



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

PETITION NO. 33 OF 2015

(Before Hon. Justice Hellen S. Wasilwa on 1st March, 2016)

PETER MUTURI CHEGEPETITIONER

VERSUS

NAIROBI COUNTY ASSEMBLY SERVICE BOARD RESPONDENT

RULING

1. The Petitioner herein Peter Muturi Chege filed his Application on 10.4.2012. This application was brought under a Certificate of Urgency and brought through a Notice of Motion filed under Articles 1, 2, 3, 19, 20, 21, 22, 23, 27, 28, 35, 39, 40, 43, 45, 47, 73, 159, 179, 183, 184, 191, 258, 259 and 165 of the Constitution. The Notice of Motion also comes under Sections 35, 36, 87, 93, 95 and 96 of the County Government Act 2012 and all other enabling provisions of the law.
2. The application seeks orders as follows:
 1. *That this Application be certified as urgent and service be dispensed of and it be heard ex-parte in the 1st instance due to urgency.*
 2. *That pending the interpartes hearing and determination of this Application the Respondent be restrained and barred from in any manner carrying out any further interviews and/or recruiting any person to the position of the Deputy County Clerk which was advertised in the Daily Nairobi Newspaper of 23rd March 2015.*
 3. *That pending the interpartes hearing and determination of this Application the Respondent be directed and ordered to release and produce to the Applicant and general public the score cards, report, minutes and records of all the candidates for the initial recruitment of the Deputy County Clerk as per interview and recruitment exercise carried out on the weekend Star Newspaper of July 19th /20th 2014.*
 4. *That pending the interpartes hearing and determination of the Petition, the Respondent be restrained and barred from in any manner carrying out any further interviews and/or recruiting any person to the position of the Deputy County Clerk which was advertised in the Daily Nairobi Newspaper of 23rd March 2015.*
 5. *That pending the interpartes hearing and determination of the Petition, the Respondent be directed and ordered to release and produce to the Applicant and general public the score cards, report, minutes and records of all the candidates for the initial recruitment of the Deputy County Clerk as per interview and recruitment exercise carried out on the weekend Star Newspaper of July 19th /20th 2014.*
 6. *That the costs of this application be paid by the Respondent.*

3. The Application is grounded upon the following grounds and on the annexed affidavit of Peter Muturi Chege the Applicant herein:
 - a. ***The Respondent is a City County established under the Constitution of Kenya.***
 - b. ***The Applicant came across an advertisement on the weekend Star Newspaper of July 19th /20th 2014 which advertised for vacancies in the County Assembly which included the position of Deputy Clerk and 22 other vacancies.***
 - c. ***The Respondent did receive Applications for all vacancies and interviews were carried out subsequent upon which appointments were made for the 22 positions other than the position of the Deputy County Clerk.***
 - d. ***The Applicant is alarmed that the Respondent purported to freshly advertise once more for vacancy in the position of Deputy Clerk and 7 other positions vide advertisement in the Daily Nation Newspaper of 23rd March 2015.***
 - e. ***The twin advertisements without any cancellation of the previous advertisement or notification to the successful and unsuccessful candidates is in breach of the principle of fairness, competitiveness, transparency and access to public information in public and country recruitment.***
 - f. ***The failure by the Respondent to publish and release the score cards, report, minutes and records of the initial recruitment of the Deputy County Clerk prior to re-advertisement for the same position without any cancellation of the initial recruitment exercise is unfair, unconstitutional and in breach of articles 27, 28, 41 and 73 of the Constitution and contrary to the Statutory Provisions of the County Government Act Sections 35, 36, 93, 95, 96 and 87 and requirement for information to all the Applicants of the outcome of the interview process and requirement of the best scoring qualified candidate.***
 - g. ***The fresh advertisement for the provision of the Deputy County Clerk is manifest of mala fides interference of the recruitment exercise and gives rise to reasonable apprehension that the propose thereof is to ensure the successful candidate is not recruited and in lieu thereof a person whom neither applied nor is qualified but is the preferred candidate despite lacking merit and qualifications is the one who is recruited in an opaque, unlawful, unconstitutional and arbitrary dummy exercise to further ulterior purposes and sinister unlawful motives.***
 - h. ***The Respondent's omissions are carried out with a view to defeating and frustrating and in flagrant abuse and infringement of the constitutional safeguards to ensure that recruitment to public offices in transparent, accountable, objective in strict accordance to the Constitution and the provisions of the County Act.***
 - i. ***The petitioner will suffer irreparably if interim restraining orders are not issued whilst the Respondent will suffer no prejudice if recruitment exercise is halted to enable the Court query its constitutionality and fairness.***
4. In his affidavit, the Applicant avers that the Respondent is established under Section 12 of County Government Act and has duties inter alia of constituting offices in the County Assembly Service and appointing and supervising office holders and provision of services and facilities to ensure efficient and effective functioning of the Nairobi City County.
5. He avers that on the weekend Star Newspaper of July 19th /20th 2014, vacancies in the County Assembly were advertised and this included the position of Deputy Clerk and 22 others (Appendix PMC1).
6. That thereafter the Respondents did receive applications for all vacancies and interviews were carried out subsequent upon which appointments were made for the 22 positions other than the position of the Deputy County Clerk.
7. The Applicant avers that, thereafter there were fresh advertisements for a vacancy of Deputy Clerk and 7 other positions vide the Daily Newspaper of 23rd March 2015 without any cancellation of the previous advertisements or notification to the successful and unsuccessful candidates in breach of the principle of fairness, competitiveness, transparency and access to public information in public and county recruitment.

8. The Applicant further avers that failure by the Respondent to publish and release the score cards, report, minutes and records of the initial recruitment of the Deputy County Clerk prior to re-advertisement for the same position without cancellation of the initial recruitment exercise is unfair, unconstitutional and in breach of Articles 27, 28, 41 and 73 of the constitutional and contrary to the statutory provisions of the County Government Act Sections 35, 36, 93, 95, 96 and 87 and requirement for information to all the Applicants of the outcome of the interview process and requirement of the best scoring qualified candidate.
9. The Applicant has also averred that the fresh advisement for the position of the Deputy County Clerk is manifest of mala fides interference of the recruitment exercise and given rise to reasonable apprehension that the purpose thereof is to ensure the successful candidate is not recruited and in lieu thereof a person whom neither applied nor is qualified but is the preferred candidate despite lacking merit and qualifications is an opaque, unlawful, unconstitutional and arbitrary dummy exercise to further ulterior purposes and sinister unlawful motives.
10. The Applicant avers that the Respondent's omissions are carried out with a view to defeating and frustrating and in flagrant abuse and infringement of the constitutional safeguards to ensure that recruitment of public officer is transparent, accountable, objective in strict adherence to the Constitution and the provisions of the County Government Act.
11. The Applicant avers that he will suffer irreparable damage if interim restraining orders are not issued whilst the Respondent will suffer no prejudice if the recruitment exercise is halted to enable the Court query its constitutionality and fairness.
12. The Respondents opposed this application and they filed their replying affidavit sworn by one Alex Ole Magelo, the Speaker of the Nairobi County Assembly and Chairman of the Nairobi County Assembly service Board.
13. They depone that the Respondent has a mandate to provide for organization staffing and functioning of the County Public Service in ways that ensure efficient, quality and productive services for the people of the County.
14. That this mandate includes ensuring that the County Assembly has competent, qualified and skillful employees and rating and establishing the public service for the County Assembly in accordance with the Constitution and the County Government Act, which clearly set out the key factors to be taken into consideration in carrying out the appointment process.
15. It is their averment that the process of appointing employees of the Respondent has never fallen short from being as elaborate, transparent, fair and all inclusive process.
16. The deponent depones that contrary to the Applicant's assertion, the re-advertisement of the position of Deputy Clerk to Assembly and other position was not done in bad faith or to further any ulterior purposes or for sinister unlawful motives and with no evidence to the contrary. The Petitioner's averment remains bare allegations.
17. The Respondents avers that the Board complied with the letter and spirit of the Act and the Constitution of Kenya in the discharge of its constitutional mandate in the advertising of various positions and vacancies in the County Assembly including the position of Deputy Clerk to the Assembly on 19th July 2014 and 23rd March 2015.
18. They aver that while couched as a Constitutional Petition and Application for vindication of alleged violation of rights, both the Petition and Application calls for an inquiry into the merits of the decisions of the Respondent's advertised and re-advert of its vacant positions, an examination of the facts and the qualifications of the persons whom the Respondent recruited or wished to recruit.

19.They deny acting outside the law in the subsequent advertisement and state that grant of any of the orders sought by the Petitioner would infringe upon the independence of the Nairobi County Assembly and the doctrine of separation of powers under Article 1(3) of the constitution.

20.Having considered the submissions and averments of both parties the issue for consideration is whether the Applicant has established a prima facie case with a likelihood of success to warrant issuance of prayers sought.

21.The issue raised by the Applicant Petitioner is that the entire process of re-advertising for the position of Deputy Town Clerk was an infringement of his right as the Applicant since he had applied for this position and there was no communication whatsoever to the successful or unsuccessful candidates. He avers that Section 35, 36, 87, 93, 95 & 96 of the county Government Act 2012 was infringed upon as well as Articles 27, 28, 40, 73 and 75 of the constitution.

22.Article 27 of Constitution states as follows:

1. ***Every person is equal before the law and has the right to equal protection and equal benefit of the law.***
2. ***Equality includes the full and equal enjoyment of all rights and fundamental freedoms.***
3. ***Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.***
4. ***The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.***
5. ***A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).***
6. ***To give full effect to the realisation of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.***
7. ***Any measure taken under clause (6) shall adequately provide for any benefits to be on the basis of genuine need.***
8. ***In addition to the measures contemplated in clause (6), the State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender.***

23.Article 73 states as follows:

1. ***Authority assigned to a State officer:***
 - a. ***is a public trust to be exercised in a manner that:***
 - i. ***is consistent with the purposes and objects of this Constitution;***
 - ii. ***demonstrates respect for the people;***
 - iii. ***brings honour to the nation and dignity to the office; and***
 - iv. ***promotes public confidence in the integrity of the office; and***

b. *vests in the State officer the responsibility to serve the people, rather than the power to rule them.*

2. *The guiding principles of leadership and integrity include:*

a. *selection on the basis of personal integrity, competence and suitability, or election in free and fair elections;*

b. *objectivity and impartiality in decision making, and in ensuring that decisions are not influenced by nepotism, favouritism, other improper motives or corrupt practices;*

c. *selfless service based solely on the public interest, demonstrated by:*

i. *honesty in the execution of public duties; and*

ii. *the declaration of any personal interest that may conflict with public duties;*

d. *accountability to the public for decisions and actions; and*

e. *discipline and commitment in service to the people.*

24. Whereas there is some correlation to Articles 27 and 73 to the issue before Court, I do not find a direct correlation of Article 40 and 75 with this issue as Article 40 deals with Protection of rights to property and Article 75 with conduct of state officers.

25. That notwithstanding, it is true that Section 87 of the County Government Act provides as follows:

“Citizen participation in county governments shall be based upon the following principles:

a. *timely access to information, data, documents, and other information relevant or related to policy formulation and implementation;*

b. *reasonable access to the process of formulating and implementing policies, laws, and regulations, including the approval of development proposals, projects and budgets, the granting of permits and the establishment of specific performance standards;*

c. *protection and promotion of the interest and rights of minorities, marginalized groups and communities and their access to relevant information;*

d. *legal standing to interested or affected persons, organizations, and where pertinent, communities, to appeal from or, review decisions, or redress grievances, with particular emphasis on persons and traditionally marginalized communities, including women, the youth, and disadvantaged communities;*

e. *reasonable balance in the roles and obligations of county governments and non-state actors in decision-making processes to promote shared responsibility and partnership, and to provide complementary authority and oversight;*

f. *promotion of public-private partnerships, such as joint committees, technical teams, and citizen commissions, to encourage direct dialogue and concerted action on sustainable development; and*

g. *recognition and promotion of the reciprocal roles of non-state actors’ participation and governmental facilitation and oversight.*

26. Section 93 provides as follows:

”Public communication and access to information shall be based on the following principles:

integration of communication in all development activities;

- b. observation of access to information by county media in accordance with Article 35 of the Constitution; and***
- c. observation of media ethics, standards and professionalism.”***

27. Section 95 provides:

- 1. A County government shall establish mechanisms to***

facilitate public communication and access to

information in the form of media with the widest public

outreach in the county, which may include:

- a. television stations;***
 - b. information communication technology centres;***
 - c. websites;***
 - d. community radio stations;***
 - e. public meetings; and***
 - f. traditional media.***
- 2. The county government shall encourage and facilitate other means of mass communication including traditional media.***

28. Section 96 provides as follows:

- 1. Every Kenyan citizen shall on request have access to information held by any county government or any unit or department thereof or any other State organ in accordance with Article 35 of the Constitution.***
- 2. Every county government and its agencies shall designate an office for purposes of ensuring access to information as required by subsection (1).***
- 3. Subject to national legislation governing access to information, a county government shall enact legislation to ensure access to information.***
- 4. A county legislation enacted pursuant to subsection (3), may impose reasonable fees or charges for accessing information held by the county government, its departments or agencies.***

29. The reading of the above provisions and my understanding of Article 35 of the Constitution is that every citizen has a right to information.

30. The Applicant has shown that the information he required was not provided to him or the larger public and thus in essence shown prima facie has a valid complaint which this court needs to resolve.

31. I therefore find that a prima facie case is established by Applicant to warrant issuance of prayers sought and I grant orders in terms of prayers:

- 4. That pending the interpartes hearing and determination of the Petition, the Respondent be***

restrained and barred from in any manner carrying out any further interviews and/or recruiting any person to the position of the Deputy County Clerk which was advertised in the Daily Nairobi Newspaper of 23rd March 2015.

5. *That pending the interpartes hearing and determination of the Petition, the Respondent be directed and ordered to release and produce to the Applicant and general public the score cards, report, minutes and records of all the candidates for the initial recruitment of the Deputy County Clerk as per interview and recruitment exercise carried out on the weekend Star Newspaper of July 19th/20th 2014.*

The costs of the Application will be in the course.

Dated and delivered in open Court this 1st day of March, 2016.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Miss Nduta for Respondent – Present

No appearance for Petitioner – Absent