



Masai v Governor, Taita Taveta County & 3 others; Salaries & Remuneration Commission & 9 others (Interested Parties) (Constitutional Petition E009 of 2023) [2024] KEHC 10315 (KLR) (31 July 2024) (Judgment)

Neutral citation: [2024] KEHC 10315 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
CONSTITUTIONAL PETITION E009 OF 2023**

**GMA DULU, J
JULY 31, 2024**

BETWEEN

EMMANUEL MASAI PETITIONER

AND

THE GOVERNOR, TAITA TAVETA COUNTY 1ST RESPONDENT

THE COUNTY ASSEMBLY OF TAITA TAVETA 2ND RESPONDENT

COUNTY ATTORNEY OF TAITA TAVETA 3RD RESPONDENT

COUNTY GOVERNMENT OF TAITA TAVETA 4TH RESPONDENT

AND

SALARIES & REMUNERATION COMMISSION INTERESTED PARTY

GLORIA WAWUDA MONIKOMBO INTERESTED PARTY

DANSON KATUU MZENGE INTERESTED PARTY

ELIZABETH MKONGO INTERESTED PARTY

GRANTON SAMBOJA MWANDAWIRO INTERESTED PARTY

SHEDRACH MWANGANGI MUTUNGI INTERESTED PARTY

GIFTON H MKAYA INTERESTED PARTY

PANUEL MWAEKE INTERESTED PARTY

MARTIN TAIRO MASEGHE INTERESTED PARTY

ERIC JOHNSON KYONGO INTERESTED PARTY



JUDGMENT

1. This is a petition dated 23rd October 2023 filed by Emmanuel Masai through counsel Moroga Wangwi Associates Advocates under Articles 1, 2, 3, 6, 10, 19, 20, 21, 22, 23, 27, 73, 174, 176, 179, 183, 185 and 196 of *the Constitution* as well as the County Government *Act No. 17 of 2012*, the Fair Administration Act and the Public Service Act No. 1A of 2015.
2. The petition lists four (4) respondents and ten (10) interested parties and seeks the following orders:-
 1. A declaration that the respondents have violated Articles 1, 2, 3, 6, 10, 19, 20, 21, 22, 23, 27, 73, 174, 176, 179, 183, 185 and 197 of *the Constitution*.
 2. A declaration that the respondents have violated Article 19, 20, 21, 22, 23 of *the Constitution*.
 3. An order of certiorari do issue to quash the entire proceedings and decision of the 1st and 2nd respondent to nominate, approve and appoint the interested parties.
 4. That in the interim before the matter is heard and determined the interested parties should be stopped by an order of this court from accessing offices the official offices, carrying out any official duties and access to the official cars and office equipment and monies inclusive of salaries and benefits until the conclusion of this matter owing to the illegality of appointment.
 5. That the court be pleased and do hereby grant any order of permanent injunction restraining the 1st, 2nd respondents, their representatives, employees, servants or anybody working under them from purporting to nominate, approve and appoint county executive members without the strict requirement of affirmative and gender parity.
 6. That the court be pleased to give an order of mandamus for the position of County Executive Committee Member be re-advertised and for the process of shortlisting, nomination, approval and appointment be carried out afresh.
 7. Costs of this petition.
 8. Any other relief that this court may deem just to grant.
3. The petition was filed with a supporting affidavit sworn by the petitioner Emmanuel Masai on 26th October 2023, in which it was deponed that the appointment of County Executive Members done in 2022 and 2023 did not meet the rules on affirmative and gender parity requirements, as required by *the Constitution* and statutory laws; and as such the positions should be re-advertised.
4. In response to the petition, the 2nd to 10th interested parties through their counsel Mwazighe & Company Advocates filed a Notice of Preliminary Objection dated 1st November 2023 in the following terms:-
 1. The petition is incompetent, incurably defective, bad in law, barred in, an abuse of court process and ought to be dismissed with costs.
 2. The petition contravenes mandatory provisions of Section 15 of County Government *Act No. 17 of 2012*.
 3. That the petition filed and canvassed goes against the letter and spirit of Article 159(2)(c) of *the Constitution* of Kenya 2010.



4. That the petition is premature as it is against the well laid down Doctrine of Exhaustion.
- 5 The court lacks jurisdiction to hear and determine the petition.
5. Thereafter, in February 2024 the 1st, 3rd and 4th respondents, appointed Mwazighe & Company Advocates, who entered appearance for them and annexed a replying affidavit sworn on 21st November 2023 by Andrew Mwadime (1st respondent) and several other documents including interim orders issued at Mombasa in ELRC Case No. E017 of 2022 – Josephine Marura Mwatibo =Versus= County Assembly of Taita Taveta and others, arising from rejection of Josephine Marura Mwatibo as County Executive Member for trade, Tourism, Cooperative Development and Industrialization.
6. In addition to the replying affidavit to the petition, a further affidavit sworn on 8th May 2024 by Andrew Mwadime the Governor (1st respondent) was filed in which it was deponed that the petition is premature; and that the gap had now been filled by the Gazettment of Getrude Nginai Nawoti, with the Kenya Gazette Notice therein of 15th March 2024 annexed thereto.
7. It is important to state here that this court directed that the Preliminary Objection filed be determined together with the main petition.
8. The petition was canvassed through written submissions. In this regard, I have perused and considered the submissions filed by Moroga Wangwi & Company Associates Advocates for the petitioner as well as the submissions filed by Mwazighe & Company Advocates for the respondents, as well as the submissions filed earlier by Mwazighe & Company Advocates for the 2nd to 10th respondents to the Preliminary Objection.
9. Having considered the petition, Preliminary Objection filed the submissions filed, as well as *the Constitution* and the law, I am of the view that since the County Assembly of Taita Taveta was made a party herein, and the Section 15 of the County Government Act, relied upon is not specific with regard to nomination or composition of Executive Committee members, the Preliminary Objection fails, and is for dismissal.
10. For the record, the said section provides as follows:-

“ 15 (1) A person has a right to petition a county assembly to consider any matter within its authority, including, enacting, amending or repealing any of its legislation.”
11. It is my view therefore, that a petition to the County Assembly envisaged in Section 15 above, is necessary only with regard to legislative authority of the County Assembly. Since the petition herein is not related to the unconstitutionality or illegality of any law or regulation of the County Assembly, in my view the objection fails the test in Mukisa Biscuit Manufacturing Company Ltd =Versus= West End Distributors Ltd (1969) EA 696 as there is nothing in this petition that would legally require reference to the County Assembly before being brought to court. I dismiss the Preliminary Objection.
12. Coming now to the determination of the petition. Prayer 4 seek interim or interlocutory orders which were not granted by this court before hearing, and thus have been overtaken by events by the hearing which has been done through written submissions.
13. Regarding the other prayers, I find that it was admitted through the replying affidavit and further affidavit of the Governor Andrew Mwadime (1st respondent) that at the time of filing the petition herein, the two-thirds gender requirements had not been complied with.
14. Thus, if no remedial action was taken herein, in my view the petition would have succeeded.



15. However, since it was deponed in the further affidavit of the Governor, which has not been controverted, that action was later taken to remedy the situation. In my view the appointment of additional female Member of the Executive Committee having been done, that remedial action cannot be redone by orders of this court at this present stage of delivery of this judgment.
16. In my view therefore, the remedial action taken by the County Government rendered this petition academic and the petitioner at that point should have considered withdrawing or compromising the petition, instead of having this court make a substantive decision on it, as interest of justice cannot be served by making the orders sought, such as reconstituting the whole County Executive Committee afresh.
17. Since this court cannot presently make any of the substantive orders sought herein without acting in vain or creating an injustice, I hereby decline to grant any of the substantive orders sought, as the petition and prayers have been overtaken by events.
18. With regard to costs, since the petition was filed at a time when the gender balance requirements had not been complied with, I will award the costs of the petition to the petitioner against the County Government of Taita Taveta, on behalf of whom the Governor was acting.
19. I thus find that the petition has been overtaken by events, and decline to grant any of the substantive orders sought.
20. I however award the costs of the petition to the petitioner, to be paid by the County Government of Taita Taveta.

DATED, SIGNED AND DELIVERED THIS 31ST DAY OF JULY 2024 IN OPEN COURT AT VOI VIRTUALLY.

GEORGE DULU

JUDGE

In the presence of:-

Alfred/Trizah – Court Assistants

*Mr. Moroga for petitioner

Mr. Mwandoto for respondents and interested parties

