



**Alphonse v Governor Nyamira County & 3 others; James Ondicho Gesami (Deputy Governor) (Interested Party) (Petition 2 of 2021) [2023] KEHC 17872 (KLR) (25 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17872 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYAMIRA  
PETITION 2 OF 2021  
WA OKWANY, J  
MAY 25, 2023**

**BETWEEN**

**DANIEL OSIEKO ALPHONSE ..... PETITIONER**

**AND**

**GOVERNOR NYAMIRA COUNTY ..... 1<sup>ST</sup> RESPONDENT**

**SPEAKER NYAMIRA COUNTY ASSEMBLY ..... 2<sup>ND</sup> RESPONDENT**

**NYAMIRA COUNTY ASSEMBLY ..... 3<sup>RD</sup> RESPONDENT**

**CLERK NYAMIRA COUNTY ASSEMBLY ..... 4<sup>TH</sup> RESPONDENT**

**AND**

**JAMES ONDICHO GESAMI (DEPUTY GOVERNOR) ..... INTERESTED PARTY**

**RULING**

**Background**

1. The Petitioner herein, Daniel Osieko Alphonse, sued the Respondents through a petition filed on May 27, 2021 in Kericho High Court, seeking the following orders: -
  - a. A declaration be and is hereby made that the actions of the 1<sup>st</sup> Respondent in failing to nominate a candidate for the office of Deputy Governor of Nyamira County government within 14 days of the vacancy offends the provisions of Section 32D (1) of the [County Governments Act, 2012](#) and Articles 1, 2, 3, 10 and 232 of the [Constitution of Kenya](#).
  - b. A declaration be and is hereby made that the actions of the 1<sup>st</sup> Respondent in resubmitting the name of the Interested Party for vetting and approval offends the provisions of Section 10 (1) and (2) of the [Public Appointments \(County Assemblies Approval\) Act, 2017](#) and Articles 1, 2, 3, 10 and 232 of the [Constitution of Kenya](#).



- c. A declaration be and is hereby issued that the actions of the 1<sup>st</sup> Respondent in resubmitting the name of the Interested Party for vetting and approval is unconstitutional, null and/or void.
  - d. A declaration be and is hereby issued that failure by the 1<sup>st</sup> Respondent to submit another name, other than that of the Interested Party, within 14 days of resolutions of the 3<sup>rd</sup> Respondent rejecting the nomination of the Interested Party amounts to abdication by the 1<sup>st</sup> Respondent of constitutional and statutory obligation by the and offends Section 32 D (1) the [County Governments Act, 2012](#).
  - e. A declaration be and is hereby made that the actions of the 4<sup>th</sup> Respondent in writing to the Interested Party on the 25<sup>th</sup> of May 2021 informing him *inter alia* that he is scheduled to appear before the 3<sup>rd</sup> Respondent's Committee on Appointments on May 28, 2021 at the County of Nyamira Boardroom for vetting and approval offends the provisions of Section 5 (2) of the [Public Appointments \(County Assemblies Approval\) Act, 2017](#) and the provisions of Articles 1, 2, 3, 10 and 232 of the [Constitution of Kenya](#).
  - f. A declaration be and is hereby made that the actions of the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents in failing to provide for any for a for public hearings or to receive any memoranda regarding the intended vetting and approval process offends the provisions of Section 7 (1) of the [Public Appointments \(County Assemblies Approval\) Act, 2017](#) and Articles 1, 2, 3, 10 and 232 of the [Constitution of Kenya](#).
  - g. A declaration be and is hereby issued that the actions of the 1<sup>st</sup> Respondent in resubmitting the name of the Interested Party to the 3<sup>rd</sup> Respondent is vide the letter dated May 13, 2021 for vetting and approval offends the provisions of Section 10 (1) and 10 (2) of the [Public Appointments \(County Assemblies Approval\) Act, 2017](#).
  - h. An order of Certiorari be and is hereby issued bring into the High Court and quashing the decision of the 1<sup>st</sup> Respondent in resubmitting the name of the Interested Party for vetting and approval for the position of Deputy Governor of Nyamira County.
  - i. An order of Mandamus be and is hereby issued directing the 1<sup>st</sup> Respondent to nominate another candidate, other than the Interested Party, for the position of Deputy Governor of Nyamira County Government within 14 days of this Honourable Court's judgment as provided in the [County Governments Act, 2012](#).
  - j. An order of Prohibition and a permanent injunction be and is hereby issued stopping the 1<sup>st</sup> Respondent from resubmitting the name of the Interested Party for vetting and approval for the office of the Deputy Governor of Nyamira County Government.
  - k. This being a public interest matter, each party to bear their own costs.
  - l. This Honourable Court be pleased to issue any other order that it shall seem just and fit in the circumstances.
2. Concurrently with the petition, the Petitioner filed an application seeking inter alia, conservatory orders to restrain the Respondents from continuing with the process of nomination, vetting and approval of the Interested Party as the Deputy Governor of the County of Nyamira.
  3. The Respondents opposed the application through the Grounds of Opposition dated June 14, 2021 wherein they listed the following grounds: -
    1. The Application is fatally and incurably defective and liable to be struck out in limine.



2. No prima facie case has been established to support grant of reliefs prayed for.
  3. Balance of convenience favours refusal of the reliefs sought.
  4. The Application is an abuse of court process as there already exist two matters before the Nyamira High Court dealing with the same subject matter. The cases being;
    - i. Petition No 1 of 2021 (Patrick Atambo v Hon. Attorney General, Hon. Amos Kimwomi Nyaribo & 2 others).
    - ii. Petition No E003 of 2021 (Alex Arani Kabinga v The Governor, Nyamira County and Dr. James Ondicho Gesami).
  5. Interim Orders similar to those sought herein were made in Petition No 1 of 2021 (Patrick Atambo v Hon. Attorney General, Hon. Amos Kimwomi Nyaribo & 2 others) on May 27, 2021 and are still in force. (Copy of the orders attached).
  6. The ruling in Petition No 1 of 2021 above is on 22<sup>nd</sup> July 2021.
  7. The Applicant will not suffer any prejudice if the reliefs sought are denied.
  8. Public interest does not favour grant of the reliefs prayed for.
4. The petition was subsequently transferred to this court through an order issued on May 31, 2021.
  5. The matter was first mentioned before this court on June 22, 2022 when Ochieng', J (as he then was) issued directions on the filing of responses to an application dated June 20, 2022 wherein the Petitioner sought, inter alia, orders directing the Auditor General to audit the 5<sup>th</sup> Respondent's Bank Accounts.
  6. The Respondents and Interested Party also filed their respective Replying Affidavits to the petition on June 29, 2021.
  7. The matter was subsequently listed for mention on October 14, 2022, November 3, 2022, February 17, 2023 and March 23, 2023 when none of the parties attended court thus prompting this court to issue notice requiring the parties to appear and show cause why the suit should not be dismissed for want of prosecution.
  8. When the matter came up for notice to show cause on April 26, 2023, Mr Ochoki, Learned Counsel for the 3<sup>rd</sup> Respondent, urged the court to dismiss the petition while arguing that it had been overtaken by events following the general elections of August 2022.
  9. Mr Onsongo, Learned Counsel for the Interested Party informed the court that the petition was premised on the challenge of office holders in the past County Government and not the current office holders.
  10. Mr Nyagarama, Learned Counsel for the 1<sup>st</sup> Respondent associated himself with Mr Onsongo's submission and added that the nomination of the Deputy Governor that was the subject of the petition had since lapsed following the general elections of August 2022. According to Mr Nyagarama, the substratum of the petition ceased to exist.
  11. Mr Makori, Learned Counsel for the Petitioner submitted that the petition has not been overtaken by events as it raises several issues besides the nomination of the Deputy Governor. He maintained that the former Deputy Governor (DG) is still the current DG and that his current appointment is also challenged. Mr Makori explained that the delay in listing the matter was occasioned by a ruling that



was delivered by Ochieng J (as he then was) without notice to parties Mr Makori sought leave to file Affidavit to explain the reasons for the delay.

12. Mr Onsongo, Mr Ochoki and Mr Nyagarama opposed the application for leave to file the affidavit while arguing that Counsel for the Petitioner lost the opportunity to file the affidavit.
13. In a ruling delivered in court on the said date, 2April 6, 2023, this court declined to grant leave to the Petitioner to file an affidavit and held that it was too late in the day to file an affidavit when parties had already made their respective arguments on the notice to show cause.
14. This ruling is therefore on the issue of whether this petition should be dismissed for want of prosecution.
15. I have considered the parties' rival submissions on the notice to show cause and I find that the Petitioner has not presented any convincing explanation/reasons why the suit should not be dismissed for want of prosecution.
16. As I have already stated in this ruling, the petition was listed for mention on numerous occasions when none of the parties attended court thereby leading to the issuance of notice to show cause. The Petitioner did not offer any explanation for his failure to attend court on the said mention dates despite service with the notices. I also note that the petition revolves around the challenge on the nomination and appointment of the Deputy Governor of Nyamira County in the year 2021 and appointment which automatically lapsed after the General Election of August 2022 when new office holders in the county governments were elected.
17. My finding is that not only has the subject matter of the petition been overtaken by events, but that Petitioner has also not offered any plausible explanation on why he has, since the year 2021, not prosecuted the petition.
18. Consequently, I dismiss the petition herein for want of prosecution with costs to the Respondents and the Interested Party.
19. It is so ordered.

**RULING SIGNED, DATED AND DELIVERED IN CHAMBERS AT NYAMIRA THIS 25<sup>TH</sup> DAY OF MAY, 2023.**

**W.A. OKWANY**

**JUDGE**

