



Kioga v Meru County Assembly Service Board & another (Constitutional Petition E029 of 2022) [2023] KEHC 24448 (KLR) (26 October 2023) (Judgment)

Neutral citation: [2023] KEHC 24448 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CONSTITUTIONAL PETITION E029 OF 2022
TW CHERERE, J
OCTOBER 26, 2023**

BETWEEN

KAUMBI KIOGA PETITIONER

AND

MERU COUNTY ASSEMBLY SERVICE BOARD 1ST RESPONDENT

MERU COUNTY ASSEMBLY 2ND RESPONDENT

JUDGMENT

1. Petitioner herein, KAUMBI KIOGA, is a Kenyan citizen and an advocate of the High Court of Kenya resident of Meru County.
2. 1st Respondent is a body corporate established under Section 12(1) of the County Government Act, 2012 pursuant to Article 176(1) of *the Constitution*.
3. 2nd Respondent is the legislative arm of the Meru County Government established pursuant to Section 176 (1) of *the Constitution*.
4. Petitioner challenges the membership of the 1st Respondent save for the speaker on the ground that *the constitution* violates the two third gender rule and was not subjected to public participation. Petitioner additionally challenges the recruitment of the 2nd Respondent's clerk on the ground that the recruitment was similarly not subjected to public participation.

The Petitioner's Case

5. The Petition is dated 15th December, 2022 and it is supported by the Petitioner's affidavit sworn on even date. The Petition is also supported by the Petitioner's further undated affidavit filed on 28th March, 2023 and submission filed on 06th April, 2023.



6. Petitioner contends that he applied for the position of external board members of the 1st Respondent by a letter dated 12th October, 2022 but was not notified of the outcome of the recruitment. That in November, 2022, he learnt that the Board had been constituted which Board he contends violates the two-third gender rule set out under Article 27(8) of *the Constitution* and Article 10 (1)(c) and 10 (2) for the reason that the recruitment was not subjected to public participation.
7. Additionally, Petitioner contends that the recruitment of the Clerk of the 2nd Respondent was not subjected to public participation and hence violated Article 10 (1)(c) and 10 (2) of *the Constitution*. Petitioner urged the court to find that the Speaker of the 2nd Respondent who is also the chairperson of 1st Respondent is in contempt of orders issued in Meru High Court Petition No. 4 of 2020 and has violated Article 35 of *the Constitution* as read with Section 4 & 8 of the *Access to Information Act* 2016 for failing to provide him with information requested by letter dated 09th November, 2022 that was served on even date.
8. Responding to Respondents' argument, Petitioner stated that he had filed an affidavit of service in support of his contention that the request for particulars was duly served. Petitioner further argued that no tangible evidence of public participation had been availed to court to demonstrate that Respondents complied with the law in the recruitment of the members of the 1st Respondent and clerk of the 2nd Respondent.
9. Consequently, Petitioner seeks the following orders:
 1. A declaration that the composition of the 1st Respondent as constituted on the 2nd November 2022 or thereabout was in violation of Article 27 (8) of *the Constitution* of Kenya, 2010 and any business, actions and/or activities conducted by the said 1st Respondent be declared invalid and a nullity.
 2. A declaration that there having been no forum for public participation in the entire process of recruitment, nomination, vetting, debating, and appointment of the members of the 1st Respondents compromised its integrity and violated the provisions of Chapter 6 of *the Constitution*, which renders the said members unfit to hold public offices.
 3. A declaration that the 1st Respondent and in particular, the Speaker is in contempt of the orders of the court pursuant to the judgement and decree of the court issued in Meru High Court Petition No. 4 of 2020 for failure to observe the two-third gender rule, and therefore be committed to civil jail for a term not exceeding six (6) months.
 4. A declaration that the failure by the acting secretary of the 1st Respondent to provide information sought under Article 35 of *the Constitution* as read with section 4 and 8 of *Access to Information Act*, 2016 on the basis of the Petitioner's request dated 09.11.2022 is a violation to access of information, values of rule of law, participation by people, human rights, good governance, transparency and accountability.
 5. A declaration that Respondents are in violation of the obligations imposed upon the Respondents by chapter six of *the Constitution* specifically Articles 73(1) and (75) (1) of *the Constitution* and section 3 of the *Leadership and Integrity Act* and sections 8,9 and 10 of the Public Officers Ethics Act.
 6. That entire process of recruitment and approval of the 1st Respondent's Board Members save for the Speaker be and is hereby nullified.



7. That advertisement sanctioned by the 1st Respondent regarding the recruitment of the Clerk of the 2nd Respondent vide the Daily Nation Newspaper dated 01.12.2022 and/or any other Newspaper and/or any other platform be nullified until the Board of the 1st Respondent is properly reconstituted.
8. That an Order of Mandamus compelling the acting secretary of the 1st Respondent and the Acting Clerk of the 2nd Respondent to forthwith provide at the Respondents' costs, information sought by the Petitioner vide his letter to the secretary of the 1st Respondent dated 09.11.2022.
9. An order that the speaker of the 2nd respondent be committed to civil jail for a period not exceeding six (6) months for being in contempt of the court's decree.
10. Costs of the petition
11. Any other relief this Honorable court may deem fit and just to meet the ends of justice

Petitioner's Submissions

10. Relying on *Kenneth Muriuki v Meru County Assembly Service Board & another, Jacob Karari & another (Interested Parties)* [2021] eKLR, Petitioner submitted that court has jurisdiction to hear this Petition and issue the orders sought.
11. Petitioner submitted, that locus to bring this Petition is derived from Articles 3 (1), 22, 50 (1) and 258 of *the Constitution* which bestows every person with powers to call upon the court on grounds that *the Constitution* has either been violated or there is threat for violation and that person can be acting in public interest as under Article 258 (2) which encompass more than just the parties to the suit as such suits are meant to benefit the wider public and not the individual directly involved and in support thereof relied on *Okoti v Cabinet Secretary, Industry, Trade and Co-operatives & 13 others; Kenya Bureau of Standards (Interested Party)* (Petition 19 of 2020) [2022] KEELRC 1416 (KLR) (25 May 2022) (Judgment).
12. Concerning composition, Petitioner made reference to the County Government Act No. 17 of 2012 and submitted that the Board is made of all men except one female recruited under Section 12 (3) (d) of the Act and thus violates Article 27 (8) and 175 (c) of *the Constitution* that provides that no elective or appointive body shall have more than two third of either gender. Relying on *Republic v Kenya National Examinations Council Ex-Parte Charles Maina Wanjihia & another* [2016] eKLR, Petitioner faulted the Speaker of the 2nd Respondent who is the chair of the 1st Respondent for failing to direct himself properly in law and procedure concerning the attainment of two third gender rule and urged the court to bury the history of gender discrimination and actualize the constitutional requirements. In support thereof, reliance was placed on *Mutua v Governor, Kitui County & 4 others; Muisyo, Acting Municipal Manager, Kitui Municipality & 3 others (Interested Parties)* (Constitutional Petition 16 of 2020) [2022] KEHC 10872 (KLR) (8 June 2022) (Judgment).
13. Additionally, Petitioner made reference to *Kenneth Muriuki v Meru County Assembly Service Board & another, Jacob Karari & another (Interested Parties)* (supra) whose orders of third gender rule the Speaker of the 2nd Respondent had continued to violate in spite of being aware of the orders made in that Petition.
14. Concerning public participation, it is the Petitioner's submission that in this case, there was just an advertisement of vacancies and a call for applications by interested parties. Petitioner contends that the law did not anticipate that recruitment of members of the 1st Respondent would be done in secrecy



without calling for suitability memoranda from the public. In support of this contention, Petitioner made reference to Article 174 of *the Constitution* which sets out the objects of devolution to include public participation, Section 3 (f) of the County Government Act No. 17 of 2012 which set out the objects of the Act to include public participation in the conduct of affairs of County Assembly as required by Article 196 of *the Constitution* and Section 14(3) of the County Government Act No. 17 of 2012 which provides that:

- (3) In considering any appointment for which approval of the county assembly is required under *the Constitution*, an Act of Parliament or county legislation—
 - (a) the appointment shall be considered first by a committee of the county assembly;
 - (b) the committee’s recommendation shall be tabled before the county assembly for approval; and
 - (c) the proceedings of the committee and the county assembly shall be open to the public

15. Petitioner additionally made reference to Section 3 (d) and 5(1) of the County Assembly Service Act which provides for the procedure for appointment of members of the County Assembly Service Board and equally requires that any nomination or appointment shall have regard to national values and principles set out in Article 10 of *the Constitution*.

16. Concerning public participation in the approval of appointment to the County Assembly Board, it is the Petitioner’s case that Meru County Standing Order No. 46 which requires approval of persons recommended for appointment by a committee echoes the necessity for the public to actively participate in such approval for they cannot participate in the proceedings of the County Assembly either from the gallery or in the arena. In the absence of clear guidelines in the Meru County Standing Order No. 46, Petitioner urged the court to be guided by the decision in *Kenneth Muriuki v Meru County Assembly Service Board & another, Jacob Karari & another (Interested Parties)* (supra) where the Otieno J stated that

“The Meru County Assembly Standing Order 46, echoes the provisions of section 7 of Public Appointments (County Assembly Approval) Act and imposed the requirement that the time and place of approval hearings before the committee and the Assembly be notified to the public. While the standing order is silent on the medium of notification, the Public Appointments (County Assembly Approval) Act is unequivocal that the notification be by publication in at least two newspapers of national circulation in addition to any other form of communication considered appropriate. The member of the public are then permitted to contest the suitability of the nominated candidate by a written statement on oath”.

17. Petitioner also relied on *Benson Riitho Mureithi v J. W. Wakhungu & 2 others* [2014] eKLR where Ngugi J (as she then was) stated that:

“It may seem that *the Constitution* has imposed an irksome and onerous burden on those responsible for making public appointments by requiring that they make the appointments on the basis of clear constitutional criteria; that they allow for public participation; and that those they appoint meet certain integrity and competence standards.”.

18. In conclusion, Petitioner urged the court to find that the appointment of the members of the 1st Respondent was null and void and the appointment of the clerk to the 2nd Respondent by the 1st Respondent that was not properly constituted was equally a nullity.



19. On the issue of contempt of court by the Speaker of the 2nd Respondent who is the chairperson of the 1st Respondent, Petitioner submitted that the chairperson was privy to the orders issued by Otieno J in *Kenneth Muriuki v Meru County Assembly Service Board & another, Jacob Karari & another (Interested Parties)* (supra) on gender parity and public participation. Petitioner urged the court to find the chairperson in contempt for the reason that 1st Respondent proceeded to recruit in contravention of the court orders.
20. Concerning the issue of right to information Petitioner submitted that the 1st Respondent has not demonstrated any justification for denial of information sought by the Petitioner vide his letter dated 09th November, 2022 which Petitioner stated was served on the secretary of the 1st Respondent.

Respondents' case

21. Respondents opposed the Petition by way of a replying affidavit sworn on 23rd March, 2023 by Hon. Ayub Bundi Solomon who is chairperson of 1st Respondent and speaker of 2nd Respondent
22. Respondents pleaded that under the provisions of Section 12 (3) (a) to (d) of the *County Governments Act* No. 17 of 2012, the membership of the 1st Respondent comprises the Speaker of the 2nd Respondent, two members of the 2nd Respondent each nominated by the majority and minority parties in the 2nd Respondent and two external members (one man and one woman) appointed from members of public by the 2nd Respondent and that the clerk of the 2nd Respondent becomes the secretary of the 1st Respondent.
23. It was contended that the 1st Respondent complied with the law in appointing one female to the Board and the Speaker pleaded that he had no powers whatsoever to direct the majority and minority parties on whom to nominate and that is how the 1st Respondent ended up with four men and one woman.
24. It was contended that the clerk of the 2nd Respondent was recruited through a competitive process whereas the positions for the two members (one man and one woman) appointed from members of public were advertised in the Daily Nation and Standard Newspapers on 29th September, 2022, 64 applications were received, an ad hoc committee shortlisted 26 applicants and they were subsequently interviewed by the County Assembly whose proceedings are open to the public who sit in the gallery and Elias Murega Julius and Everlyn Kananu Thionkolu were recommended for appointment and were subsequently appointed as members of the 1st Respondent.
25. Concerning the appointment of the clerk to the 2nd Respondent, it was pleaded that the recruitment was constitutional, legal and procedural in that it was advertised in the newspapers, 13 applicants applied, 9 were shortlisted and their names advertised in the Daily Newspaper and on the 2nd Respondent's notice board, the 9 were subsequently interviewed on 29th December by members of the 1st Respondent and Jacob Kirari was appointed.
26. On the issue of contempt of court, Hon. Ayub Bundi Solomon pleaded that he was elected speaker of the 2nd Respondent in 2022 long after the judgment in *Kenneth Muriuki v Meru County Assembly Service Board & another, Jacob Karari & another (Interested Parties)* (supra) was delivered on 22nd October, 2021 and was therefore not in contempt. Respondents urged that the Petition be dismissed.

Respondents' submissions

27. Respondents contend that the letter dated 09th November, 2022 requesting for information from the 1st Respondent is in respect of Gituma Kioga and not Kaumbi Kioga the Petitioner herein. Respondents



- urged the court to find Petitioner has not discharged the burden to prove that he requested for information from the 1st Respondent and it was denied.
28. Concerning the appointment of two members of the 1st Respondent, (one man and one woman) appointed from members of public and Clerk to the 2nd Respondent, Respondents reiterated the step by step processes undertaken including invitation for memoranda from members of public regarding the suitability or otherwise of the shortlisted candidates as pleaded in the response to the petition and submitted that the appointments were open, transparent, accountable, competitive, free, fair, verifiable, constitutional and legal. In support of its case that there was adequate public participation, Respondents relied on *Pharmaceutical Society of Kenya & another v Attorney General & 3 others* (Petition 85 of 2018) [2021] KEHC 85 (KLR) (Constitutional and Human Rights) (22 September 2021) (Judgment) where Korir J cited *Nubian Rights Forum & 2 others v Attorney General & 6 others; Child Welfare Society & 9 others (Interested Parties)* [2020] eKLR.
 29. Additionally, Respondents contended that Petitioner did not apply for any position and was therefore not affected by the appointments in anyway and in support thereof relied on *Wickliffe Odhiambo Okeyo & another v Clerk Homa Bay County Assembly & 3 others* [2018] eKLR.
 30. Concerning compliance with the two third gender rule, Respondents contended that it was not a mandatory obligation and urged the court to be guided by the Supreme Court Advisory Opinion in *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* [2012] eKLR.
 31. Concerning the issue of contempt, Respondents submitted that the 1st Respondent and Speaker of the 2nd Respondent had fully complied with the judgment of Otieno J in *Kenneth Muriuki v Meru County Assembly Service Board & another, Jacob Karari & another (Interested Parties)* (supra) and that Petitioner having failed to demonstrate any defiance on the part of the Speaker, the order that he was in contempt could not issue. To fortify their argument, Respondents relied on *Sheila Cassatt Issenberg & another v Antony Machatha Kinyanjui* [2021] eKLR where it was held that for a party to be cited for contempt, he must have violated and or disobeyed an order that was directed at him.
 32. In conclusion, Respondents urged the court to find that the Petition has not been proved and dismiss it with costs to the Respondents.

Analysis & Determination

33. I have carefully considered the affidavit evidence on record and the submissions made by the parties and the issues that arise for determination are:
 1. Whether 2nd Respondent is in contempt of orders issued in Meru High Court Petition No. 4 of 2020
 2. Whether 1st Respondent has violated Article 35 of *the Constitution* as read with Section 4 & 8 of the *Access to Information Act* 2016
 3. Whether the appointment of members of the 1st Respondent violated the two-thirds gender rule
 4. Whether the appointment of the clerk to the 2nd Respondent is a nullity.
 5. Who pays Costs
34. In the case of *R v Attorney General & Another Exparte Mike Maina Kamau* [2020] eKLR, the court held that an applicant in contempt proceedings should prove that the terms of the order were clear



and unambiguous and binding on the defendant; that the defendant had knowledge or proper notice of the orders; that he acted in breach of the terms of the order and that his conduct was deliberate. (emphasis added).

35. 1st Respondent's chairperson has denied violating the court order as alleged. He also stated that he was not served with the court order as he not the 1st Respondent's chairperson as at the time the order was issued and his averments have not been controverted.
36. The Supreme Court of India in Mahinderjit Singh Bitta v Union of India & Others 1 A NO. 10 of 2010 (13th October, 2011) held that:
- “In exercise of its contempt jurisdiction, the courts are primarily concerned with enquiring whether the contemnor is guilty of intentional and willful violation of the order of the court, even to constitute a civil contempt. Every party is lis before the court and even otherwise, is expected to obey the orders of the court in its spirit and substance. Every person is required to respect and obey the orders of the court with due dignity for the institution. (Emphasis added).
37. The emphasis as shown in the above cases is that there must be “willful and deliberate disobedience of court orders” for there cannot be deliberate and willful disobedience, unless the contemnor had knowledge of the existence of that order. And because contempt is of a criminal nature, it is always important that breach of the order be proved to the required standard; first, that the contemnor was aware of the order having been served or having personal knowledge of it, and second; that he deliberately and willfully disobeyed it.
38. Due to the gravity of consequences that ordinarily flow from contempt proceedings, it is proper that the order be served and the person cited for contempt should have had personal knowledge of that order.
39. Knowledge and service of the order issued in Meru High Court Petition No. 4 of 2020 not having been proved, I make a finding that it has not been sufficiently demonstrated that the chairperson of the 1st Respondent deliberately disobeyed the court orders or at all and that no case has been made to cite him for contempt of the orders.
40. Article 35 of *the Constitution* provides that:
- 1) “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.
 - 2) Every person has the right to the correction or deletion of untrue or misleading information that affects the person.
 - 3) The State shall publish and publicize any important information affecting the nation.
41. In the case of Mpuru Aburi V Meru County Public Service Board & 4 Others [2021] eKLR, the court held that

“*The Constitution* undoubtedly provides that information held by the state is accessible by citizens and that that information is available on request. What this means is that once a citizen places a request to access information, the information should be availed to the



citizen without delay. Article 35 of *the Constitution* does not in any way place conditions for accessing information.

42. For purposes of actualizing Article 35, Parliament enacted *Access to Information Act* 2016 (the Act). Section 8 of the Act provides for procedure of accessing information in the following terms:

(1) An application to access information shall be made in writing in English or Kiswahili and the applicant shall provide details and sufficient particulars for the public officer or any other official to understand what information is being requested.

43. The annexures filed by the Petitioner demonstrate that the letter dated 09th November, 2022 requesting for information from the 1st Respondent is in respect of Gituma Kioga and not Kaumbi Kioga the Petitioner herein.

44. There is no evidence that Petitioner made any request for information and it was declined.

45. It is now a requirement under *the Constitution* that state organs, state officers and in all their decisions, or activities, must reflect the national values and principles of governance stipulated under article 10 of *the Constitution* of Kenya 2010.

46. It has been demonstrated that the membership of the 1st Respondent violates the two-third gender rule set out under Article 27(8) of *the Constitution* in that out of the 5 members only one is a woman.

47. In *Kenneth Muriuki v Meru County Assembly Service Board & another, Jacob Karari & another* (Interested Parties) (supra) Otieno J held as follows:

“The law, section 12(3), County Government Act, does not stifle the power and ability of the assembly to choose what gender holds the office of the speaker and the two members of the assembly nominated by the political parties. The assembly and parties that contribute to its membership have the liberty to make decisions that protect, uphold and defend *the Constitution*.”

48. Consequently, I find that no effort was made to ensure compliance with Articles 10 and 27(8) of *the Constitution* and declare that the composition of the 1st Respondent violates *the constitution*.

49. Whereas there is evidence that the clerk to the 2nd Respondent was appointed by a non-compliant Board, I find that it would not be in the interest of justice to declare that appointment and any consequent actions of the Board a nullity for the consequences might be have far reaching consequences and might disrupt services to the people of Meru.

50. On whether there was public participation in the appointment of the clerk to the 2nd Respondent, there is evidence that the recruitment was advertised in the newspapers, 13 applicants applied, 9 were shortlisted and their names advertised in the Daily Newspaper and on the 2nd Respondent’s notice board, the 9 were subsequently interviewed on 29th Decembers by members of the 1st Respondent and Jacob Kirari was appointed.

51. There is no evidence of any memoranda having been received by the 1st Respondent concerning the suitability of any of the candidates and especially Jacob Karari. I am content to cite *Korir J* (as he then was) in *Nubian Rights Forum & 2 others v Attorney General & 6 others; Child Welfare Society & 9 others* (Interested Parties) [2020] eKLR, where he held:

“It is sufficient for the legislature to facilitate the participation of the public in its legislative affairs. In that regard the court stated that: “The principle of public participation does



not require the legislature to conduct a census-like exercise of knocking at the door of every person residing in its jurisdiction with a view to confirming that the residents have given their opinions on a contemplated legislative measure, and where no comments are forthcoming, to ‘forcefully’ extract opinions from residents. The duty placed upon the legislature by the law is to inform the public of its business and provide an environment and opportunity for those who wish to have a say on the issue to do so.”

52. Consequently, I find that there was sufficient public participation in the recruitment of the 2nd Respondent’s clerk.

53. From the foregoing therefore, it is hereby ordered:

1. The orders sought in the Petition are declined.
However
2. The Respondents are directed to ensure that the composition of the 1st Respondent complies with the Article 27(8) of *the Constitution* on or before 31st December, 2023
3. In the event that 1st Respondent remains non-compliant after 31st December, 2023, any action or decision that it may be taken thereafter shall be a nullity
4. Each party shall bear its own costs.

DELIVERED THIS 26th DAY OF October 2023

WAMAE. T. W. CHERERE

JUDGE

Appearances

Court Assistants - Kinoti/Munene

For Petitioner -Ms. Muchomba for Wambugu & Muriuki Advocates

For Respondent - Mr. C. Mbaabu for Carpeters Mbaabu & Co. Advocates

