



REPUBLIC OF KENYA

EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO. 73 OF 2016

(BEFORE D. K. N. MARETE)

IN THE MATTER OF THE COUNTY GOVERNMENT ACT NO. 17 OF 2012

AND

IN THE MATTER OF THE PUBLIC FINANCE MANAGEMENT ACT NO. 18 OF 2012

AND

IN THE MATTER OF COMMISSION OF REVENUE ALLOCATION ACT

AND

**IN THE MATTER OF PUBLIC FINANCE MANAGEMENT (COUNTY GOVERNMENTS
REVENUE ALLOCATION)**

BETWEEN

**KENNETH KIPROTICH KOECH.....1ST
PETITIONER**

**SYLVESTER KIPKEMOI.....2ND
PETITIONER**

VERSUS

**THE GOVERNOR BOMET COUNTY.....1ST
RESPONDENT**

**THE COUNTY SECRETARY OF BOMET.....2ND
RESPONDENT**

**THE CHIEF OFFICER BOMET COUNTY AGRIBUSINESS DEPARTMENT.....3RD
RESPONDENT**

**THE EXECUTIVE COMMITTEE FOR FINANCE.....4TH
RESPONDENT**

**THE BOMET COUNTY PUBLIC SERVICE BOARD.....5th
RESPONDENT**

JUDGMENT

This is a petition dated 23rd March, 2016 on the part of the petitioners.

The respondents in a Respondents Replying Affidavit sworn on 10th May, 2016 pray that the orders prayed should be declined in the public interest, performance of duty and enhancing good administration all of which overweigh the personal interest of the petitioners.

The basis of this petition is that the 1st, 2nd, 3rd and 4th respondents have purported to recruit, appoint and promote county employees without reference to the County Public Service Board contrary to Sections 59, 60, 63, 74 and 86 of the County Governments Act, No. 17 of 2012. The 3rd respondent purports to want to do this without any express delegation from the County Public Service Board.

This is in the Agribusiness Department.

It is the petitioners further case that the 5th respondent is in the process of recruiting over three hundred staff whose budgetary allocation has not been approved by the County Assembly and this shall go on to inflate county expenditure on the wage bill. This tendency and practice has resulted in the bloating of the wage bill from a high of 970,000,000.00 in 2014 to 1.8 billion in 2016, this amounting to 40% of the county expenditure.

The petitioners further case is that the 1st and 4th respondents have violated S. 107 (1) of the Public Finance Management Act as read with the regulation thereto and particularly regulation 25 (b) on the advisories issued by the commission on revenue ceilings on wages and benefits for public officers in the county by enabling payments and budgeting for the excess and unnecessary expenditure of personal emoluments. Section 25 of the Public Finance Management Regulations sets county expenditure on wages at 35% of County Public Revenue.

The petitioner's further case is the County Government of Bomet, County Treasury Medium Term Expenditure framework and annual budget for the year ending 30th June, 2016 indicates that the County has surpassed its ceiling with the current staff turnover. Further, this action is illegal as it is the province of the County Public Service Board, the 5th respondent herein. The action also amounts to usurpation of the power of a constitutional body and is an abuse of office. It also violates Article 201 (d) of the Constitution, the Public Finance Management Act and the Public Finance Management Regulations, 2015. They pray that an order of this court do issue declaring the recruitment unconstitutional.

The Petitioners prays as follows;

- a) A declaratory order that the intended employment of the 429 additional staff in Public Health and Medical Services and Agricultural Engineering is in violation of the provisions of the Constitution, Public Finance Management Act, and the regulations made thereunder and the commission on Revenue Allocation ceiling.*
- b) A declaratory order that that the all recruitment and or employment made by the respondents, their agents or assigns is unconstitutional, null and void.*
- c) That the costs of this claim be provided for.*
- d) Any other relief the Court may deem fit and just to grant.*

The 5th respondent in opposition to the petition avers that the County Public Service's action of advertising, shortlisting and interviewing for 386 vacancies in public health, environment and medical services did not offend the rule of law.

This is because it is the body that is mandated to establish and abolish offices in the county public service; appoint persons to hold or act in offices of the county public service and confirm appointments on behalf of the county Government as provided under section 59 of the County Government Act No. 17 of 2012.

It is the respondent's further case that the petition and application have been overtaken by events in that;

a) Candidates for the advertised 386 vacancies in public health, environment and medical services have been shortlisted and interviewed for absorption into formal employment before the filing of the main petition and application.

b) Bomet County Public Service Board stopped the recruitment of the 43 advertised vacancies in Agribusiness. Annexed hereto is copy of letter marked KM 1.

The respondent's further case is that all requisite procedures and due process of the law were followed in the 386 adverts and the Bomet County Executive has not surpassed the budget. No documentary evidence of this is tendered.

The issues for determination therefore are;

- 1) Whether the legality and constitutionality of the intended recruit of staff for Bomet County by the respondents is had?
- 2) Whether the petitioners have established a case against such legality and constitutionality?
- 3) Whether the petitioners are entitled to the relief sought?
- 4) Who bears the costs of the petition?

The 1st issue for determination is the legality and constitutionality of the intended recruit of staff for Bomet County by the respondents. The petitioner in support of the petition has filed a supporting affidavit by Kenneth Kiprotich Ngetich sworn on 23rd March, 2016. In this affidavit the petitioner reiterates the petitioner's evidence as set out in the petition. It is their averment that the intended recruitment of 386 officers without reference to the Bomet County Public Service Board contravenes the County Government Act as expressed in this petition. Again, there is no budgetary provision to accommodate such a staff turnover and the net effect of this recruitment would push the County expenditure on staff emoluments' to about 40% of the county revenue in contravention of S. 25 (1) (b) of the Public Finance Management (County Governments) Regulations, 2015.

Further, this process by the 1st, 2nd, 3rd and 4th respondent is an abrogation of the authority and responsibility the County Public Service Board – the 5th respondent. Again, the advertised positions are currently occupied by staff seconded by the national government and any additional recruitment would be duplicitous and unnecessary.

The petitioners in evidence annex the following documents;

- 1) A copy of the advertisement for vacancies in the Public Service Board in the County Government of Bomet marked KKN1(a).
- 2) A copy for the advertised vacancies marked KKN1(b).
- 3) A letter for the service board to the County secretary on Acting

Appointments marked KKN4. 4) A notice on Agricultural Engineering Staff advertisement dated 14th March, 2016 marked KKN3. 5) A copy of the county assembly committee on labour and public service committee for September, 2015.

The petitioners in their written submissions reiterate their case and submit that this inaction on the part of the respondents is a contravention of S. 39 of the County Government Act. It is their further submission that though the 5th respondent is mandated with authority to establish and abolish offices in the public service, this must be done in accordance with Public Finance Management Act and the constitution as regards public expenditure. This is as follows;

“Articles 201 (d) and 232 (1) (b) calls for efficient, effective and economic use of resources and in a responsible way, whilst section 107 (1) of the Public Finance Management Act, Cap 412C as read with the regulations made there under, especially section 25 (1) (b) of the Public Finance Management (County governments) Regulations, 2015 (L.N.35/2015) requires that county expenditure on recurrent expenditure, that is wages and benefits of public officers should not exceed 35 per cent of the county government’s revenue.”

Again, the petitioners submit that the petition is not overtaken by events in that no evidence has been produced by the respondent to show that the 386 persons shortlisted for vacancy in public health departments have been interviewed and formally employed by the respondent and therefore the petition is live and sustainable for determination.

The respondents put in a formidable defence and pray that the petition be dismissed in public interest. The respondents open by submitting that this court lacks jurisdiction to hear and determine this petition as the same does not relate or arise out of employer/employee relationship. It relates to financial positions and/or budgetary allocations and guidelines in relation to the constitution in the Public Finance Management Act.

It is their further submission that this court has exclusive jurisdiction in regard to labour relations per S. 4 and 12 of the Industrial Act and Articles 161 (1) and (2) of the Constitution which provide for systems of court and this Court. Lack of jurisdiction therefore ousts a justifiable labour dispute before the parties and therefore futility of this petition.

A look at the respective cases of the parties brings out a case in favour of the petitioner. The petitioners from the beginning pleads and submits that this is a public interest litigation. It is a matter intended to delimit the recruitment of 429 additional members of staff in the County Government of Bomet without public participation. It is the petitioners case that such recruitments would be in the first place unconstitutional and also offend the Public Finance Management Act, Chapter 412 and the Public Finance Management (County Governments) Regulations, Legal Notice No. 25 of 2015 which provides that emoluments of benefits of public officers in the county should not exceed 35% of the county governments revenue.

The petitioner from the onset avers and submits a case of jurisdiction by this court to hear and determine the issues in dispute by virtue of the constitutional provisions under Article 162 (2) (b) of the Constitution of Kenya, 2010, the Employment & Labour Relations Court Act in addition to Section 59 of the County Governments Act which establishes the functions of the County Public Service Board that relate directly to the mandate of this court. This *in toto* quells the submissions of the respondent on the jurisdiction of this court. It is therefore in this regard that I find that the respondents have no legal or constitutional basis for recruitment of staff in the county without involvement of the public and compliance with the constitution, statute and regulations guiding the user and application of public finance in the county.

The 2nd issue for determination is whether the petitioners have established a case against legality and constitutionality of the intended recruitment by the respondent. This is amply established and demonstrated in the petitioners case and submissions. And this answers the 2nd issue for determination.

I am therefore inclined to allow the petition and order relief as follows;

- i. A declaration be and is hereby issued that the intended employment of 429 additional staff employees in the Public Health, Medical Services and Agricultural Engineering, sections/departments is a violation of the provisions of the Constitution, Public Finance

Management Act and the regulations made thereunder and would occasion a situation of exceeding the ceiling on salaries and emoluments for public officers/servants as set by the Commission on Revenue Allocation.

ii. A declaration be and is hereby made that all recruitment made or intended by the respondents, their agents or assigns in Bomet County, or at all, is unconstitutional, null and void.

iii. That the costs of this petition shall be borne by the respondents.

Delivered, dated and signed this 19th day of July 2016.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr. Morintat instructed by Leina Morintat & Company Advocates for the petitioners.
2. Mr. Matwere, advocate, County Government of Bomet for the respondents.