Respondents filed a replying affidavit of Hon. SAMWEL KEROSI ONDIEKI sworn on 15th October 2014 in which it is stated that the 3rd Respondent in its normal operations sat and passed a resolution to employ persons in various positions within the County Assembly. That the vacancies were subsequently advertised in the Daily Nation, Standard and the Star newspapers on 11th August 2014. A copy of an advertisement in the Star dated 11th August 2014 is annexed to the affidavit as "SKO1". The deponent states that the respondents thereafter conducted interviews and recruited the necessary staff who were issued with letters of appointment after which they reported for work. Hon. Ondieki states that the recruitment was legally recognized and mandated by the members of the County Assembly including the petitioner.

It is submitted that **PETITION NO. 243 OF 2014** was filed in Kisumu Industrial Court challenging the entire employment exercise which matter was still pending at the time of swearing the deponent's affidavit and this petition is therefore an abuse of court process under section 6 of the Civil Procedure Act, 2010 and therefore *sub judice*. It is further deponed that the petitioner filed a motion of impeachment of the deponent at the County Assembly which was defeated following which the present petition was filed and thus the petition constitutes double jeopardy and is also *res judicata within the meaning of the Constitution* and section 7 of the Civil Procedure Act.

It is deponed that the petitioner has not disclosed the loss, prejudice or damages he would suffer in the event the orders sought are not granted.

No written submissions were filed on behalf of the 1st, 2nd, 3rd and 5th respondents.

4th Respondent's Case

The 4th Respondent filed a replying affidavit of **Johnstone O. Ndege**, the County Secretary sworn on 7th November 2014 in which he deposes that the 4th Respondent is a creature of Article 176 of the Constitution and is a total stranger to the allegations raised in the petition against the 1st, 2nd, 3rd and 5th Respondents and her name should be expunged from these proceedings. It is further submitted that the 4th respondent does not play any role in the recruitment of staff of the County Assembly nor determine their salaries and remuneration, that it is therefore non-suited and an unnecessary party to these proceedings.

In the written submissions filed on behalf of the 4th Respondent it reiterates the contents of the replying affidavit.

1st Interested party's Case

The First Interested Parties responded to the petition through a replying affidavit of GERVASE GIKOBI KAOSA sworn on 17th November 2014. He states that there was an advertisement for several jobs by the Kisii County Assembly Service Board on 30th March 2014 in the Standard Newspaper, that he applied and was shortlisted for interview in a list which was also published by the County Assembly Service Board in its notice Board. He states he was interviewed on 11th August 2014 and issued with appointment letter dated 1st September 2014.

The 1st Interested Party did not file written submissions.

2nd Interested Party's Case

The 2nd Interested Party filed an affidavit of **ROSEMARY OSANO** sworn on 14th July 2015 in which she deposes that the 3rd respondent carried out advertisement for 72 vacancies for various posts in Kisii County Assembly on 30th March 2014 in the newspapers. Applications were received, vetted and shortlisted by relevant panels under the supervision of the 1st, 2nd and 3rd respondents. Upon completion of the exercise 71 successful applicants were issued with appointment letters. It is deposed that apart from the advertisement of 30th March 2014 the respondent's had not carried any other newspaper advertisement for jobs as at the time of swearing the affidavit. It is further deposed that apart from the vacancies advertised on 30th March 2014 the 3rd Respondent did not sanction any recruitment or employment of over 400 employees who were employed on 1st September 2014. It was further deposed that there was no meeting of the 3rd respondent on 29th August 2014 at which the appointments were approved. It is deposed that the appointment letters were issued by the Deputy Clerk who was not an authorized officer in total disregard of a court order barring the deputy clerk from acting as Clerk to the County Assembly. That notwithstanding that the 3rd respondent did not meet the 1st and 5th Respondents, he proceeded to undertake an employment exercise which was irregular, illegal and void. It is deposed that some of the employees were awarded salaries that do not correspond with SRC salary scale.

It is deposed that the irregular and illegal employment shall result in the expenditure of Kshs. 30,000,000 (30 million) per month out of public coffers maintained by taxes, levies and other public funds and deprive the petitioners in violation of Article 43 of the Constitution.

In the written submissions filed on behalf of the 2nd set of Interested Party it is stated that the submissions are anchored on Articles 1(1) which provides that all sovereign power belongs to the people of Kenya and shall be exercised only in accordance with the Constitution; Article 10 which provides for national values and principles of governance which include good governance, integrity, transparency, accountability and sustainable development; Article 47(1) which provides that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair, that adheres to established principles of procedural fairness, including a right to be given reasons for an act that is likely to affect them in an adverse manner; Article 43 on the social and economic rights of citizens;

Article 73(2) which provides that the guiding principles of leadership and integrity including ensuring that decisions are not influenced by improper motives but instead are guided by selfless service based on public interest; Article 201(a); and 232. The petition is further anchored on section 162(2)(b) of Public Finance Management Act and section 13(4) of County Government Act which provide that the clerk of a county assembly is an authorized officer.

It was submitted that there need not be direct infringement of constitutional rights before a person seeks legal redress from the court. The 2nd Interested Party relied on the case of **David Ngige Tharau & 128 Others v Principal Secretary Ministry of Lands, Housing and Urban Development & 2 Others [2016]eKLR** in which the court held that there should not be undue regard to the principles in the **Anarita Karimi Njeru** case as doing so would deny parties an opportunity to petition court where their constitutional rights have or may be violated.

It is submitted that public resources must be used in a manner that respects principles laid down in Article 201 of the Constitution on finance. On this point the 2nd Interested Party relied on the case of **Speaker, Nakuru County Assembly & 46 Others v Commission on Revenue Allocation & 3 Others [2015]eKLR** where the court held that public resources must be used in a prudent manner for progressive purposes. It was submitted that the action of the respondents of employing a bloated workforce violates the principles of public finance espoused in chapter 12 of the Constitution and section 162 of the Public Finance Management Act and reflects a total disregard of effective, efficient, economical and transparent use of resources. The 2nd Interested Party further relied on the case of **Republic v Secretary County Public Service Board 7& Another Ex Parte Hulbai Gedi Abdile [2015] eKLR**. In the case the court had to determine a case where the respondents appointed persons in positions in the County Public Service Board which had never been advertised or interviews conducted. The court held that only advertised positions could be filled.

The 2nd Interested Party further relied on the case of **John Mining Temoi & Another V Governor of Bungoma County and 17 Others [2014]eKLR** wherein the court held that merit and fair competition demand that nominees must be interviewed and selected in the specific positions they have applied and been interviewed for. It was submitted that the principles of Article 232 on fair recruitment must be complied with.

Lastly it was submitted for the 2nd Interested Party that the issuance of appointment letters by the deputy clerk of the assembly on behalf of the clerk contravened the principle of *Delegatus non poteste delegare* that is that a delegate cannot delegate. It was submitted that the clerk to the County Assembly is appointed by the County Assembly Service Board under section 13(1) of County Governments Act which does not give the clerk to the County Assembly the power to delegate.

The 2nd Interested Party submitted that the recruitment of over 400 employees by the Respondents was in excess of the number advertised and without regard to the law, was unlawful and illegal. It prayed that the petition be allowed.

3rd Interested Party's Case

The 3rd Interested Party responded to the petition vide affidavit of **NANCY NYANCHOKA ONGERI** who states that the petition was filed following mass recruitment of personnel to the Kisii County Assembly in contravention of the law and more particularly Article 10(i) of the Constitution. She depones that sometime in March 2014 the 3rd respondent advertised for 71 vacancies in the Kisii County Assembly. The applicants were shortlisted, interviewed and were to be issued with letters of appointment by the 3rd respondent. Instead the 1st and 5th Respondents issued letters to 273 persons way above the vacancies advertised thereby breaching the basic foundations of the law.

She depones that as members of the County Assembly the 3rd Interested Party has oversight role to seek accountability and transparency from the respondents. That the salaries, wages and allowances of the irregularly recruited employees will be a drain on public coffers and deprive the Interested Party access to vital services which the County Government of Kisii ought to render.

The 3rd Interested Party did not file any written submissions.

Determination

I have considered the petition together with the supporting and supplementary affidavits, the replying affidavits filed by the respondents and those of the interested parties. I have further considered the written submissions on record and the authorities cited. I think the Petitioner has aptly captured the issues for determination and I will adopt the same as follows:

- a) Whether the 3rd Respondent ever met and sanctioned the employment of the 273 employees, including the 1st Interested Parties;
- b) Whether the vacancies and intended employment of 273 employees were duly advertised;
- c) Whether the appointment and/or employment of 273 employees was regular, lawful and in accordance with the constitutional threshold in terms of Article 10 and 232 of the Constitution 2010;
- d) Whether the orders sought at the foot of the petition ought to be granted.

I will consider issues (a), (b) and (c) together under (a). I will also consider separately the issue of the capacity of the 5th Respondent to issue letters of appointment and the number of persons employed.

Before I consider the issues for determination as set out above, there is a preliminary issue that I ought to consider upfront. This is whether the 4th Respondent is *non suited* as pleaded in its Replying Affidavit in response to the petition and in the written submissions filed on its behalf. It is the 4th Petitioner's argument that it is wrongly joined in these proceedings as the alleged acts of omission and commission were by the 1st, 2nd and 3rd Respondents who are independent from the 4th Respondent. It prayed that its name be expunged from the proceedings.

The 4th Respondent is the County Government of Kisii. The responsibility of a county government is provided for under Article 235 of the Constitution as follows-

235. (1) A county government is responsible, within a framework 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 appointments; and

(c) exercising disciplinary control over and removing persons holding or acting in those offices.

(2) Clause (1) shall not apply to any office or position subject to the Teachers Service Commission.

Section 6 of the County Governments Act further provides as follows-

Powers of county governments.

6. (1) *As an entity exercising constitutional authority, a county government shall be a body corporate with perpetual succession and shall have all the powers necessary for the discharge of its functions.*

(2) *Without prejudice to the generality of subsection (1), a county government may —*

(a) enter into a contract;

(b) acquire, purchase or lease any land; or

(c) delegate any of its functions to its officers, decentralised units or other entities within the county.

(3) *A county government may enter into partnerships with any public or private organization in accordance with the provisions of any law relating to public or private partnerships for any work, service or function for which it is responsible within its area of jurisdiction.*

(4) *All contracts lawfully entered into under this section shall be valid and binding on the county government, its successors and assigns.*

(5) *To ensure efficiency in the delivery of service or carrying out of a function for which the county government is responsible, the county government may —*

(a) establish a company, firm or other body for the delivery of a particular service or carrying on of a particular function; or

(b) contract any person, company, firm or other body for the delivery of a particular service or carrying on a particular function.

(6) In exercising its powers or performing any of its functions a county government shall ensure efficiency, effectiveness, inclusivity and participation of the people.

It is the finding of the court that under the provisions above the 4th Respondent has oversight and overall responsibility for all matters relating to the County government and is properly enjoined in these proceedings. The issues of recruitment and expenditure of funds affect the operations of the entire county government operations which the 4th Respondent is responsible for.

a) Whether the 3rd Respondent sanctioned employment of 273 employees

The 3rd Respondent is the body established under the County Government Act with the mandate of constituting offices within the county assembly and filling such offices. The 3rd Respondent is made up of five persons among them the 1st and 2nd Respondents herein who are the chairperson and secretary respectively. Being a body constituted by more than one person the decisions of the 3rd respondent are made at duly constituted meetings. Such decisions include the decision to constitute offices and recruitment of office holders. In the execution of its mandate the 3rd Respondent is bound by the principles set out in the constitution, among them Article 1, 2 and 10(1). The 3rd Respondent is also bound by the provisions of the County Governments Act.

Under Article 232(1) of the Constitution the 3rd Respondent is required to ensure that there is transparency, accountability and fair competition and that merit as a basis of appointments.

In the present case it is the contention of the Petitioner, the 2nd and 3rd interested parties that there was no transparency, accountability, fair competition and merit in the appointments carried out by the Respondents in August/September 2014. The Respondents and the 1st Interested Party however aver that the appointments were competitive and complied with the law.

In the replying affidavits of Hon. SAMWEL KEROSI ONDIEKI sworn on 15th October 2014 he avers that the 3rd Respondent held a meeting on 29th August 2014 and passed a resolution to employ persons in various positions within the County Assembly and that subsequently the vacancies were advertised in the Daily Nation, Standard and the Star newspapers on 11th August 2014. A copy of an advertisement in the Star dated 11th August 2014 is annexed to his affidavit as "SKO1". There was no copy of the advertisements in the Daily Nation and the Standard newspapers. On his part GERVASE GIKOBI KAOSA in his affidavit sworn on 17th November 2014 states that his appointment and those of the other persons employed at the same time with him in September 2014 was advertised on 30th March 2014 in the Standard Newspaper, that he applied and was shortlisted for interview in a list which was also published by the County Assembly Service Board in its notice Board. He states he was interviewed on 11th August 2014 and issued with appointment letter dated 1st September 2014.

The only advertisements on the record are those of 30th March 2014 in the Standard Newspaper and the advertisement in the Star dated 11th August 2014. So who between Mr. Ondieki and Mr. Kaosa are telling the truth?

As stated by the Petitioner in his Supplementary affidavit sworn on 19th November 2014, to quote him ***"..the contents of the replying affidavits are wrought and/or fraught with conscious and deliberate falsehoods, which are calculated to mislead this Honourable court and thereby defraud the cause of justice."*** He depones that no meeting took place on 29th August 2014 and that is why no minutes of the meeting have been produced to the court. He further states that the advertisement in the Star was for only 18 slots and the applications were to be received by 25th August 2014 which was the closing date for applications. He points out that it was not possible to shortlist, carry out interviews and issue letters of appointment in the 5 days between 25th August and 1st September, 2014 when Mr. Kaosa received his letter of appointment. And I agree with him as any logical person would.

From the foregoing it is clear that there was no resolution of the 3rd Respondent of 29th August 2014 creating positions to be filled, there was no advertisement of such positions and there were no interviews to fill the said positions. Any person appointed in the jobs that are impugned in this petition was therefore irregularly and unlawfully appointed in contravention of Article 10(1) and 232(1) of the Constitution and section 12(7)(b) of the County Government Act.

(b) Whether the 5th Respondent had capacity to issue letters of Appointment

The 5th Respondent is described in the petition as follows:-

“The 5th Respondent is a Male Adult of Sound Mind and Disposition, currently working for gain with the 3rd Respondent as (sic) the Deputy Clerk, Kisii County Assembly and has since purportedly constituted and/or appointed himself as an authorized Officer, Kisii County Assembly, with the mandate to execute various contracts documents and also commit the 3rd Respondent to expenses, albeit despite the existence of the lawful and authorized officer. His Address for service for purposes of this suit only, shall be care of Post Office Box Number 4552 - 40200, KISII.”

It is the contention of the petitioner that the 5th Respondent was not authorised to issue letters of appointment or act in the position of clerk following an order of the court in Industrial Court Petition No. 88 of 2014 wherein the court entered judgment declaring JAMES OMARIBA NYAOGA, the petitioner therein, as the duly appointed and constituted clerk, Kisii County Assembly. The Court issued a permanent injunction restraining DANIEL MBAKA OMWOYO the 5th Respondent herein from acting as interim clerk or accounting officer of Kisii County Assembly or discharging the duties of clerk to the County Assembly. It is the contention of the petitioner that the 5th Respondent who signed the appointment letters in respect of the impugned recruitments had no authority to do so.

The respondents did not contest the validity of the said judgment or show that the judgment was either stayed or set aside. For these reasons I find that the 5th Respondent had no authority to act as a representative of the 3rd respondent or issue letters of appointment. The letters issued are to that extent void and incapable of conferring any right.

(c) What number of vacancies were advertised

According to the Petitioner, a total of 72 positions were advertised in March 2014 by the 3rd Respondent but only 71 were filled. In the petitioner's supporting affidavit filed with the petition he attached a copy of the advertisement for the 72 positions and a summary of the interview results listing all applicants interviewed, their scores and those selected for appointment. The petitioner also attached to his affidavit 343 names of persons issued letters of appointment signed by the 5th Respondent. If the advertised positions are subtracted from the number recruited, it gives a total of 272 persons employed in excess of the number advertised. It is not clear from the submissions of parties or from pleadings if the persons who were employed regularly are part of those who were issued with letters of appointment by the 5th Respondent.

Reliefs

From the foregoing I find that the Petitioner, supported by the 2nd and 3rd Interested Parties have proved that the recruitment of 272 employees by the Respondents were in violation of the Constitution and infringed on the rights of the residents of Kisii County on whose behalf the petition was filed, by committing funds that would otherwise be used to provide services to the people of Kisii. The recruitments also deprived qualified residents of Kisii County a right to compete in the jobs that were unfairly given to the recruited staff. I further find that the Respondents unlawfully committed public funds of the County of Kisii in violation of the Constitution and the Section 162(2)(b) of Public Finance Management Act. In the case of **Speaker, Nakuru County Assembly & 46 Others v Commission on Revenue Allocation & 3 Others [2015]eKLR Lenaola J** held that public resources must be used in a prudent manner and for progressive purposes.

Article 22 of the Constitution provides that any person may institute an action where there is violation or threat of violation of a right or fundamental freedom under the Bill of Rights as follows:-

Enforcement of Bill of Rights.

22. (1) Every person has the right to institute court proceedings claiming that a right or 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—

(a) a person acting on behalf of another person who cannot act in their own name;

(b) a person acting as a member of, or in the interest of, a group or class of persons;

(c) a person acting in the public interest; or

(d) an association acting in the interest of one or more of its members.

The Constitution further provides for the powers of the court where such action has been brought as follows:-

Authority of courts to uphold and enforce the Bill of Rights.

23. (1) The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

(2) Parliament shall enact legislation to give original jurisdiction in appropriate cases to subordinate courts to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

(3) In any proceedings brought under Article 22, a court may grant appropriate relief, including—

(a) a declaration of rights;

(b) an injunction;

(c) a conservatory order;

(d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;

(e) an order for compensation; and

(f) an order of judicial review.

The Petitioner is thus clothed with locus standi to seek redress in cases such as the present one where there is gross violation of the Constitution. In the case of **David Ngige Tharau & 128 Others v Principal Secretary Ministry of Lands, Housing and Urban Development & 2 Others [2016]eKLR** the court stated as follows with respect to enforcement of the Bill of Rights:-

"In my view, where it is apparent to the Court that the Bill of Rights has been or is threatened with contravention, to avoid to enforce the Bill of Rights on the ground that the supplicant for the orders has not set out with reasonable degree of precision that of which he complains has been infringed, and the manner in which they are alleged to be infringed where the Court can glean from the pleadings the substance of what is complained of would amount to this court shirking from its constitutional duty of granting relief to deserving persons and to sacrifice the constitutional principles and the dictates of the rule of law at the altar of procedural issues. Where there is a conflict between procedural dictates and constitutional principles especially with respect to the provisions relating to the Bill of Rights it is my view and I so hold that the later ought to prevail over the former."

In this case of the Petitioner, and the 2nd and 3rd Interested parties have urged the court to find that the Respondents violated the Constitution and the County Government Act in the manner in which they carried out the recruitments of 1st September 2014 and that in doing so they violated the rights of the Petitioner, the 2nd and 3rd Interested parties.

Conclusion

Having found that the Petitioner, the 2nd and 3rd Interested Parties have established violations of both the Constitution and the County Government Act, I make the following orders-

a) Declaration be and is hereby issued to the effect that the Petitioner is entitled to Protection under the constitution.

b) Declaration be and is hereby issued that the enlistment, recruitment and/or employment of a total of 273 employees to the Kisii County Assembly by the Respondents, jointly and/or severally in excess of and/or beyond the number that was duly advertised for and without regard to the Due process of the Law, was unlawful, illegal, and illegitimate.

c) Declaration be and is hereby issued that the Respondents herein were obliged and/or enjoined to advertise all the vacancies and/or portfolios in the Kisii County Assembly and thereby carry out and/or conduct a Transparent and/or Accountable recruitment, in compliance and/or accordance with Article 10(1), (c) of the Constitution 2010.

d) An order of Judicial Review in the nature of Certiorari be and is hereby issued to remove unto the Honourable Court and quash the enlisting, recruitment and employment of the 273 Employees to the Kisii County Assembly, arising from and/or attendant to the non-existent Board Meeting of the 3rd Respondent (sic) held on the 29th day of August 2014 and who were employed without the

relevant Advertisement and without due regard to the provisions of the County Government Act, No. 17 of 2012 and Article 10 of the Constitution, 2010.

e) Permanent Injunction be and is hereby issued restraining the Respondents either by themselves, agents, servants and/or employees, from admitting the subject Employees to the Payroll of the Kisii County Assembly and/or making any payments to and/or in favour of the said employees, either on account of Remuneration, Allowances and/or Salaries, without the necessary budgetary approval of the Kisii County Assembly, whatsoever and/or howsoever.

f) Permanent injunction be and is hereby issued restraining the Respondents either by themselves, agents, servants and/or employees, from employing, recruiting and/or enlisting employees without complying with the due process of the law and in particular, the provisions of Article 10(1) of the Constitution, 2010.

g) Each party shall bear its costs.

Dated and signed and delivered this 15th day of JUNE, 2017

MAUREEN ONYANGO

JUDGE