



REPUBLIC OF KENYA
EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA
AT KERICHO
PETITION NO. 1 OF 2015

(Before D. K. N. Marete)

KENYA COUNCIL OF EMPLOYMENT AND MIGRATION

AGENCIES.....PETITIONER

VERSUS

THE NYAMIRA COUNTY GOVERNMENT.....1ST RESPONDENT

THE NYAMIRA COUNTY PUBLIC SERVICE BOARD.....2ND RESPONDENT

H.E EXCELLENCY JOHN OBIERO NYAGARAMA.....3RD RESPONDENT

ROBERT MOCHECHE.....4TH RESPONDENT

PETER NYAKUNDI.....5TH RESPONDENT

ERICK AORI ONCHANA.....6TH RESPONDENT

JOASH NYAMOKO.....7TH RESPONDENT

THE CLERK OF THE COUNTY ASSEMBLY.....8TH RESPONDENT

(NYAMIRA COUNTY ASSEMBLY

NAOMI IKONGE NYAGARAMA.....9TH RESPONDENT

THE HON. ATTORNEY GENERAL.....10TH RESPONDENT

PUBLIC SERVICE COMMISSION OF KENYA.....INTERESTED PARTY

JUDGEMENT

This is a petition dated 7th April, 2015. It is a public interest litigation and brought to court in public interest. The petitioner puts it thus;

“ The petitioner has moved the court in accordance to Article 3 (1), 260 and Legal No.117 of 28th June 2013,2,2,3,22,23,27,35,47,48,50,159 162,165,258,259,260 on behalf of public interest of persons with disabilities, disadvantages, insufficient and sufficient persons who are bankrupt and insolvent minorities unrepresented uninformed illiterate and poor Kenyans whose alleged contravention of fundamental rights and freedoms procedures and regulations are under the offences in NON OBSERVANCE OF THE RECRUITMENT APPLICABLE LAWS OF KENYA.”

The 1st and 3rd respondents in their written submissions dated 20th May, 2016 oppose the petition and submit that the petitioner is without a cause of action and the prayers sought should not be granted whatsoever. The 2nd, 4th and 5th respondents also in their written submissions dated 8th April, 2016 also ruthlessly oppose the petition for want of form and particulars. The other respondents, however, do not answer the petition, or at all.

The petitioners case is that the 1st – 10th respondents were notified of their offending/contravening/threatening the Constitution through corruption, nepotism, tribalism, political tenement and interference of the Public Employment of the (Public advertisements dated 7th July 2014 and 5th May 2014 which were appointed without interviews and merit positions that have constitutional mandate under article 10 and 232 of the Constitution of Kenya, 2010 and other enabling statutes, and were reluctant to correct or obey the law. Again, reports were made to Ethics and Anti Corruption Commission (E.A.C.C) and other oversight authorities but these have failed to move in and exercise their constitutional mandate therefore triggering this petition under Article 3 (1) Constitution of Kenya, 2010. (sic)

The petitioner's other case is that the 1st – 7th respondents illegally recommended the individuals herein to the positions advertised on 7th July, 2014 and 5th May, 2014 thereby offending the constitution and recruitment laws of Kenya as follows;

- a) Without tools of constitutional considerations as rules and regulations, subject to instruments and statutory act no.23 of 2013.*
- b) Were awarded impartially and not merit, performance, were only rewards to ethnic, nepotism, tribalism, and political patronage.*
- c) Without tools of career progression.*
- d) Without constitutional service code of regulations.*
- e) Conflict of interest.*
- f) Without audit of the certificates.*
- g) Without competition, or interviews.*
- h) Wrong replacement, poor leadership, disconnect with the lower ranks, integrity, track record, and psychological fitness, compounded by bureaucracies and corruption.*
- i) Without consideration of the opposite genders, regional balances, as the constitutional and statute requirements.*
- j) The national public service commission approvals subject to article 233,234,235,236, never authorized the number of the positions of the advertised positions of 7th July, 2014 and 5th May 2014, and never authorized the same positions to awarded to only three tribes as given in article 1,2,4,5,6 of the Constitution of Kenya.*

The petitioner's further case is that the 3rd, 4th and 6th respondents have been an impediment to the County Public Service Board reforms, occasioning unnecessary constitutional infringement that was never intended by the word and spirit of the Constitution of Kenya, 2010. The secretariat is nepotist and made up of cousins, nephews, in-laws et al which offends accountability, good governance and nurtures impunity. This is also extended to the Senior County Secretary and offends Article 3 (1) of the Constitution..

The petitioner further avers and submits that the 5th respondent has not been recruited competitively per Article 15 of the Constitution and that his secondment is beyond the constitutional period provided by law. This to me is unclear and unelaborated. She continues to plead that the 6th respondent is on record that the 3rd and 4th respondents have conspired to have advised him to offend the constitution in appointments that offend Article 10 and 232 in procuring procurement of legal positions, fraud and corruption. (sic)

She prays as follows;

THE PETITIONER THEREFORE HUMBLY PRAYS THAT THE COURT TO DO FINDINGS:

- a) *Whether article 233,234,235,236, and enabling acts, county government and county public service board were applicable when the number of 7th July 2014 and 5th May, 2014 positions were awarded to cronies. The same be declared unconstitutional nullity, void and abinitio.*
- b) *The service board offended the laws on opposite gender as no opposite gender, the public service commission act 2011, members considerations be declared unconstitutional null and void.*
- c) *Whether the absence of the two constitutional positions affected the business of the meeting triggering its nullity.*
- d) *Whether there as conflict of interest, inconsistency from the officers who attended the meeting.*
- e) *Whether the attendance of a public officer who has been arraigned in criminal court will constitutionally offend the outcome of the exercise.*
- f) *Whether the dishonesty exhibited by the nepotism in the 1st, 2nd, 8th respondents, has constitutional setback on the outcome of the said award of positions in eschewed manner to certain clans. The same be declared unconstitutional and conservatory orders be do issue pursuant to article 23 of the Constitution of Kenya.*
- g) *Whether an advocate of the high court must live to the oath of the high court.*

She prays as follows;

- a) *A declaration be and is hereby issued that at the dint of article 3,22,23,35,47,48,50,159,160,258,260 and legal notice no.117 of 28th June gives room for the petitioner to file and move the court on the bill of rights.*
- b) *A declaration that all manners originating from the county public service board and article 233,234,235,236, accommodated the opposite gender to conform with article 10 and 27, 232 of the Constitution of Kenya 2010.*
- c) *A declaration that of 7th July 2014 and 5th May 2014, were not done within the constitution and the law pursuant to article 3,22,23,258,259,260 conservatory orders to be issued.*
- d) *A declaration that it is mandatory for opposite gender to be any position as constitutional duty in the bill of rights in public offices and in accordance with article 232.*
- e) *Declarations that nepotism, tribalism, clannish, political patronage informed the positions of the*

7th July 2014 and 5th May 2014, in Nyamira county public service board, and be repeated under the rule and regulations in the act no.23 of 2013. Instruments and statutory act, public service commission superintendence and the court, compliances to be reported to the court.

f) The honourable court do issue a mandatory order quashing the appointments and deliberations, circular and decisions of the 1st, 2nd and 3rd respondents for lack of public participation, declarations and information on the positions to be awarded to three clans only. And be quashed.

g) The honourable court do issues mandatory ordering the 1st, 2nd, 3rd, 4th,5th,6th,7th,8th,9th,10th respondents and interested party, inform Kenyans the outcome of the conservatory orders under article 23 of the Constitution in / of 7th July, 2014 and 5th May 2014, for service delivery to Kenyans accommodating what is given in Article 10 and 232, Constitution of Kenya 2010.

h) The honourable court do issue any orders or declarations that the court deems fit do issue.

The 1st and 3rd respondents' case is that their functions are both constitutional and statutory and are delimited and known to all. It is their further averment that they have at all material times executed these functions and mandate within these constitutional parameters.

It is their further case that the petitioner has only reproduced a matrix of constitutional provisions that express general values, principles and norms that apply to all and sundry. These form the case of the 1st and 3rd respondent's tools of operation and that the petitioners' motive is political brinkmanship intended to subject them to ridicule.

Again, the petitioner has failed to plead the legal context and factual relevance of the constitutional provisions to the alleged issues at hand. No legal nexus or relevance exists between these two facets of the petitioner's presentation of the case. She further pleads as follows;

9. The Petitioner by enumerating these constitutional provisions and having failed to connect the same with a certain set of fact, and further having failed to establish a legal and constitutional controversy with the 1st and 3rd respondents clearly shows the complete absence of a justiciable legal claim on the part of the petitioner, especially as against the 1st and 3rd respondents.

11. The constitutional principles enumerated in the said paragraphs of the petition are generic inform and provide the ideal constitutional plateau upon which an aggrieved litigant can lay the foundation for a proper case, which is not the case before the court.

12. The Petitioner acts grossly mala fides when he drops certain constitutional provisions completely out of context and is acting in abuse of court process.

17. The Petition as pleaded is theoretical, a hypothetical postualte and speculative.

The issues for determination therefore are;

1. Whether the petitioner has laid down a substantive petition for determination by this court?
2. Whether the petitioner is entitled to the relief sought?
3. Who bears the costs of this petition?

The 1st issue for determination is whether the petitioner has laid down a substantive petition for determination by this court. The 2nd, 4th, and 5th respondent's refute this and submit that the petitioner has failed to state precisely the illegal acts of the 2nd, 4th and 5th respondents as follows;

2..... it would be fair to acknowledge beforehand that comprehending the Petition as drafted

is quite cumbersome. The Respondents herein have aired this difficulty before this Honourable Court. It is evidently difficult to figure out exactly the violation of the constitution the respondents are alleged to have committed. It is indisputable that this Honourable Court may be facing the same difficulty.

Again,

“..... the petition has failed to state precisely and to prove any illegal acts that the 2nd, 4th and 5th respondents might have engaged in. Contrary, the petitioner has resorted to an uncoordinated reference to constitutional provisions without clearly pointing out how they have been infringed on. For instance, in an attempt to demonstrate violation of the constitution, under the title particulars of the violation of the constitution and statute, the petitioner only quotes the specific subtitles and articles of the constitution without any facts or substantiation. The mere mention of the articles is not enough. The petitioner is under duty to provide details of the alleged breaches.”

Again, the respondents submit that this petition flouts the principle in the authority of **Anarita Karimi Njeru vs. Attorney General** in that the petitioner does not clearly and out rightly set out the particulars of violation as follows;

“... we would again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to this case), that he should set out with reasonable degree of precision that of which he complains, the provisions said to be infringed and the manner in which they are alleged to be infringed...”

This is further illustrated in the authorities of **Ramadhan Juma Abdalla and Others vs R Pet No. 468 of 2012** as follows;

“... before I determine that issue, I insist that it is imperative and most urgent at this preliminary stage to set the threshold that must be met for any party alleging breach of their fundamental rights and freedoms and it is this; that the allegations must be stated in all clarity and all the illustrations on infringement, threat and/or violation demonstrated with some measure of particularity.”

In the case of **Nurani vs. Nurani (1981) KLR 88 at page 99** the court in further amplification of this principle observed as follows;

“I believe this threshold was further qualified on court procedures when the court held that: “Whether the proceedings are of a civil or criminal nature, the court will not protect an imaginary deprivation of a fundamental right or allow it be capriciously pushed to absurd lengths...” I agree and it is also my view that whereas scientific exactitude is not what a court expects of a claimant, surely the court must not be treated to the mere expression of a complaint of alleged breach of fundamental rights without extrapolation...”

In this petition we are faced with a situation where the petitioner proffers a petition that is lacking in form and clarity. The petition is fumbled and does not clearly set out and enlist the particulars of fundamental rights breached or violated by the respondents. I agree with the 1st and 3rd respondents that the petitioner have that this is a mere articulation of the constitutional provisions that has expressed general values, principles and constitutional norms for general consumption. Their efficacy and applicability in the instance petition is not demonstrated, or at all.

Like is expressed in the authorities by the 2nd, 4th and 5th respondents, an application seeking determination or breach of fundamental rights must come out clearly. It must be sauntered with particulars of violation of these rights in tandem with the provisions of the constitution. In the present case, this is not so. Instead, we are treated to a cacophony of allegations against the respondents intertwined with constitutional provisions that are not related clearly or coordinated. It therefore becomes difficult to fathom the issues raised for determination or even formulate a determination thereof. I therefore find that the petitioner has not laid out a substantive issue for determination by this court.

On a finding of no substantive case against the respondents, the petitioner becomes disentitled to the relief sought. And this clears the 2nd issue for determination.

I am therefore inclined to dismiss this petition with orders that each party bears their own costs of the petition. And this answers all the issues for determination.

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

D.K.Njagi Marete

JUDGE

Appearances

1. Mr. Evans Nyambega Akuma for the petitioner.
2. Mr. Nyanchiro instructed by Nyanchiro Nyagaka & Company Advocates for the 1st and 3rd respondents.
3. Mr. Achach instructed by Achach & Company Advocates for the 2nd, 4th and 5th respondents.
4. Mr. Walukwe for 7th and 8th respondents.
5. Mr. Mogaka instructed by Musyoki & Mogaka Advocates for the 6th and 9th respondents.
6. Ms Janet Langat, State Law Office, for the Interested Party and 10th respondent.