



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

PETITION NO. 12 OF 2016

JOSEPH DANIEL GITAH MAINA.....PETITIONER

VERSUS

THE COUNTY ASSEMBLY

OF NYERI SERVICE BOARD.....1ST RESPONDENT

THE CLERK OF THE COUNTY

ASSEMBLY OF NYERI.....2ND RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday, 28th July, 2017)

RULING

The petitioner filed the petition on 11.07.2017 through Gori Ombongi & Company Advocates. The petition was in the matter of Articles 1, 10, 20(1), 23(1), 35, 73, 75, 174, 175, 179(2) (b), Article 201 and 258 of the Constitution of Kenya, 2010; in the matter of sections 65, 66, 71, 75, 87 and 88 of the County Governments Act No.17 of 2012; and in the matter of contravention of Articles 2(1) (2), 10, 20(1), 22(1), 22(1), 73, 174, and 179 (2)(b) of the Constitution of Kenya, 2010.

Together with filing of the petition, the petitioner filed a notice of motion under a certificate of urgency. The application invoked sections 3, and 3A of the Civil Procedure Act and Order 51 rule 1 of the Civil Procedure Rules, 2010. The petitioner prayed for orders as follows:

- a) The application be certified as urgent and the same be heard ex-parte in the first instance.
- b) Pending the hearing and determination of the petition, conservatory orders are issued in terms of the notice of motion filed herewith.
- c) An injunction directed at the respondents to confirm by way of evidence to the petitioner and to the court whether or not in advertising the various vacant positions as set out in the advert the provisions of the law were complied with.
- d) A declaration that the respondent's conduct infringed Articles 10, 35, and 232 of the Constitution.
- e) A declaration that by inviting applications for positions as set out in the advert the respondents breached the County Government Act and by extension Article 232 of the Constitution.

- f) The court to uphold Articles 10 and 232 of the Constitution by issuing orders of injunction:
 - i. Restraining the respondents from proceeding any further with the recruitment and subsequent short listing of candidates for the various positions, interviews, and employment.
 - ii. Compelling the immediate cancellation of recruitment and short listing of candidates for the various positions.
- g) The court to issue such orders and give such directions as it may deem mete, just, and appropriate in the circumstances of the case.
- h) The costs of the application and petition be awarded to the petitioner.

The application was based on the annexed affidavit by the petitioner and the following grounds:

- a) The 1st respondent has advertised vacant positions purportedly as per powers under Article 179(1) of the Constitution and section 63(1) of the County Government Act, 2007.
- b) On 08.09.2015 the respondent advertised vacancies similar to the ones advertised per advert that closed on 07.06.2017 (whose recruitment is now on-going and subject of the current proceedings).
- c) The respondents have failed to inform the applicant or the public the fate of similar vacancies advertised on 08.09.2015.
- d) The respondents have failed to make known the circumstances under which the challenged advertisement was made and particularly how decision to advertise was arrived at and when the vacancies occurred.
- e) By the letter dated 10.05.2017 the applicant demanded for information regarding the outcome of the recruitment and short listing of candidates pursuant to the advertisement of 08.12.2013. The claimant stated that with respect to that advertisement the public was not informed the short listed candidates and their qualifications, the criteria for short listing was not disclosed, the interviews for candidates if any was not publicised and it was not ascertainable that the candidates were qualified to hold the positions that were advertised. Under Article 35 of the Constitution, the claimant demanded to be given information and documents about the list of applicants, criteria used in short listing, and details on interviews and the members of the interview panel.
- f) In that previous recruitment the applicant had applied for the position of chief driver.
- g) The applicant's case is that following that earlier advertisement the respondents may have recruited persons in contravention of the law including Articles 10 and 73 of the Constitution.
- h) The current advertisement is mischievous as the respondents may reward cronies and woo voters in the general elections scheduled for 08.08.2017.

The respondents opposed the application by filing the replying affidavit and further replying affidavit of Jenard N. Mwiggeh, the 2nd respondent, filed on 13.07.2017 and 17.07.2017 respectively through Muchoki Kangata Njenga & Company Advocates. The respondent's grounds of opposition are as follows:

- a) The 1st respondent is established under section 12 of the County Government Act, 2012 and is mandated to perform the functions in subsection (7) thereof including constituting offices and appointment of office holders in the county assembly.
- b) Under section 12(4) of the Act the clerk to the county assembly is the secretary to the county assembly service board.

- c) The petitioner applied for the vacancies advertised 08.09.2015 but he was not successful. The current suit is the petitioner's manipulation to be employed by the respondents without due process.
- d) The petitioner admits he did not apply for the vacancies as advertised on 07.06.2017. He cannot therefore fault the current recruitment process.
- e) The petitioner cannot dictate to the respondents and on-going recruitment is as per recommendations by the Ethics and Anti-Corruption Commission (EACC).
- f) The petitioner responded only to the advertisement of 08.09.2015 and which has not been processed and will be processed once appropriate budgetary provisions are made by the County Assembly.
- g) There is no law requiring the respondents to hire sequentially in order of the advertisements for vacancies.
- h) The respondents did not receive the petitioner's letter demanding for information.
- i) The on-going process should not be stopped because financial resources have already been applied towards its undertaking.
- j) The petition and the application was therefore an abuse of court process.
- k) That the respondents have established, in a contradictory finding from the earlier position, that the petitioner never applied for any of the vacancies advertised on 08.09.2015 especially that the relevant application was not exhibited by the petitioner.
- l) The current advertisement and recruitment was in line with a decision of the 1st respondent creating the positions and authorising the recruitment.
- m) The recruitment flowing from the advertisement of 08.09.2015 was frustrated by the budgetary constraints.
- n) The current recruitment process should be allowed to go on and if there are any irregularities then the final decisions can be set aside.

The court has considered the material on record and makes findings as follows:

1) The respondents have made contradictory material facts that the applicant had applied and then, had not applied for the position of Chief Driver as advertised on 08.09.2015. Further contradiction by the respondent is that the petitioner was unsuccessful after he applied for vacancy advertised on 08.09.2015 and then, in a contradictory manner, that the processing of the recruitment and selection for appointments flowing from the advertisement of 08.09.2015 has not been completed due to lack of the relevant budgetary provision. The court finds that such contradictory statements on the part of the respondents are incredible especially when made by government. The court returns that the respondent has not exhibited any of their formal decisions about the contradictory material on record. While exhibiting the list of applicants, the respondents have not filed and explained the safeguards in place that make the list as filed credible. The court has considered that in any event any person is entitled to enforce constitutional provisions and the petitioner would in any event be at liberty to bring the present petition in furtherance of good governance as per the provisions of the Constitution the petitioner has invoked. At this stage the court returns that the respondents' contradictory and unexplained factual positions in that regard work towards supporting the court's intervention, in the interim, prior to establishing the correct position and interrogating the issues at full hearing with a view of establishing whether the respondents are proceeding in accordance with the constitutional and statutory provisions in undertaking the important human resource functions. The petitioner's concerns that his name has been omitted on the list as filed through manipulation

will have to be investigated at full hearing.

2) The respondents have not exhibited the 1st respondent's formal decisions on the fate of the recruitment process commencing with the advertisement of 08.09.2015. There is no resolution by the 1st respondent that the recruitment could not be concluded as it was frustrated by budgetary constraints; or that the petitioner applied and was not successful; or that the recruitment and selection process flowing from the later advertisement of 07.06.2017 should be prioritised over the earlier advertisement of 08.09.2015. Further, there is no decision that the advertisement of 08.09.2015 or the process of recruitment and selection flowing from that advertisement was cancelled or completed one way or the other. Thus, the court returns that it is not explained how the current recruitment process would supersede the one commenced by the advertisement of 08.09.2015.

3) The respondents while exhibiting the resolution by the 1st respondent to undertake the current recruitment, it is not confirmed that there is budgetary provision for the stated financial implications and it is not confirmed that the relevant resources would be available. In any event, even if the resources were available, it has not been explained why the current recruitment should be prioritised over the initial one as was advertised on 08.09.2015.

As submitted for the petitioner, the respondents have not established a reasonable ground to prioritise the present recruitment process over the one flowing from the advertisement of 08.09.2015. It has not been shown that the initial recruitment process came to an end lawfully through making of the relevant decisions by the 1st respondent. The court returns that the applicant has established that the respondents are likely proceeding unlawfully in view of the earlier advertisement whose fate remains unknown for want of formal decisions by the 1st respondent about the fate of that initial advertisement and recruitment process. The applicant has therefore established that the recruitment process by the respondents is likely proceeding in contravention of the principles of accountability and transparency as envisaged in Articles 10 and 232 of the Constitution. It is clear that the respondents do not have internal mechanisms, procedures and processes for such grievance management as is currently put forward by the petitioner in the present petition and application. The court's intervention is therefore necessary without which the petition would be rendered nugatory and monetary compensation is clearly not available in the present circumstances.

While making that finding, in such cases seeking to interfere with employer's powers, the court follows the opinion in the ruling in **Geoffrey Mworira-Versus- Water Resources Management Authority and 2 others [2015]eKLR** thus, "The principles are clear.

The court will very sparingly interfere in the employer's entitlement to perform any of the human resource functions such as recruitment, appointment, promotion, transfer, disciplinary control, redundancy, or any other human resource function. To interfere, the applicant must show that the employer is proceeding in a manner that is in contravention of the provision of the Constitution or legislation; or in breach of the agreement between the parties; or in a manner that is manifestly unfair in the circumstances of the case; or the internal dispute procedure must have been exhausted or the employer is proceeding in a manner that makes it impossible to deal with the breach through the employer's internal process."

In the present case the court returns that the applicant has established that the respondents are likely proceeding with human resource functions of abolition, creation or establishment of public offices; advertisement; and recruitment, selection and appointment without adherence to the applicable law under the County Governments Act No.17 of 2012 as well as the applicable constitutional principles and values as envisaged in Articles 10 and 232 of the Constitution of Kenya, 2010. While making that finding, the court follows its opinion in the judgment in **Nancy Njoroge –Versus- County Executive of Murang'a and 2 Others [2016]eKLR** thus, "The court returns that once the vacancy was in the public domain and within the provisions of the cited provisions of law, the government or the governor thereby ceased to have exclusive role over the vacancy and it was not open for the respondents to continue

with the second advertisement in the manner it was done. Accordingly, the court finds that the values applicable in public employment and as per the cited provisions of law were contravened when the respondents embarked on the second recruitment process without having concluded the initially commenced process.”

In conclusion, the application dated 11.07.2017 and filed on the same date is hereby determined and allowed with orders as follows:

- 1) That pending the hearing and determination of the petition herein, there be stay of the recruitment, selection and appointment process with respect to all positions or vacancies advertised by the respondents per exhibit JDGM 1 whose invitation for applications was closed on 07.06.2017.
- 2) That the respondents to pay costs of the application.
- 3) The parties to take directions on the next steps in the suit.

Signed, dated and delivered in court at Meru this Friday, 28th July, 2017.

BYRAM ONGAYA

JUDGE