



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

PETITION 194 OF 2019

IN THE MATTER OF: ARTICLES 10, 27, 28, 29, 41, 47 AND 236 THE CONSTITUTION OF KENYA, 2010

AND

**IN THE MATTER OF: THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FREEDOMS)
PRACTICE AND PROCEDURE RULES, 2013**

AND

IN THE MATTER OF: SECTIONS 5, 45 AND 46 OF THE EMPLOYMENT ACT of 2007.

AND

IN THE MATTER OF: SECTION 12 AND 13 OF THE COUNTY GOVERNMENTS ACT, 2012

AND

IN THE MATTER OF: SECTION 5,10,17,19,22,23 OF THE COUNTY ASSEMBLY SERVICE ACT, 2017

AND

**IN THE MATTER OF CONTRAVENTION OF SECTION 9 (2) (d) OF THE PUBLIC SERVICE (VALUES AND
PRINCIPLES) ACT 2017.**

AND

**IN THE MATTER OF: VIOLATION AND CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS
GUARANTEES UNDER ARTICLES 10, 27, 28, 29, 41, 47, AND 236 OF THE CONSTITUTION OF KENYA, 2010.**

BETWEEN

THE CLERK, NAIROBI CITY COUNTY ASSEMBLYPETITIONER

-VERSUS-

THE SPEAKER NAIROBI CITY

COUNTY ASSEMBLY.....1ST RESPONDENT

THE NAIROBI CITY COUNTY

ASSEMBLY SERVICE BOARD.....2ND RESPONDENT

THE ORANGE DEMOCRATIC PARTY.....1ST INTERESTED PARTY

THE JUBILEE PARTY.....2ND INTERESTED PARTY

HON. ABDI HASSAN GUYO.....3RD INTERESTED PARTY

HON. MAURICE GARL.....4TH INTERESTED PARTY

HON. MARK NDUNG’U.....5TH INTERESTED PARTY

RULING

Introduction

1. The second Interested Party herein after called “Jubilee”, filed a Notice of Preliminary Objection (P.O) dated 1st November 2019 seeking for the striking out of this suit for the following grounds:

a. The Motion and complaint upon which it is founded have been filed in violation of the provisions of section 40 (2) of the Political Parties Act and is thus incapable of invoking the jurisdiction of this Honourable Court.

b. The Motion does not raise any justiciable issues and it is therefore frivolous, vexatious and raises no valid grounds for adjudication by this Honourable Court.

c. The Motion has been filed for an improper purpose, which is not sanctioned by law.

d. The Motion and the Complaint upon which it is founded seek the adjudication of feigned issues and are thus an abuse of the process of this Honourable Court.

2. The 1st Respondents, 1st, 4th and 5th Interested parties supported the PO but the Petitioner and the 3rd interested party opposed the PO. The PO was orally canvassed in the open court on 5.11.2019 by counsel for all the parties.

Submissions in support of the PO

3. Mr. Macharia, learned counsel for Jubilee prosecuted the PO. He submitted that PO is merited and ought to be allowed. He contended that the dispute before this Court was instigated by the letter dated 22nd October, 2019 appearing on page 164 of the Motion and Page 169 of the Petition by the Secretary General of Jubilee which informed the impugned Gazette Notice.

4. He further contended that the said letter was done in accordance with Section 12 (3) (c) of the County Governments Act, which entitles parties to nominate members to the board making this matter fall into the ambit of Section 40 of the Political Parties Act. He argued that under the said section, disputes related to such nominations ought to be resolved through internal party mechanism and if not, it ought to be referred to Political Parties Disputes Tribunal (PPDT). According to him the joinder of Mr. Guyo in this suit has robbed this Court of its jurisdiction. To fortify the forgoing submission, he relied on *Gabriel Bukachi Chapia Vs ODM & Another (2017) eKLR* and urged the court to down its tools. He further relied on the Court of Appeal decision in *Jubilee Party of Kenya Vs Patrick Kabundu Mukiri & Another (2017)eKLR* for emphasis.

5. He further submitted that the Petition before this Court is purely speculative as the petitioner seems apprehensive that the new board would fire him once in office. He argued that in the event the petitioner is so dismissed by the new Board, then he will have a reason to approach this Honourable Court.

6. In addition, the counsel submitted that the Petitioner has no right to approach this Court alleging violation of rights of another by virtue of the doctrine of privity of contracts. To buttress this argument he relied on *Agricultural Finance Corporation Vs Lengetia Limited & Jack Mwangi (1985)eKLR*.

7. Mr. Kinyanjui, learned counsel 1st Respondent also held brief for Mr. Miller for the 2nd respondent in supporting the PO by Jubilee. He agreed with the submissions by Mr. Macharia that the 1st and 2nd Interested Parties exercised their powers under Section 12 (3) (c) of the County Governments Act in nominating the 4th and 5th interested parties respectively and if any dispute arises from the said nominations, the same is a political dispute and it ought to be resolved by the internal mechanisms of the party and thereafter by the political Parties Dispute Tribunal in the event one is dissatisfied with the outcome. To buttress this argument, the counsel relied on the case of *John Musakali Vs Speaker of the County of Bungoma & 4 Others (2015)eKLR*.

8. He further submitted that the doctrine of exhaustion must be given preference and allow the respective political parties to sort out their own issues. According to him the Petitioner seeks to use the Court to avert the doctrine of exhaustion.

9. He contended that the threat to the petitioner's employment was removed by the consent order which saw his suspension letter withdrawn. According to the counsel, prayer (a) in the petition is speculative in nature while prayer (b) and (c) relate to a political dispute which should go to the correct forum. He therefore urged the Court to uphold the Preliminary Objection and proceed to dismiss the Petition with Costs.

10. Mr. Anzala learned counsel for the 1st Interested Party associated himself with the submissions by Mr. Macharia and reiterated that this Court has no jurisdiction to determine the instant Petition as it emanates from a political dispute. He relied on the Supreme Court decision in *Samuel Kamau Macharia Vs Kenya Commercial Bank & 2 Others (2012)eKLR* for emphasis and prayed for the Petition to be dismissed with Costs.

11. Mr. Njenga learned counsel for the 5th Interested Party similarly joined submissions with Mr. Macharia reiterating the fact that this Honourable Court lacks Jurisdiction to hear and determine the instant Petition by dint of the provisions of Section 40 of the Political Parties Act. He therefore urged the Court to allow the Preliminary Objection and dismiss the Petition with costs.

12. Mr. Faraji learned counsel for the 4th Interested Party joined submissions with Mr. Macharia in support of the Preliminary Objection dated 1st November, 2019. He further reiterated the fact that this matter ought to be before the Political Parties Dispute Tribunal because it involves a political dispute. He therefore urged this Court to allow the Preliminary Objection and dismiss the Petition with Costs.

Submissions in opposition to the PO

13. Mr. Muthomi learned counsel for the Petition submitted that the PO is misconceived, frivolous and is only meant to delay the hearing of the main Petition. He further submitted that the principle of Preliminary Objection as set out by **Mukhisa Biscuits Manufacturing Company limited v West End Distributors Limited [1969] EA 696** is that a PO presupposes that the facts pleaded by the opposing party are true. He therefore urged that the instant PO presumes that the facts pleaded by the petitioner in paragraph 8 to 26 of the petition are true. He observed that the same facts are contained in the affidavit sworn by the 3rd interested party (Hon. Guyo).

14. The said facts include averment that the 1st respondent has designed a scheme to remove from office, the petitioner and other senior officers of the 2nd respondent; and that when the use of criminal cases failed, the 1st respondent resolved to reconstitute the 2nd respondent with new members who are sympathetic to her said scheme. He contended that the petitioner and his colleagues are civil servants who are employed by the 2nd respondent and urged that this Court has jurisdiction to stop civil servants from being removed from office unfairly.

15. The counsel further submitted that it has not been proved that the Petitioner and the other civil servants are members of any political party and denied that this case falls under the ambit of Section 40 of the Political Parties Act as submitted by the proponents of the Preliminary Objection. He further contended that the court has jurisdiction to stop removal from office people who are insulated from political interferences and observed that the said employees have no remedy in the PPD tribunal.

16. He relied on *Anisminic Limited Vs Foreign Compensation Commission & Another (1969) 2 A.C 147* in which the English

House of Lords laid down the principle in relation to a statutory provision ousting the ordinary jurisdiction of the court, thus:

“It is a well established principle that a provision ousting the ordinary jurisdiction of the Court must be construed strictly-meaning, I think, that, if such a provision is reasonably capable of having two meanings, that meaning shall be taken which preserves the ordinary jurisdiction of the Court.”

17. On the issue of nomination, the counsel submitted that once the two political parties nominated their respective nominees in the year 2017 they became *functus officio* as the members were to hold office for a period of five (5) years by virtue of Section 12 (5) of the County Government Act. He further contended that Section 40 of the Political Parties Act must be construed narrowly and strictly. He further relied on *Hon. Beatrice Kadeveresia Elachi Vs Nairobi City County Service Board (2018) eKLR* which involved similar facts and in which this Court dismissed a similar preliminary Objection in favour of the 1st respondent herein. He therefore prayed for the PO to be dismissed with costs.

18. As regards the composition of the Board, the counsel submitted that the Jubilee and ODM extended the mandate of their representatives in the Board in 2017 for another term of 5 years. He urged that the section 12(5) of the County Governments Act is anchored to protect the civil servants from partisan politics.

19. Mr. Theuri learned counsel for the 3rd Interested Party associated himself with the submissions by Mr. Muthomi in opposition to the PO. He contended that the dispute before this Court relate to employment and/or a threat to employment as well as the composition of the 2nd Respondent under Section 11 of the County Assembly Services Act. Mr. Theuri further contended that the assembly has 2 creatures, namely, the political leadership and the Board. He denied that the dispute before the Court is political in nature and submitted that it revolves around the appointments to the board.

20. He further submitted that Section 4 (4) of the County Assembly Services Act establishes County assembly service board with the status of a body corporate which is non-partisan and non-political in nature. He further pointed that Section 12 (5) of the County Governments Act, as amended by section 46 of the county Assembly Service Act, gives security of tenure to members of the 2nd Respondent. He contended that the amendment was intended to insulate the board from political wrangles. He therefore urged that the Authorities relied upon by the proponents of the Notice of Preliminary Objection are irrelevant to the instant case.

21. Finally, he submitted that the doctrine of privity of contract should be construed alongside the provisions of Article 22 (2) of the Constitution of Kenya.

Rejoinder

22. In brief, rejoinder Mr. Macharia maintained that this matter is political in nature as the Political Parties exercised their discretion to nominate members to the board by virtue of Section 12 (5) of the County Governments Act. He further submitted that nomination of board members under section 12 of the County Governments Act and employment is not one and the same thing. He argued that under section 3 and 9 of the Employment Act, there must be a contract of employment while in nominations a Gazette notice is the instrument of appointment.

23. He relied on the cases *of Nyali Vs Attorney General (1956) Vol. 2 2 QB page 1* where Lord Denning held that the interpretation in the **Anasimic case** must be construed with modification because we have different laws and circumstances. He further relied on *Robert Amos Okech Vs Andrew Hamilton & Others (2017) eKLR* where the court held that the right to sue for alleged violation of Human Rights or threat thereto should not be used every time as this is likely to devalue that process and advised that the parties should use it as a last mechanism.

Issues for determination

24. After careful consideration of the Notice of the Preliminary Objection, pleadings, and the rival submissions, it is clear that ground 2 and 3 of the PO are overtaken by events because they relate to the petitioner’s Notice of Motion that was disposed of by consent of the parties on 30.10.2019. On the other hand, ground 4 of the PO raises a factual question that requires evidence to prove and as such it does not stand within the four walls of a valid PO. The foregoing view is fortified by *Oraro v Mbaja [2005]eKLR* in which Ojwang J, as he then was, held that:

“I think the principle is abundantly clear. A “preliminary objection”, correctly understood, is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed. I am in agreement with learned counsel, Mr. Ougo, that “where a Court needs to investigate facts, a matter cannot be raised as a preliminary point.” This legal principle is beyond dispute, as there are divers weighty authorities carrying the message. In addition to the ones I have cited, Mr. Ougo drew my attention to yet others.”

25. In view of the above, the only issue for determination arising from the PO is whether the court has jurisdiction to determine the petition herein.

Analysis and determination

26. In Samuel Kamau Macharia Vs Kenya Commercial Bank & 2 Others (2012) eKLR the Supreme Court held that:

“A court’s jurisdiction flows either from the Constitution or legislation or both. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by the law. ... it cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a court of law beyond the scope defined by the Constitution.”

27. In the Owners of MV Lilian S v Caltex Oil(Kenya) limited [1989] KLR Nyarangi JA held that:

“I think that it is reasonably plain that the question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

28. The basis of the PO is section 40 of the Political Parties Act which provides for the jurisdiction of the PPDT in the following terms:

“(1) The Tribunal shall determine—

(a) disputes between the members of a political party;

(b) disputes between a member of a political party and a political party;

(c) disputes between political parties;

(d) disputes between an independent candidate and a political party;

(e) disputes between coalition partners; and

(f) appeals from decisions of the Registrar under this Act;

(g) disputes arising out of party primaries.

(2) Notwithstanding subsection (1), the Tribunal shall not hear or determine a dispute under paragraphs (a), (b), (c) or (e) unless the dispute has been heard and determined by the internal political party dispute resolution mechanisms.”

29. The dispute before the court is twofold. First, the petitioner has brought the petition as an employee of the second respondent Board and he has done so for himself and on behalf of his co-employees of the Board. In that regard he alleges violation of their constitutional rights and freedoms including freedom from discrimination or harassment on grounds of (*inter alia*) ethnicity and

political affiliation; right to security, protection of the law and freedom from cruel, inhuman and degrading treatment; right to fair labour practices; right to fair administrative action; right to protection of civil servants from victimization or discrimination for performing the function of their office in accordance with the constitution or any other law, and protection from dismissal, removal from office, demotion in rank or subjection to disciplinary action without the due process. The said fundamental rights and freedoms are guaranteed to the petitioner and his fellow employees of the 2nd respondent under Article 27,28,29,41,47 and 236 of the Constitution and amplified by section 5, 45 and 46 of the Employment Act.

30. Second, the petitioner has brought the petition as the Secretary of the 2nd respondent Board and he has done so for himself and the two members of the Board who represent the majority and minority political parties in the Nairobi City County Assembly. In that regard, the petitioner contends that the 1st respondent and by extension, the 1st and 2nd interested parties have violated statutory provisions which amplify the said constitutional provisions. The alleged violation of statutory provisions include section 12(5) of the County Governments Act which protect the tenure of office for members of the 2nd respondent; section 5 of the County Assembly Services Act which provides for political neutrality and values of service of the petitioner and the senior staff of the 2nd respondent; section 10 of the County Assembly Services Act which provides for the removal of the members of the 2nd respondent; section 11 of the County Assembly Services Act which provides for the functions of the 2nd respondent; section 17 and 19 of the County Assembly Services Act which provides for the functions of the Secretary/Clerk of the 2nd respondent; and section 22 and 23 of the County Assembly Services Act which provides for the security of office, suspension or removal of the Clerk of the Assembly form office.

31. The jurisdiction of this court in determining the first aspect of the petition in my view is quite obvious considering the provisions of Article 162(2)(a) and 165(5) of the Constitution and section 12 of the Employment and Labour Relations Court Act (ELRC Act). The said provisions are worthy duplicating hereunder respectively:

“Article 162(2) the parliament shall establish courts with equal status of the High court to hear and determine disputes relating to

(a) Employment and labour relations;”

“Article 165(5) the High Court shall not have jurisdiction in respect of matters-

(a) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or

(b) falling within the jurisdiction of the courts contemplated in Article 162(2).”

“section 12(1) The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of the Constitution and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including-

(a) disputes relating to or arising out of employment between an employer and an employee; ...”

32. In view of the foregoing express provisions of the constitution and the Statute, it is clear that this court and not the PPDT has the jurisdiction to determine the first aspect of the petition herein because essentially it relates to employment relationship. Consequently, I return that section 4 of the Political Parties Act does not apply to the said dispute.

33. The issue of privity of contract was raised although it was not among the grounds raised by the Notice of the preliminary objection. However, I agree with the petitioner that Article 22 (2) of the Constitution gives him the *locus standi* to bring the impugned petition on behalf of his co-employees and seek relief for their rights infringements. Article 22 of the Constitution provides that:

“(1) Every person has the right to institute court proceedings claiming that a right or a 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;...”

34. The second aspect of the petition, however, presents some challenges because it relates to the composition or membership of the 2nd respondent which involves political discretion by the majority and minority political parties in the assembly. To contextualize the issue and reflect on the submissions by counsel regarding the composition of the 2nd respondent, it is necessary to highlight the provisions that deal with the establishment of the 2nd respondent and how she is constituted. Section 12 of the County Governments Act provides that:

“(1) There shall be a county assembly service board for each county assembly.

(2) The county assembly service board shall be a body corporate with perpetual succession and common seal.

(3) The county assembly service board shall consist of-

(a) the speaker of the county assembly as the chairperson;

(b) the leader of the majority party or a member of the county assembly deputed by him or her, as the Vice chairperson;

(c) the leader of the minority party or a member of the county assembly deputed by him or her; and

(d) one person resident in the county, appointed by the county assembly from among persons who have knowledge and experience in public affairs, but who is not a member of the county assembly.

(4) The county assembly clerk shall be the secretary to the county assembly service board.

(5) A member of the county assembly board shall vacate office-

(a) if the person is a member of the county assembly-

(i) at the end of the term of the county assembly;

(ii) if the person ceases to be a member of the county assembly; or

(b) if the person is an appointed member, on revocation of the person’s appointment by the assembly; or

(c) If the person is the speaker, leader of majority party or leader of minority party when the person ceases to be such speaker, leader of majority party or leader of minority party.”

35. The foregoing provision was amended in 2017 by section 46 of the County Assembly Services Act which provides that:

“46. Section 12 of the County Governments Act is amended by-

(a) Deleting subsection 3 and substituting therefor the following new subsection-

(3) The Board consists of –

(a) the speaker of the county assembly, as the chairperson;

(b) a vice- chairperson elected by the board from the members appointed under paragraph (c);

(c) two members of the county assembly nominated by the political parties represented in the county assembly according to their proportion of members in the county assembly; and

(d) one man and one women appointed by the county assembly from amongst persons who are experienced in public affairs, but are not members of the county assembly.

(b) inserting the following new sub-section immediately after subsection (3)-

(3A) The members of the Board appointed under section 12(3)(d) shall serve on a part-time basis.

(c) Deleting subsection (c) of paragraph (5) and substituting therefor the following new subsection-

(d) if the person is the speaker, when the person ceases to be such Speaker.”

36. The effect of the said amendment was to give the nominees of the political parties to the board security of tenure and insulate the board from political manipulations and wrangles; the said political party nominees no longer needed to be the majority leader or the minority leader in the county assembly; and they were now to serve up to the end of the term of the county assembly unless they ceased to be members of the county assembly before the expiry of the term.

37. Finally, section 48 of the County Assembly Services Act provided for the transition as follows:

“48. (1) Subject to subsection (2), each county assembly shall appoint the members of a County Assembly Services Board under section 12(3)(b),(c) and (d) of the County Governments Act within thirty days after the commencement of this Act.

(2) Upon the commencement of this Act and before the first general election held after coming into force this Act, a person, who immediately before the commencement of this Act served as a member of a County Assembly Service Board appointed under section 12(3)(b)(c) and (d) of County Governments Act in force before the commencement of this Act, shall continue to serve as a member of the Board, as one of the persons, appointed under section 12(3)(b)(c) and (d).”

38. The foregoing provisions provide for the key organ (2nd respondent) which is the employer of the staff in the County Assembly Service. They are clear and unambiguous provisions which speak for themselves. The court takes judicial notice that the County Assembly Services Act came into force on the 27.7.2017 and as such subsection 48(2) of the Act applied to the existing board until the first general election after the said commencement date. The court further takes judicial notice that the first general election after the said commencement date, took place in August 2017 after which section 48 of the Act became obsolete and paved the way for reconstitution of the board under the amended section 12 (3)(b)(c) and (d) of the County Governments Act.

39. The 1st and 2nd interested parties alleged that after the said general election, the 2nd respondent board was never constituted as required under the amended section 12 (3)(b)(c) and (d) of the County Governments Act. They further contended that they never nominated their representatives to the board as required for the majority and minority parties in the county assembly. According to their pleadings, they finally nominated their representatives by the letters dated 16.10.2019 and 22.10.2019 respectively and the names were published in the Kenya Gazette No. 144 of 22.10.2019.

40. The 3rd interested party, however contended in his pleadings that he was nominated by the 2nd interested party (majority party) as her representative to the board while Hon. Okumu Elias Otieno was nominated by the 1st interested party (minority party) to represent her in the board by the letters dated 27.9.2017 and 5.9.2017 respectively. He further contended that they took the Oath of Office on 28.9.2017 which was administered by the 1st respondent after she had taken her Oath of Office which was administered by the petitioner on the same day.

41. The foregoing dispute relating to party nominations arising from decisions by the respective political parties under section 12(3) (c) of the County Governments Act. The proponents of the PO cited several precedents which are unanimous that nominations by political parties are not justiciable and they should be left, in the first instance, to the political parties’ internal dispute resolution mechanisms and the PPDT were the need to escalate the same arises. In ***Gabriel Bukachi Chapia Vs ODM & Another (2017)eKLR*** the Court of Appeal held that

“In effect the PPDT should not entertain disputes between members of a political party, disputes between a member of a political party and a political party, disputes between political parties and disputes between coalition partners, unless such dispute is in the first instance heard and determined by the internal political party dispute resolution mechanism.”

42. The foregoing judicial precedent binds this court and in my view, it is a good law which encourages alternative dispute resolution mechanisms as provided under Article 159 of the Constitution and also the doctrine of exhaustion. Although the dispute herein does not relate to party list for purposes of a general election, it is akin to that because it relates to nomination of party representatives in to the County Assembly Service Board through political parties’ internal processes.

43. In view of the foregoing binding precedent, I am not persuaded by the decision of the House of Lords in *Anisminic Limited Vs Foreign Compensation Commission & Another (1969) 2 A.C* cited by the petitioner. Consequently, I down my tools on the second aspect of the petition and strike out the petition in so far as it relates to the reliefs sought for and on behalf of the 3rd interested party and Hon. Okumu Elias Otieno. The issue of the party nomination is therefore referred to the respective political parties for resolution using the internal dispute resolution mechanisms within a period of 21 days in line with section 4 of the Political Parties Act so that the 2nd respondent board may be fully reconstituted.

Conclusion and disposition

44. I have found that the petition herein is clothed with two aspects. The first one involves an employment related dispute between the 2nd respondent’s employees and their employer over which this court is seized of the jurisdiction to determine. As such, the PO fails to that extent. The second aspect revolves around membership and/or composition of the second respondent, which entitles the majority and minority political parties in the county assembly to nominate their representatives. The said nominations involve political discretion which is nonjusticiable in the first instance. Consequently, the PO succeeds to that extent, and the petition stands struck out with no costs in respect of the said political dispute.

Dated and delivered at Nairobi this 15th day of November, 2019

ONESMUS N. MAKAU

JUDGE



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