



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI**

**PETITION NO. 5 OF 2016**

**RAHAB GATHONI GICHOHI.....PETITIONER**

**VERSUS**

**MURANGA COUNTY GOVERNMENT.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday, 18<sup>th</sup> November, 2016)

**JUDGMENT**

The petitioner filed the petition on 01.08.2016 through K.M Mburu & Associates Advocates. The petitioner invoked Articles 10, 22, 23, 35, 41, 47 and 232 of the Constitution; the Employment and Labour Relations Act 2011; the Fair Administrative Action Act, 2015; alleged contravention of Articles 10, 35, and 232 of the Constitution in a dispute relating to employment and labour relations and for connected purposes; application for orders pursuant to Articles 22, 23, 35, 41, 47, and 232 of the Constitution of Kenya and section 12 of the Employment and Labour Relations Act, 2011; and in the matter of the recruitment for the position of chairperson, Murang'a County Public Service Board. The petitioner prayed for orders as follows:

- a) Pending the hearing and determination of the petition, conservatory orders be issued in terms of the Notice of motion filed herewith.
- b) An injunction do issue compelling the respondent to confirm by way of evidence to the petitioner and to the court whether or not in inviting applications for the position of the chairperson Murang'a County Public Service Board, the provisions of law were complied with.
- c) A declaration be issued to declare that the respondent's conduct infringed Articles 10, 35, and 232 of the Constitution.
- d) A declaration be issued to declare that by inviting applications for the position of the chairperson Murang'a County Public Service Board in July 2016, the respondent breached the County Government Act 2012 and by extension Article 232 of the Constitution.
- e) The Honourable Court be pleased to uphold Articles 10 and 232 of the Constitution by issuing orders of injunction:
  - i. Restraining the respondent from proceeding any further with the inviting applications or conducting interviews for the position of chairperson Murang'a County Public Service Board.

ii. Compelling the immediate cancellation of recruitment for the position of the chairperson Murang'a County Public Service Board.

f) The Honourable Court to issue such orders and give such directions as it may deem meet, just and appropriate in the circumstances of the case.

g) The costs of the petition be awarded to the petitioner.

The petition was based on the supporting affidavit by the petitioner filed together with the petition. The petitioner filed her further affidavit on 27.10.2016.

The respondent filed the notice of preliminary objection on 19.09.2016 through Mbugua Ng'ang'a & Company Advocates. It was stated that by dint of Article 162(2) of the Constitution and Section 12 of the Employment and Labour Relations Act, 2011, the dispute does lie for determination before the Employment and Labour Relations Court but the High Court. The respondent also filed on 19.09.2016 the replying affidavit of P.K. Mukuria, the respondent's County Secretary.

The vacancy in the office of the chairperson for the Murang'a County Public Service Board was declared and advertised in the local print media on 8.07.2016. The vacancy had previously been advertised in the print media about December 2015, prospective candidates had applied, been shortlisted and interviews conducted. The petitioner is a Kenyan who hails from the County of Murang'a. It was her case that at the conclusion of the previous recruitment process following the December 2015 advertisement, the results had not been declared and made public in the print media or the respondent's website. Instead the position had been re-advertised on 08.07.2016. Thus, on 23.07.2016 the petitioner wrote through her advocates demanding that the respondent make public the results of the previous recruitment process in accordance with the provisions of Article 35 and 232 of the Constitution.

The parties agree that by reason of the replying affidavit filed for the respondent, the information as requested for has been made available and has accordingly been disclosed. The information is as follows:

- a) The respondent advertised a vacancy in the office of the chairperson of the Board on 07.12.2015.
- b) A consultant, Manpower Services (K) Limited was appointed by the respondent to shortlist suitable candidates to be interviewed by the respondent.
- c) The consultant forwarded its report to the respondent by the letter dated 09.02.2016 providing a list of shortlisted candidates.
- d) The clearance by the Ethics and Anti-Corruption Commission on the shortlisted candidates, a mandatory requirement, was not availed. Thus the interviews could not be held.
- e) In the meantime the Murang'a County Public Service Board was sued in Anthony Mwangi Maina –Versus- Murang'a County Public Service Board, High Court Petition No. 6 of 2016 at Muranga and interim orders given on 05.07.2016 restraining the Board from advertising, short listing, recruiting, appointing or in any way purporting to offer employment to any person who is not already in the employment of the County Government. At that time the Board was in the process of recruiting some officers including youth polytechnic instructors and health workers. The reason for the interim orders was that the Board did not have a chairperson and vice chairperson. Thus, to avert a crisis in the recruitment processes, the respondent re-advertised for the position of chairperson on 08.07.2017. In the present petition the respondent has on the interim been restrained from recruiting a chairperson of the Board.

The 1<sup>st</sup> issue for determination is whether the Court has jurisdiction to determine the present petition. As stated in the preliminary objection, it is urged for the respondent that the court lacks jurisdiction. It is submitted for the respondent that the Court should follow its holding in Abdikadir Suleiman –Versus- County Government of Isiolo and Another [2015]eKLR where the Court stated thus, “As stated by

**the court earlier in this judgment, the original and unlimited jurisdiction to make a finding on legitimacy or lawfulness of decisions in disputes between employers and employees rests with this court as vested with the appropriate jurisdiction under Articles 159(1), 162 (2) (a) as read with Article 165(5) and (6) of the Constitution; Articles 22(1) and 258(1) of the Constitution, and the provisions of the Employment and Labour Relations Act, 2011. The court holds that the jurisdiction spreads to all issues in the employment relationship and related matters including the enforcement of the fundamental rights and freedoms under Article 22 of the Constitution and enforcement of the Constitution under Article 258 as far as the issues in dispute are, evolve, revolve or relate to employment and labour relations. The court holds that the compass or golden test for the court's jurisdiction is the subject matter in the dispute namely disputes relating to employment and labour relations as provided for Article 162 (a) of the Constitution and as amplified in the Employment and Labour Relations Act, 2011 and not the remedies sought or the procedure of moving the court or the situ of the applicable law or any other extraneous considerations as may be advanced by or for a litigant."**

The court follows that opinion and finds that in the present dispute the question is about legitimacy or lawfulness of the recruitment of the Board's chairperson. Recruitment is obviously a human resource function and the dispute is about the petitioner's alleged right to access information about the recruitment process. The court returns that it clearly has jurisdiction to entertain the petitioner's case alleging contravention of Articles 35 and 232 in the recruitment process in issue.

The **2<sup>nd</sup> issue** for determination is whether the petitioner is entitled to the remedies as prayed for. The court makes findings as follows:

1) Prayers a, b, and c in the petition have been exhausted by reason of the interim orders on record and by reason that the respondent has since provided the information that the petitioner wanted disclosed. It was submitted for the respondent that the petitioner wrote on 23.07.2016 requesting for the disclosure and before the respondent could act on the request, the petition was filed on 01.08.2016 but nevertheless, the information has been provided to the petitioner in the documents filed in court. The court does not act in vanity and as the information has been filed in court as disclosed, the remedies will be declined as superfluous.

2) The petitioner prays for a declaration to be issued to declare that by inviting applications for the position of the chairperson Murang'a County Public Service Board in July 2016, the respondent breached the County Government Act 2012 and by extension Article 232 of the Constitution. It is submitted that interviews had been conducted for the position of the chairperson and it is wastage of public funds to recommence the process without disclosing the outcome of the previous process. Since the information has been disclosed and the candidates in the initial process were not barred from reapplying, the court finds that the line of submission by the petitioner will not justify the grant of the remedy as prayed for. The court further finds that the fate of the initial recruitment having been disclosed, the petitioner has not showed the material particulars disclosing contravention of Article 232 of the Constitution or provisions of the County Government Act, 2012. The remedy will therefore be declined.

1) The petitioner prayed for orders that the Honourable Court be pleased to uphold Articles 10 and 232 of the Constitution by issuing orders of injunction:

a) Restraining the respondent from proceeding any further with the inviting applications or conducting interviews for the position of chairperson Murang'a County Public Service Board.

b) Compelling the immediate cancellation of recruitment for the position of the chairperson Murang'a County Public Service Board.

The court has considered the prayers. The respondent has already invited applicants for the position of chairperson of the Board. As a matter of judicial principle, the court cannot restrain that which has already happened. The advertisement having been issued and the applications having been invited, there

is nothing left of the advertisement and the invitation of applications to be restrained by the court. Further there are no reasons advanced to justify the cancellation of the recruitment for the position of the chairperson. Instead, the court considers that the process should be continued and concluded expeditiously and in accordance with the applicable law.

The court has considered the parties' margins of success in the case and considers that each party shall bear own costs of the suit.

In conclusion, judgment is hereby entered on the petition with orders as follows:

- a) The prayers as made for the petitioner are hereby declined.
- b) Each party to bear own costs of the petition.

**Signed, dated and delivered in court at Nyeri this Friday, 18<sup>th</sup> November, 2016.**

**BYRAM ONGAYA**

**JUDGE**