



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

PETITION NO. 29 OF 2017

(Before Hon. Lady Justice Maureen Onyango)

NEWTON KAPIYO.....PETITIONER

-Versus-

HOMA BAY COUNTY ASSEMBLY SERVICE BOARD.....1ST RESPONDENT

HOMA BAY COUNTY ASSEMBLY.....2ND RESPONDENT

RULING

The application before me for determination is dated 24th July 2017. It was filed under certificate of urgency on 26th July 2017. The applicant seeks the following orders-

- 1. THAT**, this Application be certified urgent and be heard ex-parte at the first instance.
- 2. THAT**, pending the hearing and determination of this application inter partes an order of temporary injunction directed at the Respondents individually, or jointly or by any other person acting under their direction jointly or individual from carrying out any interviews, recruitment, employment or engaging persons into employment of the 2nd Respondent.
- 3. THAT** pending the hearing and determination of this claim an order of temporary injunction directed at the Respondents individually, or jointly or by any other person acting under their direction jointly or individually from carrying out any interviews, recruitment, employment or engaging persons into employment of the 2nd Respondent unless and until the same is provided for in the budget and the 1st Respondent is able to legally have a meeting capable of conducting its affairs as per the law.
- 4. THAT** Costs of the application herein be provided for.

The application is supported by the grounds on the face thereof and the affidavit of the applicant who describes himself as a citizen of Kenya and resident of Mbita Constituency within Homa Bay County.

The gist of the application and the Claim filed therewith is that by an advertisement placed in the Standard Newspaper of 5th July 2017 the 1st Respondent sought to fill the positions of Principal Fiscal Analyst, Public Relations and Communications Officer, Legal Counsel and Principal Internal Auditor. It is the Petitioner's contention that the filling of those positions were not authorised by the County Assembly as categorically expressed in the Budget Report at Paragraph 3 where it is stated:

3. In order to moderate the personnel wages ration, all the vacant positions earlier proposed in the Budget have been removed and the total of Kshs. 14,628,562 has been included in the savings to pay the extra eight (8) months for the MCA emoluments.

The Petitioner further avers that the advertisement was placed when the County Assembly Service Board was not properly constituted as it did not have the requisite quorum to conduct legal business in accordance with section 12(1), (3) and (5) of the County Governments Act due to the fact that the Majority Leader who is a mandatory member of the 1st Respondent **Michael Owino Ooro** had on 22nd May 2017 lost his seat and joined Federal Party of Kenya and defected from ODM Party hence could not participate in the affairs of the 1st Respondent wherein he was a member by virtue of being the majority leader.

The Petitioner further avers that the term of office of the 2nd Respondent had also expired and there was no majority or minority leader of the 2nd Respondent to form the Board of the 1st Respondent.

The Petitioner avers that as a result of the foregoing the intended interviews would be null and void and would lead to a loss of public funds. He avers that the actions of the Respondents are contrary to the Constitution and the law and if allowed would lead to impunity, disregard of the Rule of Law and erode the checks and balances that were aimed at guiding public service to ensure prudent use of public funds. He avers that the actions of the Respondents if allowed would offend Chapter 1 of the Constitution which safeguards the principles of public finance.

The Petitioner further avers that the 2nd Respondent did not at that time have an approved scheme of service for its staff and had not carried out performance appraisal or a needs assessment report to determine the need for the positions advertised. He further avers that the 2nd Respondent ignored the input of its Audit Committee which according to the National Treasury Guidelines mandates the Committee to determine the recruitment, promotion and termination of the Head of Internal Audit.

The application was heard ex parte on 3rd August 2017 during the court vacation by the duty Judge in Nairobi and the following orders granted-

1. **THAT** the Application dated 24/7/2017 is hereby certified urgent and merited.
2. **THAT** pending inter partes hearing on 19/9/2017 of this claim an order of temporary injunction is hereby directed at the respondents individually, or jointly or by any other person acting under their direction jointly or individually from carrying out any interviews, recruitment, employment or engaging persons into employment of the 2nd respondent when the matter will be mentioned at Kisumu Employment & Labour Relations Court for directions on hearing and disposal.
3. **THAT** the respondent be served.

The Respondents filed a Replying Affidavit of **BOB KEPHAS OTIENO**, the Clerk to the County Assembly, the 2nd Respondent in which he deposes that the County Assembly is responsible for constituting offices and appointing officers in the County Assembly service and to supervise the office holders under section 12(7)(c) of the County Governments Act and by employing office holders the Board was discharging its statutory mandate which it ought not be stopped from doing. He deposes that by advertising the impugned positions the 2nd Respondent was acting above board and the employment process was transparent.

Mr. Otieno deposes that approval for the recruitment was given on 30th June 2017 and attached (what he refers to as) minutes of a meeting of the Board held on 30th June 2017. I will come back to this issue.

Mr. Otieno further deposes that on 17th August 2017 (presumably) the 1st Respondent requested for reallocation of funds which was approved on 23rd August 2017 and the funds were therefore available for

the recruitment. He further deposes that the application herein has been overtaken by events as the interviews were undertaken and candidates shortlisted.

Mr. Otieno deposes that the Respondents complied with all procedures and processes including the requirements of Salaries and Remuneration Commission that the issues raised in the application and claim are administrative and that the application is defective for attempting to stop the Board from discharging its statutory mandate. He prays that the application be dismissed.

The application was argued on 25th September 2017. Mr. Obach instructed by H. Obach and Partners Advocates appeared for the Applicant/Petitioner while Mr. Ojuro instructed by Otieno, Yogo, Ojuro & Co. Advocates appeared for the Respondents. The parties largely adopted and expounded on the contents of the affidavits on record.

Determination

I have considered the application together with the claim, the grounds and affidavit in support thereof, the replying affidavit, the documents on record and the submissions counsel.

The issues for determination are whether the Petitioner/Applicant has satisfied the court that he is entitled to the orders sought in the application.

The Petitioner/Applicant has raised several issues in the application and claim. The first is that the Respondent had no quorum to undertake the impugned recruitments. The second is that the recruitments had not been authorised by the county assembly and there was no budget for the same and thirdly that the 2nd Respondent's term had lapsed by the time the recruitments were advertised.

On the first issue on quorum the Respondents have not commented. The Clerk in his affidavit merely referred to the statutory mandate of the Respondents to recruit without stating whether or not it had a quorum to carry out the recruitment function or any other functions as mandated by the Act at the material time. It was not denied that the leader of majority **Michael Owino Ooro** had on 22nd May 2017 lost his seat, defected from ODM Party and joined Federal Party of Kenya and hence could not participate in the affairs of the 1st Respondent. It has further not been denied that the leader of the majority is a mandatory member of the 1st Respondent without whom the 1st Respondent cannot transact any business. I will therefore presume that these averments are true.

On the second issue on budget and authorisation of the recruitments by the 2nd Respondent, the Respondents position is that there was reallocation of funds. The Respondents referred to an extract of minutes of the 1st Respondent held on 30th June 2017. The extract is not minutes and there is no evidence of such meeting having taken place. More fundamentally, a meeting of the 1st Respondent cannot overturn a decision of the 2nd Respondent as reflected in the Budget report annexed to the Memorandum of Claim. It is only the County Assembly which can overturn its decision which was very categorical that ***"all the vacant positions earlier proposed in the Budget have been removed"***. Again there is no evidence that there was quorum of such meeting in the absence of the Leader of the Majority whom the Petitioner has averred lost his seat on 22nd May 2017.

The Respondents further stated that there was reallocation of funds. The letter seeking reallocation of funds is dated 17th August and the letter of approval of reallocation of the funds is dated 23rd August 2017. As pointed out by Mr. Obach the letters were written after the advertisement on 5th July 2017 and is proof that the advertisements were carried out without a budget approval. In any event the reallocation would be inconsistent with the decision of the county Assembly which removed all proposed appointments when approving the budget for the period in which the advertisements fall. Again as already pointed out the positions for which the reallocation of funds was sought had been removed from the budget by the 2nd Respondent.

The third issue that the term of the 1st Respondent had expired is also not addresses by the Respondents. In the absence of any contrary position I must presume that the averments of the Petitioner are true.

Mr. Otieno deposed in the Replying Affidavit that the application has been overtaken by events because the interviews were done and persons shortlisted for the jobs. He does not state that the positions were filled. He has not produced letters to the persons who were selected for the positions to prove that those positions were filled before the date on which the orders of the court were issued.

However, even if the positions have been filled they are illegally and irregularly filled as there is no approval by the 2nd Respondent as has been pointed out above. The fact that the positions have been filled cannot legitimise an illegality. The application is therefore not overtaken by events as alleged.

Conclusion

In conclusion I find that the Petitioner/Applicant has proved that the advertisement of the positions of Principal Fiscal Analyst, Public Relations and Communications Officer, Legal Counsel and Principal Internal Auditor by the 1st Respondent in the Standard Newspaper of 5th July 2017 was without authority, was irregular and unlawful. I therefore issue the following orders-

1. That the Respondents be and are hereby individually or jointly or by any other person acting under their direction jointly or individually restrained from recruitment, employment or engaging persons into the employment of the 2nd Respondent unless and until the same is provided for in the Budget and the 1st Respondent is able to legally have a meeting capable of conducting its affairs as per law. For the avoidance of doubt the 2nd Respondent is restrained from adopting, approving or sanctioning any recruitment carried out pursuant to or as t, arising from or subsequent upon the advertisement carried out in the Standard Newspaper of 5th July 2017.
2. Any person who disobeys this order shall be personally liable for the expenditure of public funds incurred as a consequence thereof.
3. Costs shall be in the cause.

DATED DELIVERED AND SIGNED THIS 12TH DAY OF OCTOBER 2017

MAUREEN ONYANGO

JUDGE