



**REPUBLIC OF KENYA**

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

**PETITION NO. 9 OF 2016**

**NANCY NJOROGE.....PETITIONER**

**-VERSUS-**

**COUNTY EXECUTIVE OF MURANG'A.....1<sup>ST</sup> RESPONDENT**

**COUNTY ASSEMBLY OF MURANG'A.....2<sup>ND</sup> RESPONDENT**

**AND**

**TITUS WAITHAKA KINYANJUI.....INTERESTED PARTY**

(Before Hon. Justice Byram Ongaya on Tuesday 20<sup>th</sup> December, 2016)

**JUDGMENT**

The petitioner filed the petition on 02.12.2016 through Charles B. G. Ouma, Advocate. The petition was supported by the petitioner's affidavit filed together with the petition together with the attached exhibits. The petition was in the matter of Articles 41 and 232 of the Constitution of Kenya, 2010; the Fair Administrative Action Act, 2015; section 12(1) (a) of the Employment and Labour Relations Court Act, Cap.24B; and in the matter of the recruitment for the chairperson, Murang'a County Public Service Board. The petitioner prayed for:

- a) A declaration that the refusal of the 1<sup>st</sup> respondent to process the appointment of the petitioner as chairman of the Murang'a County Public Service Board in terms of the recommendations of a competent human resources recruitment agency, Manpower Services, was a violation of her rights to equal opportunity and freedom from discrimination as guaranteed by Article 27 of the Constitution as well as her rights to fair labour practices as guaranteed by Article 232 of the Constitution.
- b) An order directing the 1<sup>st</sup> and 2<sup>nd</sup> respondents to proceed with the recruitment exercise of the chairman of the Murang'a County Public Service Board only in accordance with the process initially undertaken and recommendations made by Manpower Services.
- c) An order stopping the continued processing of the interested party or any other person as the chairman of the Murang'a County Public Service Board following the 2<sup>nd</sup> irregular recruitment exercise.

d) Costs of and incidental to this petition.

The petitioner filed her further supporting affidavit on 05.12.2016.

The 1<sup>st</sup> respondent filed a preliminary objection on 06.12.2016 through Mbugua Ng'ang'a & Company Advocates. The 1<sup>st</sup> respondent urged that the suit should be dismissed with costs because it is *res judicata* in view of the earlier determined suit **Rahab Gathoni Gichohi -Versus-Murang'a County Government [2016] eKLR, Petition No. ELRC 5 of 2016 at Nyeri**, in which this court delivered the judgment on 18.11.2016. The 1<sup>st</sup> respondent stated that the issue in the earlier suit, like in the present suit, regarded the recruitment of the chair of Murang'a County Public Service Board. In that suit the court returned that the recruitment of the chair person should proceed and be concluded expeditiously in accordance with the law. It was urged that the petitioner in the present suit litigated through proxy in the earlier suit and indeed filed a supporting affidavit in that suit and in the present suit she was acting through craft, innovation and another form to introduce a new cause of action but which had already been determined by the court in the earlier petition. Under *res judicata* an issue which ought to have been attacked or canvassed in the earlier suit is deemed to have been directly in issue in the earlier suit and as reliefs in the present suit were substantially in issue in the earlier suit, it was submitted that litigation must come to an end. The 1<sup>st</sup> respondent concluded that the current proceedings were therefore an abuse of court process and the present petition should be dismissed with costs.

The court directed that the matter having been certified urgent, the preliminary objection be subject of the final submissions by the parties. The 1<sup>st</sup> respondent also filed the replying affidavit of P.K. Mukuria on 15.12.2016 to oppose the petition.

The 2<sup>nd</sup> respondent appointed Yvonne Njoki Ndirang'u to act for the county assembly in the petition. The 2<sup>nd</sup> respondent did not file a replying affidavit and did not file final submissions. The interested party did not enter appearance and did not file any papers.

The 1<sup>st</sup> issue for determination is whether the present suit is *res judicata* in view of the previously decided suit **Rahab Gathoni Gichohi -Versus-Murang'a County Government [2016] eKLR, Petition No. ELRC 5 of 2016 at Nyeri**.

***Res-Judicata*** is an affirmative defense barring the same parties from litigating a second law suit on the same claim or any other claim arising from the same transaction or series of transactions and that could have been, but was not raised in the first suit (See Black's Law Dictionary, 9<sup>th</sup> Edition). The three essential elements are:

- (a) an earlier decision on the issue;
- (b) a final judgment on the merits; and
- (c) the involvement of the same parties, or parties in privities with the original parties.

The doctrine of *res judicata* aims at ensuring that litigation comes to an end. An issue that has been conclusively decided upon by a competent judicial authority must not find itself before the same or other competent judicial authority for reconsideration.

It is submitted for the petitioner that the in the earlier suit the court found and ordered that the recruitment of the chairperson should continue and be concluded expeditiously and in accordance with the applicable law. It is further submitted that on 21.11.2016 the 1<sup>st</sup> respondent purported to recruit the interested party as the chairperson of the Board. The present petition is questioning that recruitment and it is the petitioner's case that the recruitment is unlawful. The matter being questioned came after the judgment in the earlier suit as delivered on 18.11.2016. The present petition was filed on 07.12.2016 and it is submitted for the petitioner that the subject matter is different from the earlier suit.

The court has revisited the material on record. It is obvious that the petitioner was not a party to the earlier suit even if she filed a supporting affidavit in that suit. It is the opinion of the court that filing of an affidavit in a suit does not make the maker of the affidavit a party to a suit. Thus, the court returns that the parties in the present suit are different from those in the earlier suit. Further, the matters in issue in the present suit are substantially different and could not be raised in the earlier suit even with due diligence as the petitioner was not a party in that suit and some of the material facts in issue such as the interested party having been nominated to appear before the 2<sup>nd</sup> respondent for approval for appointment appear to have come up after the judgment in the earlier suit. Accordingly, the court returns that the suit is not *res judicata* in view of the previous suit and the preliminary objection will therefore fail.

The facts of this case are as follows. The petitioner and the interested party are members of the Murang'a County Public Service Board. The board is established under section 57 of the County Governments Act, 2012 to undertake human resource functions, as per section 59 of the Act, on behalf of the county government and in accordance with the provisions of the Act. The petitioner was appointed following a competitive recruitment exercise by a consultant hired by the 1<sup>st</sup> respondent. It is the petitioner's case that the consultant had been involved to ensure fair, transparent and competitive process. The successful applicants per the consultant's report were then subjected to a selection process by the 1<sup>st</sup> respondent's internal selection panel. The successful candidates including the petitioner were sworn into office on 16.08.2013.

The person appointed chairperson was one Peterson Mwangi who subsequently resigned and the petitioner was appointed acting chairperson because she had been serving as the board's vice chairperson.

On 07.12.2015 the board published in the print media invitation for suitable persons to apply for the position of the chairperson of the board. The petitioner applied. The 1<sup>st</sup> respondent hired a consulting firm one Manpower Services to undertake fair, transparent and competitive recruitment of the chairperson. The consultant interviewed the petitioner on 04.02.2016. The outcome of the interview process was not communicated to the petitioner or the other applicants.

On 08.07.2016 the Murang'a County Government advertised for the position of the chairperson of the board for the second time. The advertisement did not mention the fate of the earlier advertisement and did not advise the applicants in the earlier advertisement to apply or not to apply in view of the second advertisement.

On 23.07.2016 **Rahab Gathoni Gichohi -Versus-Murang'a County Government [2016] eKLR, Petition No. ELRC 5 of 2016 at Nyeri** was filed seeking information on the outcome of the earlier advertisement. The petitioner filed an affidavit in that case as approached by the petitioner in that case. In that case the county government disclosed that the reason for not concluding the first recruitment process was because the Ethics and Anti-Corruption Commission(EACC) had not given clearance for the candidates as shortlisted by the consultant, Manpower Services. It was in that petition by **Rahab** that the county government had come out to publish the fate of that earlier recruitment process. It was said that the EACC had not provided an integrity report on the candidates as prequalified by the consultant.

The petitioner's case is that the county government has not exhibited that it had ever requested the EACC to provide the necessary clearance for the candidates in the earlier recruitment process so that the reason given for the abortion of that process was not valid or genuine. The petitioner has stated that as a member of the board she had provided to the county government the prescribed integrity declaration and she had further provided the integrity declaration as she applied for the position of the chairperson. It is her case that the 1<sup>st</sup> respondent had therefore deliberately failed to pursue the relevant clearance from EACC and the same should not be visited against the candidates in the earlier recruitment process.

On 21.11.2016 the county government constituted an internal interview panel and interviewed candidates who had responded to the 2<sup>nd</sup> advertisement. On 24.11.2016 the government published a press advertisement inviting objections, if any, to the appointment of the interested party as chairperson of the board. The petitioner is aggrieved that she was not invited for the 2<sup>nd</sup> interview process even though she

had been ranked the best candidate in the interviews by Manpower Services. She is also concerned that the 2<sup>nd</sup> interview process had not involved an independent consultant so that it had not met the high threshold of fairness, transparency and competitiveness as the initial process. Thus, the process was discriminatory as there was clear favouritism.

The petitioner urged that her predicament had roots in her firm performance as acting chairperson of the board including when she resisted the governor's pressure to establish and recruit for the offices of the deputy sub-county administrators in circumstances whereby it would be irregular to do so as the government had no budget provided for such offices. Thus, the governor had on 15.04.2016 conveyed to the petitioner a short text message thus, **"If agreed adverts don't run by Monday, I will send some people on compulsory leave without any further reference."** However, the petitioner's case was that the board stood its ground and never did the irregular action of establishing and recruiting for the offices. Thus, by the letter of 19.04.2016 the board communicated its decision to the county secretary and the county executive member for public service. On 22.04.2016 the governor conveyed a text message to the petitioner to the effect that the board was frustrating the departments and that the governor was **".... very, very disappointed"**. The petitioner shared the message with all board members and the petitioner's evidence was that all board members including the interested party agreed that they had to stand firm and make only lawful decisions. The petitioner has further provided evidence about the governor's persistent imposition of pressure upon the board in recruitment processes and the governor's public pronouncements that the board had failed to employ staff. The petitioner lamented that the governor's office had failed to invite her to an official function where other board members had been invited. Subsequently about 29.04.2016 the county secretary forwarded to the petitioner a letter appointing the interested party as the acting chairperson at a time when the petitioner was the substantive vice chairperson and acting chairperson. The reason for the appointment of the interested party was stated as making the position rotational so as to build capacity and leadership skills in the board. However, the petitioner's case is that she was removed as acting chairperson because of her firmness in lawful performance of the board's functions.

The petitioner has stated that on 03.05.2016 the board irregularly interviewed and appointed one Peter Muchiri as the Senior Assistant Director of Agriculture. The petitioner's case was that the appointment was irregular because the said Peter Muchiri had not been amongst the 8 candidates the board had initially shortlisted and published the relevant list. Thus on 04.05.2016 the petitioner stepped down from the office of vice chairperson in the hope that the relationship between the board and the governor would improve. The county assembly investigated the appointment of Peter Muchiri as it was apparently irregular. The board acting chairperson, the interested party, testified before the assembly to the effect that the appointment was regular because Peter Muchiri had not initially been included because his application had been misfiled. The petitioner's evidence to the county assembly was that the inclusion had been irregular. The petitioner's case was that the irregular appointment was also under investigation by the Commission on Administrative Justice.

The petitioner stated that the board had another problem with the government about recruitment of casual workers. During her acting as chairperson, the board had declined to ratify irregular recruitment of casual workers by the government departments because the recruitment had been done without authority of the board.

The petitioner's case is that she had been unfairly denied an opportunity to appear before the internal recruitment panel and the second recruitment process was discriminatory and did not involve an objective consultant. There was no evidence that EACC had provided clearance for the interested party's nomination and the petitioner believed that the governor had unfairly favoured the interested party. The petitioner urged that her rights under Articles 27, 41 and 232 of the Constitution had been violated in the circumstances of the case.

The 1<sup>st</sup> respondent's case is that the second advertisement was in July 2016 and the petitioner had belatedly moved to court on 01.12.2016. Further, the interview panel had found the interested party as the suitable candidate for the office of the board's chairperson. The petitioner had not applied for the position after the second advertisement. Section 58(1) (a) of the County Governments Act did not prescribe the

involvement of the independent consultant in the appointment of the chairperson or member of the board. It is stated that the governor had not been enjoined as a party and it was unfair that the petitioner made the serious allegations against the governor.

The court has considered the pleadings, the affidavits and the submissions filed for the parties.

The **2nd issue** for determination is whether the second recruitment process was lawful in view of the unfinished or pending first recruitment process. In **Trusted Society of Human Rights Alliance -Versus- Nakuru Water and Sanitation Services and Another [2013]eKLR** the court stated thus,

**“Article 73 (2) provides for responsibilities of leadership as follows;**

**“73. (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.”**

**.... Thus, the court holds that the law governing employment in a public body like the respondent includes the constitutional provisions on employment generally such as Article 41 of the Constitution, the provisions on public service engagement such as those cited for the petitioner (Articles 10 and 73) and more specifically Article 232 of the Constitution on the values and principles of public service and generally the provisions of Chapter 13 of the Constitution on the public service. The court further finds that the general labour legislations such as the Employment Act, 2007 will apply. For a public body, such as the respondent, the court holds that the Public Officer Ethics Act, 2003 will specifically apply.”**

The court also upholds its opinion in **Robert Muriithi Ndegwa –Versus- Minister for Tourism, Petition No. 41 of 2012 at Nairobi**, where it stated thus, “.... Article 232 of the Constitution provides

**for the values and principles of public service to include:**

- a) high standards of professional ethics;**
- b) efficient, effective and economic use of resources;**
- c) responsive, prompt, effective, impartial and equitable provision of services;**
- d) involvement of the people in the process of policy making;**
- e) accountability for administrative acts;**
- f) transparency and provision to the public of timely, accurate information;**
- g) subject to paragraph (h) and (i), fair competition and merit as the basis of appointments and promotions;**
- h) representation of Kenya's diverse communities; and**
- i) affording adequate and equal opportunities for appointment, training and advancement, at all levels of the public service of men and women; the members of all ethnic groups; and persons with disabilities.**

**Section 22 of the Public Officer Ethics Act, 2003 provides that public officers shall practice and promote the principle that public officers are selected on the basis of integrity, competence and suitability or elected in fair elections. Thus, by the Constitution and by statute, the standards for undertaking public employment have been determined. In the instant case, the petitioner was recruited competitively and it is not said that he lacks qualifications. The court holds that there would be no suitability or merit in public employment in event of presence of bribery, cronyism, nepotism, tribalism, and in absence of qualifications, competence, competition, integrity and respect for inclusion and diversity....”**

The court holds that the applicable law in public service employment includes the constitutional and statutory provisions on public service, employment and labour relations and more specifically the constitutional and statutory provisions cited above as standards for public service employment.

In the present case, the petitioner has established that after the initial advertisement the recruitment process commenced and the outcome was not communicated to her or the public. The court finds that the county executive government through the governor imposed unfair pressure and intimidation or harassment in the performance of her official duties. The court finds that there is no reason to doubt that in view of the petitioner's firmness and fairness in the discharge of her duties, there is no reason to doubt her submission that the first recruitment process was terminated to prevent her fair evaluation and consideration as a candidate for the board's chairperson's office. The court finds that in so doing, the 1<sup>st</sup> respondent's actions amounted to contravention of Article 236 of the Constitution that protects public officers from victimization or intimidation for having performed the duties of the office held in accordance with the law.

The court further finds that the initial recruitment process never concluded and was never cancelled. The court finds that once the vacancy was declared to the public by way of the initial advertisement, the county government or the governor's power to make such declaration of the vacancy and to invite applicants was thereby exhausted – it was *functus officio* so that there was no vacancy to be redeclared, re-advertised and subject of the recruitment and selection process. Thus, at the time of the second advertisement, the court returns that there was no vacancy to be declared and there was no authority in law to undertake recruitment for the same office of the chairperson which had earlier been declared and which process had not come to a logical conclusion or end. Needless to state, the petitioner was entitled not to apply after the second advertisement as she had a legitimate expectation to receive the results of the

process she had already participated in.

The court returns that once the vacancy was in the public domain and within the provisions of the cited provisions of law, the government or the governor thereby ceased to have exclusive role over the vacancy and it was not open for the respondents to continue with the second advertisement in the manner it was done. Accordingly, the court finds that the values applicable in public employment and as per the cited provisions of law were contravened when the respondents embarked on the second recruitment process without having concluded the initially commenced process.

To answer the **2<sup>nd</sup> issue** for determination the court returns that the second recruitment process was unlawful in view of the unfinished or pending first recruitment process.

The **3<sup>rd</sup> issue** for determination is whether the petitioner is entitled to the remedies as prayed for. The court makes findings that in view of the findings on the 2<sup>nd</sup> issue, the petitioner is entitled as prayed for. The petitioner's evidence was not challenged and she is entitled as prayed as she has established the facts as were pleaded and as supported by evidence in her affidavit and which was not specifically controverted.

In conclusion judgment is hereby entered for the petitioner against the respondents for:

- a) The declaration that the refusal of the 1<sup>st</sup> respondent to process the appointment of the petitioner as chairman of the Murang'a County Public Service Board in terms of the recommendations of a competent human resources recruitment agency, Manpower Services, was a violation of her rights to equal opportunity and freedom from discrimination as guaranteed by Article 27 of the Constitution as well as her rights to fair labour practices as guaranteed by Article 232 of the Constitution.
- b) The order directing the 1<sup>st</sup> and 2<sup>nd</sup> respondents to proceed with the recruitment exercise of the chairman of the Murang'a County Public Service Board only in accordance with the process initially undertaken and recommendations made by Manpower Services.
- c) The order stopping the continued processing of the interested party or any other person as the chairman of the Murang'a County Public Service Board following the 2<sup>nd</sup> irregular recruitment exercise.
- d) The respondents to pay the petitioner's costs of the petition.

**Signed, dated and delivered** in court at Nyeri this **Tuesday, 20<sup>th</sup> December, 2016.**

**BYRAM ONGAYA**

**JUDGE**