



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT KISUMU

PETITION NO. 248 OF 2014

(formerly KSM HCC Pet. No. 14/2014)

(Before Hon. Justice Hellen S. Wasilwa on 29th October, 2014)

WILFRED OTIENO OKOTH..... PETITIONER

VERSUS

COUNTY GOVT. OF KISUMU.....1ST RESPONDENT

KISUMU COUNTY PUBLIC SERVIC BOARD 2ND RESPONDENT

AND

AGGREY OCHIENG ODONGO & 4 OTHERS INTERESTED PARTIES

JUDGMENT

On 4.8.2014, the petitioner filed this petition accompanied by an application brought through a notice of motion brought under S. 3 and 1A of the Civil Procedure Act and Under O. 5 rule 1 of the Civil Procedure Rules and all other enabling provisions of law alleging contravention of Articles 1, 2, 3, 6(3), 10, 20, 22, 23, 27(4), 33, 48, 73, 75, 165(3) (d) (iii) and 258 of the Constitution. The petitioner also alleges breach of fundamental rights and freedoms under Article 47, 201, 227, 232 of the Constitution and Sections 45, 60, 65 and 87 of the County Government Act 2012.

The applicant petitioner, sought orders to have the application certified urgent and heard *ex parte* in the first instance which order was granted. Other orders sought were conservatory orders of injunction directed at the respondents and their agents/servants from shortlisting new candidates and/or conducting fresh interviews or new appointments to the post of County Chief Officer – Treasury Ref: KSM/CPSB/2013/001 in any manner.

The petitioner also sought orders that:-

1. ---
2. ---
3. **Pending the hearing and determination of this petition, a conservatory order of injunction be issued prohibiting the respondents from short listing new candidates and or conducting fresh interviews or new appointments to the post of County Chief Officer – Treasury Ref:**

- KSM/CPSB/2013/001 in any manner.
4. Pending the hearing and determination of this petition the respondents be ordered to provide the petitioner and file in court certified copies of all the advertisements for the post of County Chief Officer – Treasury Ref: KSM/CPSB/2013/001, evaluation report of the interviews conducted, letters of regret to unsuccessful candidates, evidence of the final results and outcome of the interviews advertised on 14th February, 2014 and any other post of County Chief Officer – Treasury Ref: KSM/CPSB/2013/001 without the first results being disclosed.
 5. A declaration that the decisions, actions and omissions of respondents in respect of placing a re-advertisement on the Friday 4th July 2014 Daily Nation newspaper for the post of County Chief Officer – Treasury Ref: KSM/CPSB/2013/001 is a violation of the County Government Act, 2012 and the Constitution.
 6. That the said decision of the respondents prompting a re-advertisement on the Friday 4th July 2014 daily nation newspaper for the post of County Chief Officer – Treasury Ref: KSM/CPSB/2013/001 be brought into the court and be quashed pursuant to an order of certiorari.
 7. That the courts do give directions as to the hearing and disposal of the petition.
 8. The costs be in the cause.

The application is based on the petition and affidavit of Wilfred Otieno Okoth filed in court and on grounds that:-

1. Through an advertisement dated 20th December, 2013 in the Standard newspaper, the respondents advertised ten (10) vacancies for the post of County Chief Officer – Ref: KSM/CPSB/2013/001.
2. That the post of County Treasury was amongst the above stated 10 posts.
3. Subsequently, the respondents placed another advertisement in the Standard newspaper on 18th February, 2014 where seven (7) names (including the 1st to 5th interested parties) were shortlisted for the position of County Chief Officer – Treasury stating the date and time when the short listed candidates were to attend interviews.
4. The petitioner has ascertained that the shortlisted candidates subsequently attended the interviews as scheduled.
5. The petitioner has further ascertained that none of the candidates who attended the interview have been informed of the outcome of the said interviews to date which contravenes Article 47 of the Constitution.
6. The respondents have since gone ahead to spend taxpayers hard earned money and re-advertised the position of County Chief Officer – Treasury Ref: KSM/CPSB/2013/001 in the Daily Nation newspaper for Friday 4th July, 2014 without revealing the outcome of the first interviews to the public and/or the interested parties herein contrary to Article 47, 201 and 227 of the Constitution and Sections 87, 93, 95, 96 and 116 of the County Governments Act, 2012, making their actions unconstitutional and illegal.
7. The petitioner has also ascertained that the respondents is now in the process of illegally and unconstitutionally shortlisting other candidates for the same position following the latter advertisement contrary to the said provisions of the law and unless conservatory orders are issued it would lead to massive loss of public funds and breach of constitutional rights of the petitioner, the interested parties and other residents of Kisumu County.
8. That it is just and fair if conservatory orders were to issue in order to preserve the constitutional rights of the parties herein.
9. That the respondent will not suffer any prejudice whatsoever whereas if the orders herein are not granted the claimants will suffer irreparable harm and damage.

In her affidavit sworn on 31st July 2014, the petitioner depones that she is a resident of Kisumu and a tax-payer and she brings the petition on her own behalf and on behalf of other citizens including the interested parties herein and of other residents of Kisumu and therefore is competent to bring the petition before court.

She further depones that the 1st respondents is a public entity with powers to levy and collect taxes from residents and business entities operating within Kisumu County and has been levying land rates and other taxes and levies from owners of land within its jurisdiction and persons running businesses within its jurisdiction.

It is the averment of the petitioner that the respondents has breached the provisions of Article 227(1) of the Constitution by re-advertising for the post of County Chief Officer when they had previously done so thus not prudently using public funds in a cost effective manner. The petitioner avers that the 1st respondent has also breached the rights of the interested parties under Article 47, 201 and 227 of the Constitution and Sections 87, 93, 95, 96 and 116 of the County Government Act 2012 without revealing the outcome of the first interviewed to the public and thus making their actions unconstitutional and illegal.

The petitioner further contends that under Article 75 of the Constitution, responsibilities of leadership require objectivity and impartiality in decision are not influenced by nepotism, favoritism and other improper motives. It is therefore her contention that re-advertising of the post of County Chief Officer – Treasury Ref: KSM/CPSB/2013/001, without any public participation and without following the laid down law in procurement, can only be a decision influenced by improper motive contrary to requirement of Article 75.

Another breach of the Constitution alluded to by the petitioner is Article 201 of the Constitution where the petitioner avers that, where public funds have to be used, they must be utilized in a prudent manner. The petitioner therefore avers that the re-advertisement of the post of County Chief Officer – Treasury Ref: KSM/CPSB/2013/001 in any manner demonstrated puts the public funds at high risk of loss and failure of accountability. Further, the petitioner avers that by refusing to provide the public with information on the procurement, the respondents contravened Article 35 of the Constitution and did not act on the public interest.

The petitioner seeks prayers that:-

(a) Pending the hearing and determination of this petition a conservatory order of injunction be issued prohibiting the respondents from shortlisting new candidates and or conducting fresh interviews or new appointments to the post of County Chief Officer – Treasury Ref: KSM/CPSB/2013/001 in any manner.

(b) Pending the hearing and determination of this petition the respondents be ordered to provide the petitioner and file in court certified copies of all the advertisements for the post of County Chief Officer – Treasury Ref: KSM/CPSB/2013/001, evaluation report of the interviews conducted, letters of regret to unsuccessful candidates, evidence of the final results and outcome of the interviews advertised on 14th February, 2014 and any other document and memoranda relied upon in the decision to re-advertise the post of County Chief Officer – Treasury Ref: KSM/CPSB/2013/001 without the first results being disclosed.

(c) A declaration that the decisions, actions and omissions of respondents in respect of placing a re-advertisement on the Friday 4th July 2014 Daily Nation newspaper for the post of County Chief Officer – Treasury Ref:KSM/CPSB/2013/001 is a violation of the county Government Act, 2012 and the Constitution.

(d) That the said decision of the respondents prompting a re-advertisement on the Friday 4th July 2014 Daily Nation newspaper for the County Chief Officer – Treasury Ref: KSM/CPSB/2013/001 be brought into the court and be quashed pursuant to an order of certiorari.

(e) A declaration be issued that by virtue of Article 227 of the Constitution the 1st respondent is bound by the provisions of Public Procurement and disposal Act.

(f) A declaration be issued that the re-advertisement of the said post contravened Article 227

as read together with Article 201 and Article 75 of the Constitution and ought to be set aside.

(g) A declaration be issued that re-advertising the said posts threatens the rights of the petitioner, the interested parties and those of the other residents of Kisumu County as stipulated in Articles 47 and 46 of the Constitution.

(h) A declaration do issue that the re-advertising the said posts is null and void to the extent that the whole procurement and re-advertisement process was flawed and contrary to Article 227 of the Constitution of Kenya and laid down procedures in law.

(i) An order compelling the 1st respondent to forthwith select one of the interested parties who were competitively, transparently, fairly, through public participation and in an open manner and in accordance with the law already shortlisted and interviewed for the said position.

(j) Costs of this petition.

(k) Any such further orders as this honorable court shall deem just and fit.

The respondents filed their replying affidavit sworn by one Hesbon Owuor Hongo, secretary of the 2nd respondent on 8.10.2014 through the firm of Rodi Orege & Co. Advocates.

It is the respondents averments that after they made the advertisement on 20.12.2012 and 21/12/2013, in the Standard and Star Newspapers, the turnout in response thereof was poor and so the deponent sought for extension of the advertisement to January 17th 2014. They then shortlisted the candidates and conducted interviews accordingly. That pursuant to the County Government Act, the result of the interview did not meet the required threshold for recommendation to the governor for appointment.

The deponent further deponed that, in view of the affirmation by the governor regarding the threshold, it was agreed by the Board that the post be re-advertised as per Annex **HOH 3**. They finally shortlisted suitable candidates as per their **App HOH – 4**.

They contend that they did not interfere with any rights of the petitioner. They also contend that the interested parties in the application were enjoined in the suit without being consulted and that they never authorized use of their names in the petition. This is per Annex **HOH – 5**.

It is their averment that the petition in court is brought prematurely and in bad faith to scuttle the smooth operation of the 2nd respondent and should be dismissed. They also deny that the board has misused any public funds as alleged and that what has been done was conducted overboard and pursuant to the law.

The petitioner and respondents have also filed their respective submissions. Upon considering the averments of the parties and their respective submissions, the issues for determination are as follows:-

- 1. Whether the petition is competently before court and whether the interested parties are rightfully enjoined in this petition.**
- 2. Whether the actions of the respondents amounted to unfair administrative action under Article 47 of Constitution.**
- 3. Whether public funds were misused in the re-advertisement of the position of County Treasurer as provided for under Article 201 and 227 of the Constitution.**
- 4. Whether provisions of the County Government Act S. 87 on citizen participation was flouted in the processes undertaken by the respondents.**
- 5. Whether S. 95 of County Government Act was flouted for lack of public communication and access to information.**
- 6. What remedies the petitioner is entitled to.**

On the 1st issue, the respondents had submitted to court that the matter in court is not a public issue but an issue of individuals looking for jobs. In the premise, it is their submission that the petitioner has no business bringing this petition to court. They also contend that the interested parties were enjoined in the suit without their consent and so their names should be struck off.

The issue for determination then is whether the petitioner has *locus* to bring this petition before court and whether the petition can stand without the involvement of the interested parties.

Under Article 22(1) & 21 of the Constitution”-

“Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.

(2) In addition to a person acting in their own interest, court proceedings under Clause (1) may be instituted by;

(a) a person acting on behalf of another person who cannot act in their own name.

(b) a person acting as a member of or in the interest of a group or class of persons.

(c) a person acting in the public interest or

(d) an association action in the interest of one or more of it's members”.

Other than the above provision, Article 258(1) of the Constitution states that;

“Every person has the right to institute court proceedings claiming that this Constitution has been contravened, or is threatened with contravention.”

In answer therefore to the first issue, the petitioner has *locus* to file this petition; Can she however enjoin the interested parties without their consent? Just as everyone has a right to information under Article 35 of Constitution, it follows that one should not be enjoined in a suit without being informed and after giving the requisite consent. Enjoining the interested parties without their informed consent was wrong and I expunge them accordingly from this court record.

On the second issue the applicant contend that the respondent's action amounted to unfair administrative action under Article 47 of the Constitution. From the submissions, the parties who applied for the position of County Chief Officer were shortlisted and finally interviewed. The results of the interview was not communicated to them. They were still awaiting the interview outcome when the same positions were re-advertised.

Under Article 47 of the Constitution:

“Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

(3) ---”

Of course the re-advertising of the position was going to adversely affect those previously interviewed for the positions. They had a right to know why they were not being picked for the job. They were not given any written reasons as to why the position was being re-advertised after they had been interviewed. They were also not informed that they had not met the requirements of the job after the interview. This flouts the provision of Article 47 and coupled with Article 35(1) of the Constitution

which provides that:-

“Every citizen has the right of access to:-

(a) Information held by the State and

(b) Information held by another person and required for the exercise or protection of any right or fundamental freedom ---”

It is therefore the finding of this court that the actions of the respondents amounted to unfair administrative action under Article 47 of the Constitution.

On the question of misuse of public funds, Article 201 of Constitution deals with principles of public finance. The applicant contend that public funds were misused by carrying out a re-advertisement of the position without proper regard to the expenses and by using the money in unprudent and irresponsible manner. They also argue that procurement rules were flouted. The applicant however did not demonstrate to the court what public funds and how much was spent as against another existing obligation or contrary to budgetary provisions. This contention is therefore not supported by evidence and I find it not tenable.

In answer to question 4 and 5, I have already alluded to it under question 2 above on issue of unfair administrative action and right to information and I have already made a finding that the Constitutional provisions which are superior to the County Government Act were flouted.

What remedies is the applicant then entitled to?

Having found as above, I make the following orders:-

- 1. A declaration that the decisions, actions and omission of respondents in respect of placing a re-advertisement on the Friday 4th July 2014 Daily Nation Newspaper for the post of County Chief Officer – Treasury Ref: KSM/CPSB/2013/001 is brought into court and quashed by an order of certiorari.**
- 2. The re-advertising of the said post threaten the rights of the petitioner and other residents of Kisumu County as stipulated under Article 47 of the Constitution.**
- 3. The 1st respondent do forthwith select one of the parties already interviewed competently, transparently, fairly and through public participation to the said position.**
- 4. In the alternative the parties already interviewed be informed in writing the reason(s) why they are not competent for the position as against the requirements of the job.**
- 5. The respondents to pay costs of this petition.**

HELLEN S. WASILWA

JUDGE

29/10/2014

Appearances:-

Omboto for petitioner present

N/A respondents

CC. Wamache