



REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CONSTITUTIONAL PETITION NO. 15 OF 2018

IN THE MATTER OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF THE COUNTY GOVERNMENTS ACT

AND

**IN THE MATTER OF APPOINTMENT OF CHIEF OFFICERS, ADVISORS, MEMBERS OF THE PUBLIC SERVICE BOARD
AND MEMBERS OF THE MUNICIPAL BOARDS**

AND

**IN THE MATTER OF DISCRIMINATION AND MARGINALIZATION OF THE OGIEK/NDOROBO COMMUNITY IN THE
APPOINTMENTS.**

BETWEEN

JOHNSON CHEPROT TAKUR suing on behalf

of the Ogiek/Ndorobo Council of elders.....PETITIONER

AND

COUNTY GOVERNMENT OF BUNGOMA.....1ST RESPONDENT

GOVERNOR OF BUNGOMA COUNTY

WYCLIFFE WAFULA WANGAMATI.....2ND RESPONDENT

BUNGOMA COUNTY PUBLIC

SERVICE BOARD.....3RD RESPONDENT

COUNTY ASSEMBLY OF BUNGOMA.....4TH RESPONDENT

J U D G E M E N T

By a petition dated 12th November, 2018, the petitioner on behalf of the Ogiek Community seeks;

- a. A declaration that nominees by the 2nd respondent to the position of Chief Officers, Advisors, members of the Public Service Board and members of the Municipal Boards is in contravention of Articles 10 and 27 of the Constitution.

- b. An order of certiorari to quash the nominees by the 2nd respondent as reflected in the press release dated 29/8/2018 to the position of Chief Officers, Advisors members of the Public Service Board and members of the Municipal Boards as the same is in contravention with Articles 10 and 27 of the Constitution.

c. An order of mandamus to compel the 2nd respondent to include members of the Ogiek community, proportionate number of all the genders to the positions of Chief Officers, advisors, members of the Public Service Board and members of the Municipal Boards as the same is in contravention of Articles 10 and 27 of the Constitution.

The petitioners aver that on 29th August, 2018, the 2nd respondent issued a press release of people to be appointed for the positions of Chief Officers, Advisors, members of the Public Service Board and members of the Municipal Boards.

From the list of the appointees, no member of the Ogiek community had been appointed to any of the positions and does not take into account the Two Thirds gender principle, the disabled and the youth. The petitioners want the appointments declared unconstitutional.

The petitioners aver that the composition disregards the Constitutional and Statutory demands to include all the communities resident in Bungoma including the petitioners, a minority and marginalized community. That the appointment contravenes Article 27 as it is made up of 13 women out of 46 appointees.

That the 4th respondent has started the process of vetting the appointees that does not meet the gender composition, the youth, the disabled and members of the marginalized communities. That all appointments made by the 2nd respondent since election have ignored the petitioner's qualified members.

The petitioners further aver that the 2nd respondent has also ignored the petitioners even in appointments of county executive committees and the same has been raised in the county assembly.

The respondents opposed the petition by way of a Replying Affidavit sworn by the Speaker who depones that upon receipt of the names of the nominees from the 1st and 2nd respondents together with petitions from the petitioners and 2 other groups, he committed the nominees to the sectoral committees and suspended the vetting exercise pending the hearing and determination of the petitions challenging the nominations.

That the petitioners were invited by the Committee on Public Administration and ICT whereby they were given a hearing and the report later tabled and adopted by the House whereupon adoption of the report by the 4th respondent, the suspension was vacated for vetting to proceed.

That 4th respondent vetted and approved one Somali Youth lady aged 27 years as the Chief Officer Gender and Culture and 3 other women as Chief Officers and a member of the County Public Service Board. The process is substantially done and the nominees approved by the House.

That the County Assembly is just carrying out its mandate under Section 8(1) of the County Governments Act and Sections 4 and 9 of the Public Appointments (County Assemblies Approval) Act. He urges this court to dismiss the petition.

Chrisantus Wamalwathe Acting County Secretary and Head of Public Service of 3rd Respondent on his part depones that the 1st respondent through the 3rd respondent advertised for various posts in the Daily Nation of 8th April, 2018 whereby several applications were received and various names shortlisted. That interviews were thereafter conducted on diverse dates and later on forwarded the qualified candidates to the 2nd respondent for onward transmission to the 4th respondent for vetting in relation to the 12 positions for Chief Officers, 2 for County Public Service Board and 1 for the County Secretary.

He depones that all the Legal requirements under Article 232 of the Constitution, Sections 44, 45, 58 and 65 of the County Governments Act as well as the Public Appointments (County Assemblies Approval) Act were duly followed.

The deponent avers that the County Assembly invited members of the public to attend the vetting exercise and submit memoranda on the nominees to assist in the vetting process whereupon the petitioners presented a petition which was heard and a decision made.

He depones that Saphia Awil Ibrahim and Carolyne Nekesa Maset aged 27 and 31 years respectively have been appointed to the positions of Chief Officers Gender and Culture and Youth and Sports respectively thus the youth category have been considered. That Saphia Awil Ibrahim is from the minority Somali community.

That in the category of people living with disability, the Deputy Governor, County Executive Committee Member for Environment, the Chairman, Public Service Board and the Chief Officer Finance and Treasury are people living with disability.

That the County Government has employed persons from the 9 Sub Counties forming Bungoma County and that all the 43 communities residing in Bungoma will not all make into the 10 County Executive Committee Members, 18 Chief Officers and other positions.

In their written submissions, the petitioners raised the following issues for determination.

- 1. Did the respondents violate Article 27(4) by discriminating against the petitioners in appointments of chief officers, advisors, members of the public service board and members of the municipal boards within Bungoma County Government?**
- 2. Was the respondent's failure to undertake affirmative action in favour of the petitioners contrary to Article 27(6) hence unconstitutional?**
- 3. Did the respondents violate Articles 10 and 232 in appointment of chief officers, advisors, members of the public service**

board and members of the municipal boards within Bungoma County Government?

4. What are the appropriate reliefs and costs order.

On the first issue, it is submitted by Petitioners that Article 27 is concerned with formal equality. The respondents discriminated against the petitioners by excluding all the members of the Ogiek/Ndorobo community from appointment into the positions of Chief Officers, Advisors, members of the Public Service Board and members of the Municipal Boards within Bungoma County Government thus the respondents discriminated against the petitioners based on ethnic or social origin contrary to Article 27(4) of the Constitution.

It is further submitted on this issue that the Respondents unlawfully excluded disabled persons from the appointments and disregarded the 5 percent quota under Article 54(2) as well as the Gender quota under Article 27(8) by appointing county executive committee members beyond the two-thirds gender quota.

On the 2nd issue, counsel submits that Article 27(6) requires the state to take Legislative and other measures including affirmative action programmes and policies to redress any disadvantage suffered by individuals or groups because of past discrimination in order to give full effect to rights under Article 27. That the Ogiek Community are a marginalized community as defined by Article 260.

Counsel cites the statutory report of the National gender and equality Commission entitled ***Unmasking Ethnic Minorities and Marginalized Communities; who and where(2017)*** which identifies the Ogiek as a minority as well as a marginalized community.

The petitioners further submit that their rights are protected by Article 56 of the Constitution and Section 97 of the County Governments Act, 2012 which sets out mandatory principles.

Counsel submits that Article 21(1) imposes a mandatory obligation on the respondents to observe, respect, promote and fulfill all the rights and fundamental rights in the Bill of rights including those in Article 27.

That despite the foregoing, the respondents failed to take any affirmative action or other measures to redress the marginalization of the petitioners in public appointments. That the admission by the respondents that it did not take any affirmative action measure not only violates article 27(6) but also article 21(1) and section 97(d) of the county governments act, 2012.

Citing the case of ***Republic Vs Independent Electoral and Boundaries Commission ex-parte councilor Eliot Lidubwi Kihusa (2012) eKLR***, counsel submits that positive discrimination or affirmative action is justified to lift disadvantaged groups to equal worth as members of the human race under Article 27.

It is their submission that the respondent have not offered any justifiable reason why they did not take any affirmative action in favour of the petitioners rendering the omission unreasonable and unjustifiable under Article 24 of the Constitution. For this proposition, counsel relies on the decision in ***Marilyn Muthoni Kamuru Vs Attorney General (2016)eKLR***.

It is the petitioners' submission that the respondent's failure to employ affirmative action in favour of the women candidates in the conduct of the interview is unconstitutional.

On the 3rd issue, it is submitted that the positions of Chief Officers, advisors, members of the Public Service Board and members of the Municipal Boards are public offices in the Public Service and therefore amenable to Constitutional principles of equality, competition and diversity. That the provisions of Article 10 binds the respondents in this regard.

That the Public Service (Values and Principles) Act, 2015 implements the provisions of Article 232 and is therefore a normative derivative of the Constitution. Section 10(2)(a)(c) and (d) of the Act reinforces the principles of equality in the public service.

Citing ***The matter of the Kenya National Human Rights Commission (2014) eKLR***, the court is required while interpreting the Constitution to take into account a consideration of the text and other provisions in question, non-legal; phenomenon such as Kenya's historical, economic, social, cultural and political considerations. These principles are supported by the case of ***Community Advocacy And Awareness Trust Vs Attorney General (2012)eKLR*** and ***Republic Vs Attorney General ex-parte Tom Odoyo Oloo (2015)eKLR***.

On the requirement of merit, integrity and diversity as the basis for appointment to the public office, counsel cites principle V of the ***Commonwealth (Latimer House) principles on the accountability of and the relationship between the three branches of Government, 2004***.

On the 4th issue, it is submitted that the court ***E.W. A & 2 Others Vs Director of Immigration and Registration of Persons and Another (2018) eKLR***, delineated the scope and category of appropriate relief. That the appropriate relief in the circumstances of this case is one that ensures that recruitment and appointment to public office are constitutionally conducted and that the principles of equality and diversity are upheld. Counsel submits that the appropriate relief is to nullify all the appointments. Reliance has been placed in the case of ***David Kariuki Muigua Vs Attorney general (2012)eKLR***.

The 1st, 2nd and 4th respondents equally filed their submissions raising the following issues for determination by this court.

1. Whether the honourable court has jurisdiction to hear and determine the petition.

2. Whether the interest of the minorities, marginalized, the youth and persons with disability were taken care of vis-à-vis the

provisions of the constitution.

3. Whether the petition is competent.

On the 1st issue, it is submitted by the Respondents that the dispute relates to the nomination and appointment of Chief officers, Advisors, members of county public service board and members of Bungoma and Kimilili Municipal Boards. The provisions of Article 162 (2)(1) of the Constitution as well as Section 12 of the Employment Act and 77 of the County Governments Act have been cited.

In urging the court to dismiss this petition, the respondents have relied in several authorities *to wit*; ***Owners Of Motor Vessel ‘Lilian S’ Vs Caltex Oil Kenya Limited (1989)1KLR 1, Macharia & Another Vs Kenya Commercial Bank Limited & 2 Others Civil Application 2/ 2011, Beatrice Nyaboke Oisebe Vs Independent Electoral And Boundaries Commission And 2 Others (2013)eKLR, Isaiah Gichu Ndirangu & 2 Others Vs Independent Electoral and Boundaries Commission and 4 Others (2016)eKLR, Dr. Billy Elias Nyonje Vs The National Alliance Party of Kenya & 2 Others Nairobi J.R 61/2013 inter alia.***

On the competence of the petition, the respondents submit that the petitioners have failed to demonstrate which particular rights have been violated and to what extent. That the respondents have complied with the requirements of the disabled, the youth and the marginalized who have been catered for. The gender rule has also been complied with.

They further submit that the respondents endeavoured to employ people from all the 9 Sub Counties of Bungoma County, the minorities and marginalized groups, women, youth and persons with disability.

On whether the appointments were illegal, irregular, un-procedural and unconstitutional, the respondents submit that the petitioners have never interrogated the employment records of the County Government of Bungoma. That they have failed to provide any evidence to support the same save for allegations and speculations.

Analysis and Determination

Having analyzed the petition together with the rival submissions, the court is of the view that the following issues emerge for determination.

1. Whether the court has jurisdiction to determine the matter.

2. Whether the respondents discriminated against the petitioners in their appointment of officers into various offices, within the County Government of Bungoma.

On the first issue, it is true, jurisdiction is everything. Without the requisite jurisdiction which flows from either the constitution or Laws, the court ought to, at the earliest opportune time down its tools. There are a number of decisions on this very subject. In the case of ***Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service [2019] eKLR***, the Court of Appeal citing with approval the case of ***Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd. (1989) KLR 1 held;***

A suit filed devoid of jurisdiction is dead on arrival and cannot be remedied. Without jurisdiction, the Court cannot confer jurisdiction to itself.

The respondents’ challenge on jurisdiction is based on the fact that proper procedure that the petitioners should have taken is contained in Section 77 (1) and (2) of the County Governments Act. The Section provides;

1. Any person dissatisfied or affected by a decision made by the County Public Service Board or a person in exercise or purported exercise of disciplinary control against any county public officer may appeal to the Public Service Commission (in this Part referred to as the “Commission”) against the decision.

(2) The Commission shall entertain appeals on any decision relating to employment of a person in a county government including a decision in respect of—

(a) recruitment, selection, appointment and qualifications attached to any office; (b) remuneration and terms and conditions of service; (c) disciplinary control; (d) national values and principles of governance, under Article 10, and values and principles of public service under Article 232 of the Constitution; (e) retirement and other removal from service; (f) pension benefits, gratuity and any other terminal benefits; or (g) any other decision the Commission considers to fall within its constitutional competence to hear and determine on appeal in that regard.

This court’s jurisdiction to hear and determine matters which concern itself with the interpretation of the constitution as well as enforcement of individual rights flows from the provisions of Articles 23 and 165 of the Constitution. The petitioners herein approached this court seeking the court’s intervention in redressing the violation of their rights by the Respondent in the manner of recruitment and appointment of various officers by the respondents. The petitioners’ challenge hinges on the provisions of Article 27 which guarantees them of being treated with equality and being protected from discrimination and the failure by the respondents to set in action affirmative action processes to redress the disadvantage suffered by the petitioners.

Having scrutinized the petition and the rival submissions on the issue, I am satisfied that the petitioner’s claim is based on a constitutional matter falling under the Article 27 of the constitution.

I find that the petition is properly instituted before this court.

On whether the petitioners were discriminated against, the relevant Article dealing with the right is Article 27 of the Constitution which provides;

(1) Every person is equal before the law and has the right to equal protection and equal benefit of the law;

(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms;

(3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic cultural and social spheres,

(4) The state shall not discriminate, directly or indirectly against any person on any grounds, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age disability, religion conscience, belief culture dress, language or birth;

(5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified as contemplated in clause (4),

(6) To give full effect to the realization of the rights guaranteed under this Article, the state shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination;

(7) Any measures taken under clause (6) shall adequately provide for any benefits to be on the basis of genuine need;

(8) In addition to the measures contemplated in clause (6), the state shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same genders.”

The petitioners' contention is based on sub Article 27(4) and (6). That no qualified member of the Ogiek, a marginalized Community has been appointed, the appointment does not take into account the gender balance as well as the youth and the disabled.

On the subject of the respondents failing to adhere to the gender rule principle, the Supreme Court in ***The Matter of The Principle of Gender Representation in the National assembly and the Senate {2012} eKLR (Advisory Opinion No, 2 of 2012)***, which had sought an advisory opinion on whether the two-third gender principle could apply in the 2013 general elections. The Supreme Court held that realization of the principle was to be achieved progressively and Parliament was to enact an enabling legislation by 27th August 2015.

The other contention is with respect to the youth and the disabled. The respondent stated on oath as well as in its submissions that a number of its employees fall within this category. In the youth category, it is stated that two people representing the youth were appointed; Saphia Awil Ibrahim, a Somali aged 27 years was appointed into the docket of Chief Officer Gender and Culture and another one Caroline Nekesa Maset aged 31 years appointed Chief Officer Youth and Sports.

It was further stated that the Deputy Governor, County Executive Committee Member for environment, the chairman, Public Service Board and the Chief Officer Finance and Treasury are people living with disability.

Upon perusal of the petition and the replies thereto, the court notes that the respondent through the 3rd respondent did put up a newspaper advertisement on 18th April, 2018 inviting members of the public to submit their applications for consideration and possible recruitment to the offices.

After closure of the application, selected candidates names' were published and members of the public invited to give their views on the suitability of each candidate. I also note several petitions were presented before the sectoral committees of the house. One such petition was lodged by the Ogiek community on the appointment of the chief officers, advisors and the members of the public service boards. The petitioner herein appeared before the committee on public administration and ICT on the 11th October, 2018. They gave their views and a decision made.

The petitioners have not tabled evidence showing that the process was flawed or that unsuitable persons were shortlisted to the positions. Even if that was the case, they were given chance by the committee and their views factored in. There is no evidence that suitable candidates from the petitioners' community applied and were not considered for the appointment despite qualifying.

It was incumbent upon the petitioners to bring out this fact in court showing that by virtue of their ethnic background, the respondents unfairly and in disregard of their rights under Article 27, the respondents discriminated against them.

This court therefore finds that the appointment of the officers into the various offices did not discriminate against the petitioners in any way. There is no evidence tabled before this court showing any violation of their constitutionally protected rights.

In sum total, this petition is dismissed with no orders as to costs.

DATED, AND SIGNED AT BUNGOMA THIS 30TH DAY JULY, 2021.

S N RIECHI

JUDGE