



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT KERICHO

PETITION NO. 8 OF 2015

(BEFORE D. K. N. MARETE)

JOHNSTONE CHEBUSIT.....1ST PETITIONER

JOSPHAT TOWETT.....2ND PETITIONER

VERSUS

THE GOVERNOR BOMET COUNTY1ST RESPONDENT

COUNTY SECRETARY BOMET COUNTY GOVERNMENT.....2ND RESPONDENT

**COUNTY EXECUTIVE MEMBER FOR FINANCE BOMET COUNTY..... 3RD
RESPONDENT**

BOMET COUNTY PUBLIC SERVICE BOARD.....1ST INTERESTED PARTY

BOMET COUNTY ASSEMBLY.....2ND INTERESTED PARTY

JUDGEMENT

This is a Petition dated 24th November, 2015.

The petition is buttressed by a Replying Affidavit by Amb. Joshua Terer on behalf of the Interested Parties and sworn on 15th December, 2015.

The Respondents in their Grounds of Opposition dated 8th December, 2015 and Replying Affidavit sworn on 13th December instant prayed that the entire petition be struck out with costs.

The Petitioners case is that the 1st Respondent has continually and with abandoned interfered with the functions of the County Public Service Board in contravention of the County Governments Act, 2012.

The petitioner’s case is as follows;

20. The 1st Respondent has unconstitutionally arrogated himself the role of overseeing the affairs of the Bomet Public Service Board despite the fact that the County Governments Act has designated the County Assembly as the direct oversight agency responsible for the performance of the board.

21. That the 1st Respondent's purported supervisory role over Board has involved administrative superintendence that includes matters as minor as approving payments for meetings attended by the Board Members.

22. The 1st and 2nd Respondent have unilaterally and without reference to the Board presided over the establishment and of offices in the Bomet Public service and subsequently appointed persons to hold in those offices with some offices created due to political exigencies.

23. That the 1st and 2nd Respondents in disregard of the Public Service Board's advice have unilaterally confirmed appointments of personnel promoted and demoted county staff without involving the Board and have even purported to dismiss county employees from office without following due process.

24. That despite the mandatory requirement of section 60 of the County Government Act that staff establishment be provided and budgetary allocation be ascertained as a precondition to the establishment of an office the 1st and 2nd Respondents have ignored/disregarded the need to ensure that the criteria, as set therein has been satisfied before starting the process of conducting recruitment of county employees.

25. That the 1st Respondent has attempted to threaten, coerce and intimidate the County Public Service to delegate all the functions of the Board including recruitment, promotions and discipline of county staff to officers of the County Executive which would have an effect of rendering the Board redundant.

26. That the 1st and 2nd Respondent have contemptuously disregarded decisions of the Bomet County Public service Board reversing appointment done unprocedurally under auspices of the County Executive notwithstanding that the decisions are in line with the Boards mandate under section 75 of the County Governments Act.

27. That the 1st and 2nd Respondents have facilitated the denial of access by the County Public Service Board to the county. As a result, the body that is rightly required to know how many employees are in the county's payroll cannot conclusively determine the number of employees in the Bomet County Public Service and their cumulative earnings to enable them plan on the management of the county wage bill.

28. That the 1st Respondent has on very many occasions singularly recruited county personnel which in some instances has included through roadside declarations and subsequently instructed the county payroll office to insert the name of the beneficiaries so such recruitment.

29. That the Board has severally raised issue with the 2nd Respondent in manner in which human resource issues particularly the irregular recruitment re-designation, promotions and demotions and removal persons is being done without the County Public Service Board approval.

30. That in the termination of employees, the 2nd Respondent has acted without following the prescripts of the Employment Act that requires such employees to be given notification and hearing before termination on grounds of misconduct.

31. That 1st Respondent has unlawfully hindered the Bomet County Public Service Board's access to funds allocated to it by the County Assembly and that the withholding of funding is being used by the 1st Respondent as a means of exercising improper control and undue influence over the board.

32. That 1st Respondent has ensured that the public service Board lacks financial autonomy by under-budgeting and under-resourcing it and to-date its finances and administration have been directly controlled by the executive and its agents.

33. That the 1st Respondent has arrogated himself the role of the accounting officer of the board and has consequently declined to facilitate attendance to seminars and professional association meetings to members of the county public service board despite the County Public Service Board having a budgetary allocation for its activities in the Bomet Appropriation Act.

34. The 1st Respondent has attempted to coerce and intimidate the board into delegating its functions of hiring certain staff to some chief officers.

35. That as matters currently stand the Bomet County Public Service Board is devoid of financial and administrative sufficiency rendering its existence meaningless, an inanity and sheer rhetoric.

36. That the interference of the Bomet County Public Service Board, a body that is statutorily structured pursuant to article 235 of the Constitution to operate as an independent legal entity, by the 1st respondent constitutes a violation of the constitution.

They pray as follows;

i. The Court be pleased to a declaration that the 1st and 2nd Respondent do not have jurisdiction and/or powers to supervise the financial or administrative aspects of the County Public Service Board.

ii. The court pleased to a declaration that the 1st and 2nd Respondent do not have jurisdiction and/or powers to perform the roles of the Bomet County Public Service Board without express authorization from the Board.

iii. The Court be pleased to a declaration that all promotions, demotions, re- designation and dismissals done by the 1st and 2nd Respondent and/or their agents to the county public service without authorization of the Board is unconstitutional, illegal, null and void and is a violation of the law and an order quashing the said purported promotions, demotions, re-designation and dismissals.

iv. The Court be pleased to a declaration the 1st and 2nd Respondents, by falsely assuming and usurping powers statutorily ascribed to the Bomet, public service board, have abused their constitutional and statutory mandate and powers and that this amounts to an act of impunity.

v. The Court be pleased to issue order that the 1st and 2nd Respondents be surcharged for any court awards arising out of any claim of unlawful dismissals of employees carried out by themselves or persons under their directions.

vi. The Court be pleased to issue an order that the County Government releases a list of all employees in the county payroll information as the Board may reasonably require for the purpose of effecting their statutory mandate.

vii. That the Court be pleased to issue and order the 1st and 2nd Respondents be surcharged for any irregular appointments of personnel made by themselves or persons under their instruction.

viii. The court be pleased to issue a declaration that the 1st and 2nd Respondents have grossly violated of the constitution.

ix. *The court issue orders mandamus compelling that the 3rd Respondents designate the secretary of the Board County Public Service Board as an accounting officer of the Board under the provisions of article 226 of the constitution as read with section 148 Public Finance Management Act, 2012.*

x. *The court be pleased to issue an order of permanent injunction restraining the 1st Respondent and/or his agents and officers from interfering in any manner with the administration of the Bomet County Public Service Board and further restrained from in any way obstructing, impeding and/or preventing it from carrying out its functions as provided for under the law.*

xi. *That the court be pleased to issue a declaration that the County Executive and the county Assembly has a statutory obligation to provide adequate resources, both human and material, to the County Public Service Board.*

xii. *That the Court be pleased to issue a declaration that the independence of the Board entitles it to be given its own budget to administer.*

xiii. *That each party to bear their own costs.*

xiv. *Any other appropriate relief that the Court deems fit.*

The matter came to court variously and on 20th May, 2015, the parties present agreed on a determination by way of written submissions. However, only the 1st Interested Party rose to the occasion and filed her written submissions.

The petitioners' in their petition and written submissions in support thereof present a case of a violation of the Constitution of Kenya, 2010 in that the respondents have continued to unduly interfere with the roles, functions and operations of the 1st Interested Party. This, they submit, is a violation of the constitution and also a transgression of the clear provisions of the County Governments Act, 2012.

It is the petitioners' submissions that this petition is a public interest litigation under Article 258 of the Constitution of Kenya, 2010. They belabor in the establishment of a case for this court involving in a determination of issues of this nature as was established in the authority of **United State International University (USIU) vs. Attorney-General, (2012) eKLR** and **Daniel N. Mugendi**

vs. Kenyatta University & 3 others (2013)eKLR where such authority and jurisdiction was reaffirmed.

The petitioners' in a summation of their submissions submit that the respondents have no authority, legal or constitutional basis to involve, interfere or perform roles of the 1st Interested Party and this continued involvement amounts to impunity and blatant contravention of Article 73 of the Constitution.

The petitioners' further submits the independence of the 1st Interested Party, the County Public Service Board - Bomet County and also her entitlement to have its own budget to access and administer without the direction of the respondents.

The respondents in their Grounds of Opposition and Replying Affidavit aforesaid opposed the petition and aver that this is an internal matter between the respondents and Interested Parties and therefore the petitioners have no interest and would not be prejudiced if the orders and prayers sought are denied.

The 1st Interested Party submits a case of support for the petition and also seeks to rely on their Replying Affidavit sworn by Amb. Joshua Terer.

The 1st Interested Party further seeks to rely on the authority of Sections 59 (1) (a-c) and 60 of the County Governments Act, 2012 as an illustration of the functions and roles of the County Public Service Board in the overall establishment of public offices and any offices it deems appropriate and in the service of public interest within a county government as follows;

59 (1) the functions of the County Public Service Board shall be, on behalf of the county government, to-

a. Establish and abolish offices in the county public service;

b. Appoint persons to hold or act in offices of the county public service including in the Boards of cities and urban areas within the county and to confirm appointments;

c. Exercise disciplinary control over, and remove, persons holding or acting in those offices as provided for under the Part;.....

She therefore submits a case of a meritorious petition which is supported by evidence and prays that this be allowed with costs.

The issues for determination therefore are;

1. Whether the Petitioners and Interested Parties have established a sound case of contravention of the Constitution and County Governments Act, 2012 as to warrant a determination in their favour.

2. Who bears the costs of this cause?

The 1st issue for determination is whether the Petitioners and Interested Parties have established a sound case of contravention of the Constitution and County Governments Act, 2012 as to warrant a determination in their favour. We move on to try this.

This is a very unfortunate litigation. It is my observation that it should not have been borne in the first instance. This is because the issues in contention are obvious. They do not require any extras to fathom. They are naked.

That we were treated to the melodrama of such litigation is a clear pointer of abdication of public duty by public officers. Article 10 of the Constitution on national values and principles of governance appropriates public officers with our values and principles of governance. Impunity is not part of the bargain. It would appear that we may be forced to allow our constitution to evolve at its own pace, whatever others may feel about the speed. What with public officers and citizenry that is all too interested in stumbling the implementation of our beloved Constitution?

The respondent's case is wholly one of denial. It is not viable or supported in any

substantial form I therefore find a case for the Petitioners and Interested Parties and hold as such. They have established their case, albeit with unnecessary tempo as would have been required of such a simple matter. The 1st issue for determination is so answered.

The 2nd issue for determination is who bears the costs of this cause? I note that the petition prays that every party bears their own costs of the same. However, both the petitioner and the 1st interested party plead for an award of costs in their respective written submissions. How then do we manage this?

Let me conclude this matter by allowing the petition with an award of orders as follows;

i. A declaration be and is hereby issued that the 1st and 2nd Respondents do not have jurisdiction and/or powers to supervise the financial or administrative aspects of the County Public Service Board.

ii. A declaration be and is hereby issued that the 1st and 2nd Respondents do not have jurisdiction and/or powers to perform the roles of the Bomet County Public Service Board without express authorization from the Board.

iii. A declaration be and is hereby issued that all promotions, demotions, re-designation and dismissals done by the 1st and 2nd Respondents and/or their agents to the county public service without authorization of the Board is unconstitutional, illegal, null and void and is a violation of the law .

iv. An order be and is hereby issued quashing the said purported promotions, demotions, re-designation and dismissals by the respondents.

v. A declaration be and is hereby issued that the 1st and 2nd Respondents, by falsely assuming and usurping powers statutorily ascribed to the Bomet, public service board, have abused their constitutional and statutory mandate and powers and that this amounts to an act of impunity.

vi. That the County Government of Bomet be and is hereby ordered to release a list of all employees in the county payroll and such information as the

Board may reasonably require for the purpose of effecting their statutory mandate.

vii. A declaration be and is hereby issued that the 1st and 2nd Respondents have in such conduct grossly violated the constitution.

viii. That an order of mandamus do issue compelling that the 3rd Respondents designate the secretary of the Board County Public Service Board as an accounting officer of the Board under the provisions of article 226 of the constitution as read with section 148 Public Finance Management Act, 2012.

ix. That an order of permanent injunction be and is hereby issued restraining the 1st Respondent and/or his agents and officers from interfering in any manner with the administration of the Bomet County Public Service Board or in any way obstructing, impeding and/or preventing it from carrying out its functions as provided for under the law.

x. A declaration be and is hereby issued that the County Executive and the County Assembly has a statutory obligation to provide adequate resources, both human and material, to the County Public Service Board.

xi. That the Court be pleased to issue a declaration that the independence of the Board entitles it to be given its own budget to administer.

xii. The costs of the petition shall be borne by the respondents.

xiii. The costs of the petition be and are hereby assessed at Kshs.100,000.00.

xiv. The costs of the petition shall not be payable to the Interested Parties.

Delivered, dated and signed this 17th day of October 2017.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr. J.K Koech instructed by J.K Koech & Company Advocates for the Petitioners.

2. Mr. Koech holding brief for Mr. Birech instructed by Birech Ngetich & Company Associates for the 1st Interested Party.

3. Mr. Matwere instructed by Matwere & Company Advocates for the Respondents.