



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MERU**

**PETITION NO. 4 OF 2020**

**IN THE MATTER OF**

**ABUSE OF ADMINISTRATIVE ACTION CONTRARY TO**

**ARTICLE 47 OF THE COSTITUION OF KENYA,**

**AND**

**IN THE MATTER OF**

**COTRAVENTION OF THE NATIONAL VALUES AND PRINCIPLES OF**

**GOVERNANCE AS PROVIDED UNDER ARTICLE 10 OF**

**THE CONSTITUTION OF KENYA,**

**AND**

**IN THE MATTER OF**

**ARTICLES 2, 3,19,20,21,22,23,24,165 AND 258 OF**

**THE CONSTITUTION OF KENYA,**

**AND**

**IN THE MATTER OF**

**CONTRAVENTION OF THE TWO-THIRD GENDER RULE AS PROVIDED**

**UNDER ARTICLE 27 (8) OF THE CONSTITUTION OF KENYA,**

**AND**

**IN THE MATTER OF**

**CONTRAVENTION OF THE OBJECTS OF DEVOLUTION AS PROVIDED**

**UNDER ARTICLE 174 OF THE OF THE CONSTITUTION OF KENYA,**

**AND**

**IN THE MATTER OF**

**CONTRAVENTION OF LEADERSHIP AND INTERGRITY PRINCIPLES AS**

**PROVIDED UNDER ARTICLE 73 OF THE CONSTITUTION OF KENYA,**

**AND**

**IN THE MATTER OF**

**CONTRAVENTION OF PUBLIC PARTICIPATION IN THE COUNTY ASSEMBLY**

**AFFAIRS AS PROVIDED UNDER ARTICLE 196(1) OF**

**THE CONSTITUTION OF KENYA,**

**AND**

**IN THE MATTER OF**

**CONTRAVENTION OF VALUES AND PRINCIPLES OF PUBLIC SERVICES**

**AS PROVIDED UNDER ARTICLE 232 OF THE CONSTITUTION OF KENYA,**

**AND**

**IN THE MATTER**

**OF THE FAIR ADMINISTRATIVE ACTION ACT,**

**AND**

**IN THE MATTER OF**

**CONTRAVENTION PUBLIC APPOINTMENTS**

**(COUNTY ASSEMBLIES APPROVALS) ACT**

**AND**

**IN THE MATTER OF**

**CONTRAVENTION MERU COUNTY ASSEMBLY SERVICES ACT,**

**BETWEEN**

**KENNETH MURIUKI.....PETITIONER**

**AND**

**MERU COUNTY ASSEMBLY SERVICE BOARD.....1<sup>ST</sup> RESPONDENT**

**MERU COUNTY ASSEMBLY.....2<sup>ND</sup> RESPONDENT**

**AND**

**JACOB KARARI.....1<sup>ST</sup> INTERESTED PARTY**

**EARNEST KIMAITA..... 2<sup>ND</sup> INTERESTED PARTY**

**JUDGMENT**

1. The petitioner approached this court through the Petition dated 9/3/2020 and sought orders of declaration to the effect that the composition of the 1<sup>st</sup> respondent as constituted on the 21/2/2020 was in violation of Article 27(8) of the Constitution, and any business, actions and/or activities conducted by it be declared invalid and a nullity; that the 2<sup>nd</sup> respondent overlooked the constitutional and statutory requirements in approval of the 1<sup>st</sup> interested party as its clerk as it was in violation of the provisions of the Constitution, the Standing Orders, County Government Act and the Public Appointments (County Assemblies Approval) Act, and therefore a nullity; that there having been no forum for public participation in the entire process of recruitment, nomination, vetting, debate and appointment of the 1<sup>st</sup> respondent as the Clerk for the 2<sup>nd</sup> respondent, the 1<sup>st</sup> and 2<sup>nd</sup> respondents compromised its integrity and violated the provisions of Chapter 6 of the

Constitution, thereby rendering the entire process a nullity and that the entire process of recruitment of the Clerk of the 2<sup>nd</sup> respondent be nullified. The petitioner also asked for costs as well as any other relief the Honorable court may deem fit and just to meet the ends of justice.

### **Background and Outline of the Petitioner's Case**

2. Following the retirement of a Mr. Justus Kiambi Ariithi on 30/07/2019, the 1<sup>st</sup> respondent thus embarked on the process of recruiting a replacement. The 1<sup>st</sup> respondent, on 27/08/2019, put an advertisement in the Daily Nation Newspaper inviting qualified applicants to apply for the said post for the applications to be received not later than the 09/09/2019. As at the date of that advertisement, the 1<sup>st</sup> respondent was constituted of 5 members, being 1 female and 4 male. It is upon this composition of the 1<sup>st</sup> respondent that the petitioner grounds his allegation of violation of Article 27 of the Constitution, on the two third gender rule.

3. Subsequently, 7 candidates were shortlisted for interviews. On 14/02/2020, the Human Resource Officer invited the shortlisted candidates for interviews scheduled for 21/02/2020, before the 1<sup>st</sup> respondent. The petitioner contends that the public was not invited to participate in the process, which amounts to violation of constitutional and statutory provisions.

4. After the interviews were concluded, the 1<sup>st</sup> respondent retreated to Nairobi to prepare a report, which awarded the scores as below;

a) Jacob Kirari	90%
b) Earnest Kimaita	80%
c) Jenaro Guantai	74%
d) Justin Majau	70%
e) Ibrahim Muteire	76%
f) Stephen Kithieka	71%
g) Johnson Gitobu	55%

5. The 1<sup>st</sup> respondent recommended appointment of the 1<sup>st</sup> interested party as the clerk to the 2<sup>nd</sup> respondent, subject to county assembly approval. At the assembly, Hon. Godfrey Mutembei moved the motion for approval on 27/02/2020, the same was so approved and on the same day it was forwarded to the 2<sup>nd</sup> respondent. The process of approval is faulted on the allegations that the approval motion was not in the weekly schedule of house business. Despite that fact, the 2<sup>nd</sup> respondent approved the nomination and the 1<sup>st</sup> interested party was sworn in as the Clerk to the 2<sup>nd</sup> respondent.

6. The petitioner further contends that the proceedings of the 2<sup>nd</sup> respondent on 27/02/2020 remain a comical satire devoid of any constitutional and statutory compliance. He further maintains that the violations of the law render the appointment of the 1<sup>st</sup> interested party as clerk to the 2<sup>nd</sup> respondent illegal and unlawful and invites the court to so declare.

### **Respondents' Case in Opposition to the petition**

7. The two respondents filed a replying affidavit sworn by the speaker of the 2<sup>nd</sup> respondent, Hon. Joseph Kaberia on 24/7/2020 in which the deponent states that at the time of the recruitment process, the 1<sup>st</sup> respondent was properly constituted according to Section 12 of the County Governments Act in that save for the man and woman to be appointed by the Assembly from persons with experience in public affairs and not members of the Assembly, other members are members by virtue of positions held and the assembly has no control over political parties on the persons they appoint to the board. The speaker sought reliance on the Advisory Opinion No 2 of 2012, in the matter of Principles of Gender Representation in the National Assembly and senate which advised progressive application of the principle towards realization of gender parity. He urged that the court considers the possible ramification of nullification of the appointment of the 1<sup>st</sup> interested party to be able to impact on all the staff of the assembly recruited by the assembly while similarly constituted.

8. The speaker then seeks that the petition be struck out for want of jurisdiction on the basis that the matter ought to have been filed and pursued before the Employment and Labour Relations Court and not the High Court. He contends that the position was well advertised as provided by section 18 of the County Governments Act and Section 13 of the County Assembly Services Act and that the applicants shortlisted were well informed and invited for interviews. The 1<sup>st</sup> interested party was nominated and appointed with County Assembly's approval, after he scored the highest marks. He denies any sittings by the assembly or him chairing any sittings on 24/02/2020 and asserted the lack of any evidence of such sitting in the Hansard is because the Assembly never sits on Mondays.

9. He clarifies that the assembly decisions are made by way of resolution and passed by vote from the members exercising the delegated power of the people and that the provisions of Articles 38, 47 and 50 Constitution do not apply. The principles of separation of powers between arms of government was underscored and the court urged not to interfere with the 2<sup>nd</sup> respondent in execution of its mandate in approving and appointment of the 1<sup>st</sup> Interested party and asserted that the proceedings and decisions of the 2<sup>nd</sup> respondent are beyond question in any court in terms of section 10 of the County Assemblies, Powers and Privileges Act, 2017. He then took the position that the petitioner should have lobbied the assembly to reject the report and proposed appointment by raising matters now raised here rather than waiting to invite the court to the matter beyond the court's mandate.

10. On the assertion and contention that there was violation of the provisions of Public Appointments (County Assemblies Approval) Act, 2017, the deponent took the view that the same applies not, as the office of the Clerk is an office in the County Assembly Service and governed by the county Assembly Service Act exclusively. In conclusion, he prays for dismissal of the petition with costs on the basis that it carries no public interests but personal and political interests which then present abuse of court process.

### **The interested parties' Case**

11. The 1<sup>st</sup> interested party in his replying affidavit sworn on 16/6/2020, controverts the averments in the petition, by stating that he was duly recruited, appointed and sworn into office as the clerk to the 2<sup>nd</sup> respondent, pursuant to section 13 of the County Governments Act and County Assembly Services Act. He maintains that he emerged the best after an open, transparent, rigorous and competitive interview process after which the 1<sup>st</sup> respondent forwarded the report to the 2<sup>nd</sup> respondent for approval. The same report was tabled, debated and approved in accordance with the County Government Act. In his view, his appointment was beyond reproach as it was done in strict adherence to both the Constitution, the relevant statute as well as the rules regarding recruitment. Further, he states that the 1<sup>st</sup> respondent was well constituted during the entire recruitment process.

12. The 2<sup>nd</sup> interested party on the other hand states that, following the 1<sup>st</sup> respondent's advertisement for the position of clerk, he forwarded his application to that effect. He was then called by a Mr. Marete on 14/02/2020 informing him that he had been shortlisted, he did attend the interview on 21/02/2020, however, no other communication came from the 1<sup>st</sup> respondent in that regard till he was served with the current petition. He only came to learn from social media that the 1<sup>st</sup> interested party had been appointed as clerk to the 2<sup>nd</sup> respondent. He maintains that the public was neither informed of the shortlisted candidates nor invited to comment on their suitability. The media was also not present during the interviews. He thus concludes that there was no public participation in the recruitment process yet it is a public office. The 2<sup>nd</sup> interested Party evidently supports the petition.

### **Submissions Offered by the petitioner and 2<sup>nd</sup> interested party in support of the petition**

13. The petitioner in his submissions filed on 18/8/2020, contends that the board falls short of the requirements of Article 27(8) of the Constitution and Section 46(a) of the County Assembly Services Act because at the time of recruitment, the 1<sup>st</sup> respondent was made up of five members; being one female and four males. On the question of whether the appointment of the clerk was done procedurally, the petitioner's contention is that the procedure was disregarded in that the names of shortlisted candidates were never published and the public was not invited to give remarks on their integrity or suitability during the approval hearing and therefore the constitutional dictated impute by the public was circumvented or just sidestepped. To further his assertions, the petitioner cites the case of **Benson Riitho Mureithi v J.W. Wakhungu & 2 others (2014) eKLR** for the proposition that there is a burden, even if perceived irksome, upon persons mandated to make public appointment to do so on constitutional criterion embracing public participation to gauge integrity and competence standards. He submits further that the appointment of the 1<sup>st</sup> interested party by the 1<sup>st</sup> respondent was done hastily and secretly without informing the public and that the 1<sup>st</sup> respondent contravened Article 73 of the Constitution. On the nomination of the 1<sup>st</sup> interested party, he faults the 1<sup>st</sup> respondent for non-compliance with the laid down legal procedure in sections 13 and 14 of the County Governments Act. He further quotes section 18 of the County Assembly Services Act which emphasizes on an open, transparent and competitive recruitment process. He contends that the 2<sup>nd</sup> respondent breached Standing Order 46 of Meru County Assembly Standing Orders, in the manner in which the approval of the 1<sup>st</sup> interested party was conducted. To bolster this point, he cites Section 7 of the Public Appointments (County Assemblies Approval) Act, which sets out how an approval hearing is to be conducted. Specifically, he notes that no notices were issued to the public or the interested parties for the approval hearings.

14. It is additionally submitted that public participation as provided under Article 10(2) of the Constitution is not aspirational nor progressive but immediate. The Court of Appeal decision in **Independent Electoral (IEBC) and Boundaries Commission v National Super Alliance (NASA) Kenya & 6 others (2017) eKLR** was cited for the proposition that the values in Article 10 (2) of the constitution are justiciable and enforceable. In conclusion, it was submitted that the appointment of the 1<sup>st</sup> interested party was not open, transparent and was shielded from public participation thus amenable to being upset. Based on such submissions, the petitioner isolates and identifies issues to determination to be; whether the 1<sup>st</sup> respondent was constitutionally constituted while undertaking the process of appointment of the 1<sup>st</sup> interested party; whether the constitutional and statutory legal requirements for public participation were honoured in the process of recruitment of the 1<sup>st</sup> interested party and if the statutory procedural requirements were made and lastly if the office of Clerk to County Assembly is a public office.

15. The 2<sup>nd</sup> interested party in his submissions filed on 28/9/2020 supports the petition and takes the stand that the entire recruitment process was devoid of public participation and was thus void and therefore the respondents were keen to shield the court from scrutinizing their conduct by failure to provide the information sought. On jurisdiction, it is asserted and submitted that the court has the requisite jurisdiction to entertain the petition by citing the decision in **Sollo Nzuki v Salaries and Remuneration Commission & 2 Others [2019]eKLR** where the court held that whereas the processes towards recruitment are intended to create employer-employee relationship, where the question is whether the constitutional provisions have been complied with or flouted, the high court has jurisdiction to entertain the matter pursuant to article 165(3) of the constitution.

16. On the application for provision of information, it is contended that there is a greater duty on the state, state organs and state officers to give access to information as a way to enjoy an integral right in the bill of rights, not a fringe right, or justify failure to give such access. For that position, the decision in **Katiba Institute v Presidents Delivery Unit & 3 Others (2017) eKLR** was cited. The court was thus urged to find that the documents requested were indeed necessary for the just determination of the petition and the failure by the respondent to provide the document, which has denied the court access to same should be noted by the court.

17. On the petition, the 2<sup>nd</sup> interested party took the view that the requirement for public participation was breached and circumvented and cited to the court the decision in **IEBC v NASA (2017) eKLR** for the proposition that, public participation is a national value grounding the expression of people's sovereignty and a cornerstone of democratic governance whose violation can found a cause of action. In relation to

county governments, the 2<sup>nd</sup> interested party posits that public participation is a jealously guarded principle of governance to secure ownership by the people of decisions by devolved units which justifies the enactment of the same in section 3(f) of the County Governments Act. For the petition here, the 2<sup>nd</sup> interested party takes the position that there was never public participation hence the recruitment of the 1<sup>st</sup> interested party was untenable and should be declared so.

#### **Submissions by The Respondents in opposition to the petition**

18. The 1<sup>st</sup> (sic) respondent and 1<sup>st</sup> interested party filed joint written submissions on 2/10/2020 which largely rehearse the factual positions in the Replying Affidavit but very little reliance on the law on otherwise very forceful submissions. The gist of the submissions is that the recruitment of the clerk is not guided by the provisions of the Public Appointments (County Assembly Approval) Act rather, the substantive laws are the County Assembly Services Act and the County Government Act. Both contend that the Public Appointments (County Assembly Approval) Act, only governs the approval of external appointments and not internal county Assembly appointments. That in deed is a very forceful submission which ought to have cited a statute or decision of the court to buttress but no law was cited.

19. The further submission by the two is on gender parity and to the effect that the board is constituted by appointment of both male and female members as required under section 12(3) of the County Assembly Services Act. To them only Section 12(3) d of the County Assembly Service Act mandates the appointment of a female and the same had been complied with.

20. Finally, the two maintain that the appointment of the 1<sup>st</sup> interested party was done in strict adherence to the Constitution, relevant statute as well as rules regarding competitive recruitment, in that there was public declaration of the vacancies, invitation of applications, shortlisting of qualified applicants, interviews and approval hearings in the Assembly before the appointment, hence the process was beyond reproach. The submissions referred the court to paragraphs 6 of the Replying Affidavit and the exhibits annexed thereto including the Hansard to show that the statutory requirements and procedures were exhaustively complied with.

21. In pursuit of the furtherance to his case, the 2<sup>nd</sup> interested party filed an application dated 2/7/ 2020, for discovery of documents, to enable the court arrive at a just conclusion and efficaciously determine the petition. In his supporting affidavit sworn on even date, he affirmed that none of the documents requested in his application, had been made available to him.

22. Both respondents in their oral submissions resisted the application for discovery and insisted that all the documents sought had been already supplied as requested and that the ones not supplied were non-existent. In addition, the 1<sup>st</sup> interested party, on his part takes the view that the documents sought by the 2<sup>nd</sup> interested party were bulky, non-existent, unavailable, extraneous and/or had already been supplied in response to the petition. There was no proof of what documents had been supplied and when supplied.

#### **Submissions by The 1<sup>st</sup> and 2<sup>nd</sup> Respondents in Opposition to The Petition**

23. The respondents submitted that the petition had been brought by a mischievous looser and litigator as collateral action for the benefit of the 2<sup>nd</sup> interested party. Their further submission was that the laws governing the recruitment and appointment of the clerk was as laid down in the County Governments Act and the County Assemblies Service Act, and not the public Appointments (County Approval) Act, which is only applicable to recruitment processes for positions that require the vetting and approval of the County Assembly. With regard to the allegation that the board was improperly constituted for want of compliance with the two thirds gender rule, they submitted that the board is a statutory institution constituted of specific persons as provided under Section 12 of the County Governments Act, and there is no discretion for reconstitution of the board and/or addition of other members, to ensure compliance with the rule. They added that the board was properly constituted as all its members are members thereof by virtue of their positions in the county assembly, save for the one man and woman appointed to the board pursuant to section 12(3)(d) of the County Governments Act. They contended that the non- compliance with the two thirds gender rule does not by itself render the process or an institution as improperly constituted. They invited the court to take judicial notice that with regard to compliance therewith by parliament and the legislatures, the said matter is in court in the matter of the advisory by the Chief Justice to the President to dissolve parliament. They cited **Supreme Court of Kenya in Advisory Opinion No.2 of 2012, In the matter of the Principle of Gender Representation in the National Assembly and Senate (2012) eKLR**, where it was determined that as a matter of course, the said two thirds gender rule as a constitutional principle invites progressive application where applicable. They further submitted that the composition of the 1<sup>st</sup> respondent cannot be the basis for the nullification of the process of recruitment of the clerk of the County Assembly, as by parity of reasoning, the net effect would be that all the staff of the county Assembly recruited by the same board are liable for removal. They submitted that such interpretation and application of the constitution would not only be adverse to third parties who are not parties to these proceedings, but also ridiculous, as it does not promote the purposes and principles of Article 259 of the Constitution. They maintained that the approval process of the 1<sup>st</sup> interested party was done by way of a resolution of the County Assembly as provided in the standing orders thereof. They submitted that the decisions of the County Assembly are made by resolutions passed by a vote by the members and are therefore legislative and elective processes to which the provisions of Articles 38, 47 and 50 of the Constitution do not apply. They submitted that the passing of resolutions by a county assembly is a constitutional expression of the sovereign will of the people at the county level in line with Article 1(4)(b) of the Constitution, and a legislative process to which due deference should be given by the courts to the County Assembly. They submitted that the processes and resolutions of the County Assembly and its members were immune to any strictures and shackles including the ordinary motions of the court through its intervention by way of judicial action as provided under Article 196(3) of the Constitution and the County Assemblies, Powers and Privileges Act. Section 10 of the County Assemblies, Powers and Privileges Act expressly and unequivocally ousts the jurisdiction of the court to hear and determine any dispute regarding the proceedings, processes or decisions of the County Assembly. They frown upon the petitioner's failure to raise the issues raised herein either during the approval hearings and discussion at the county assembly or petition the county assembly to reject the 1<sup>st</sup> interested party's appointment. The court was cautioned against the dangers of interfering with the functions of other constitutional organs and urged the court to refer the dispute herein back to the County Assembly and the Speaker thereof for resolution within the framework of the standing orders. They relied on **Peter O. Ngoge v Francis Ole Kaparo & 4 others (2007) eKLR, Hon. Ibrahim Swaleh v The Speaker, County Assembly of Embu & 2 others (2015) eKLR and Hon. Justus Kariuki Mate & anor v Martin Nyaga Wambora & anor (2017) eKLR** in support of their submissions.

## Analysis and Determination

24. I have carefully considered all the pleadings as filed by all parties in the petition as well as in the application together with the written and oral submissions offered. I have equally given regard to the four issues proposed by the petitioner and the three as proposed by the 1<sup>st</sup> respondent and the 1<sup>st</sup> Interested party. Having done so, and based on the pleadings on record, I find the following issues to isolate themselves for determination by the court; -

- a) Whether there is jurisdiction in the court to entertain the petition?
- b) Whether the 1<sup>st</sup> respondent was properly constituted when the recruitment of the 1<sup>st</sup> interested party was undertaken?
- c) Whether there was compliance with the principle of public participation in the recruitment and appointment of the 1<sup>st</sup> interested party?
- d) Whether the office of the 1<sup>st</sup> interested party is a public office?
- e) What orders need be made regarding costs?

## Jurisdiction of the court

25. The starting point must be for the court to satisfy itself that it is vested with power to determine the dispute, lest it act in vain for whatever action taken bereft of jurisdiction amount to naught and is thus null and void.

26. The court's jurisdiction is prescribed by the constitution at Article 165(3) d in very clear words. The provision says: -

### **3) Subject to clause (5), the High Court shall have—**

(a) ...

(b) ...

(c) ...

### **(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—**

**(i) the question whether any law is inconsistent with or in contravention of this Constitution;**

**(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;**

**(iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and...**

27. In this petition, the gravamen of the complaints is that the constitutional imperative that no more than two thirds of an elective or appointive body shall be of the same gender has been violated. I determine that the petition questions the composition of the 1<sup>st</sup> respondent when it undertook the recruitment of the 1<sup>st</sup> interested party it being contended and alleged that the composition of the five-member body with only one woman did not meet the imperative that no one gender occupies more than two-thirds of the membership of the 1<sup>st</sup> respondent. To determine the question of jurisdiction, it matters not that the recruitment did result into an employer- employee relationship between the 1<sup>st</sup> respondent and the 1<sup>st</sup> interested party. It matters not because there is no dispute between the two as the petitioner questioning the acts by the 1<sup>st</sup> interested party enjoys no employment relationship with the 1<sup>st</sup> interested party. With such appreciation, I determine, as was determined in **solo Nzuki v Salaries and Remuneration Commission and others (2019) eKLR**, that *“the matter for determination in this petition cannot be treated as purely recruitment or employment issues or one that deals purely with labour relations; rather it is a constitutional issue which this court has jurisdiction to determine by virtue of Article 165 (3) of the Constitution. I find no merit in the objection on account of jurisdiction and find that the matter is properly before the court and I will therefore proceed to determine the matter on the merits. I however need to add that even if I had determined that the court lacks jurisdiction, I would never dismiss the matter or strike it out but transfer it to the relevant court.*

## Composition of the 1<sup>st</sup> Respondent.

28. On 27/07/2020, the court directed that the application dated 02/07/2020 by the 2<sup>nd</sup> interested party and seeking the supply of information be heard and determined simultaneously with the petition. It appears to me that by the time I determine the petition, making a pronouncement on the application would amount to not much but purely academic and more of expression of the courts view that all creatures of the law have no otherwise but to comply to the letter. The applicant appears to appreciate that fact when he submits at paragraph 3 of page 07 of its submissions that the object of that application has been overtaken by events by the order that it be heard together with the petition.

29. It is the petitioner's contention that the composition of the 1<sup>st</sup> respondent fell short of the legal requirement of Article 27 (8) of the

Constitution on the basis that out of five members, only one is a female. While the respondents and the 1<sup>st</sup> interested party tacitly concede the fact that only one woman serves in the Board, they assert that the board is properly constituted and that the membership of the board is circumscribed and they have no way of manouvre. In fact, according to the speaker, the law only mandates appointment of one woman to the board pursuant to section 12(3) d. Whether the board as constituted and composed meets the thresholds of the gender parity rule must now be placed at its right place in our value systems. We must accept that retrogressive biases leading to and perpetuating marginalization any section of the Kenyan society deserve no praise but outrightly annihilated. While it cannot be denied that in **Advisory Opinion No 2 of 2012; The Matter of the Principle of Gender Representation in The National Assembly and Senate (2012)**, the Supreme Court held that the principle invites progressive application where applicable, that was never a blanket adjournment of the need to activate the crystalised rights where applicable. Indeed, the court did sound an early warning, in its judgment when it said that owing to the ‘*effects of alleged legislative tardiness*’ instant application of the principle for elective positions *is an issue of fateful significance, in terms of the sustainability of the constitutional order itself*.

30. It is to this court quite clear that the apex court was dealing with representation in the two houses of parliament with appreciation that elective and appointive positions pose significantly different paradigms. And when the court determined that there was need for progressivity, that was as far as elective positions are concerned. I do not read and understand the judgment to have prescribed progressivity in the application of the principle of gender parity in all spheres where the same is applicable and where the obligated organs have the ability to achieve the Rule. It is clear to me that the court was deliberate that the realization be progressive. Used in its ordinary sense, to progress is never near static. It is important to note that the decision relied upon by the speaker was made just some twenty-seven months after the promulgation of the constitution. Today, our constitution, is more than eleven years old. If one was to advocate for progressivity in good faith, one has to say how much progress has been attained in the last decade we have had the constitution with us. Nothing was offered before me in that regard by the speaker.

31. The speaker, who heads both respondents, expressed helplessness and painted a picture of a law obeying public servant hesitant to appear to conflict with the law, when he depones at paragraph 4 of his replying affidavit that the law dictates who ought to be appointed and their gender. I hold the view that there is no helplessness at all. I also find that the law invites no interpretation given to it by the respondents. 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. I see such liberties to have been given by Parliament in the statute to facilitate the attainment of the enjoyment of rights including the right not to be subjected to discrimination and to achieve affirmative action.

32. Pursuant to their obligation under article 3(1) of the Constitution, the respondents cannot be gagged in implementing the gender equity in the composition of the 1<sup>st</sup> respondent. The assembly merely needs to be deliberate that at least two women shall sit as members of the 1<sup>st</sup> respondent. They can do that by deliberate head-search for a Madam Speaker and/or have the political parties exercise their right to nominate under section 12(3) c in such a way that a woman is nominated. I see that to be an inevitable obligation upon the respondents under sub-article 6 of Article 27.

33. In my judgment, to comply and satisfy their obligation the constitution, 1<sup>st</sup> respondent must have at least two women as members. Currently, with only one woman, the percentage of the representation of the female gender stands at 20% while the male gender takes 80% thus clearly violating the dictates of article 27(8). With such clarity, I have no hesitation in finding and declaring that the 1<sup>st</sup> respondent was not properly constituted but rather constituted in a fashion that affronts the constitution.

#### **Was there public participation in the recruitment of the 1<sup>st</sup> interested party?**

34. The need for public participation, as a national value under Article 10 (2), flows from the ever present foundation of the constitutional order that state power vests in the people, and is exercised by state organs and officers on behalf of the people whose approval must be sought in the manner of that exercise. In commanding participation of the people in decision making, the state organs are reminded that the power exercised by them is from the sovereign, the people, and not inherent in such organs.

35. For public recruitment like that conducted by the 1<sup>st</sup> respondent and leading to the impugned appointment of the 1<sup>st</sup> interested party, the other values of the constitution including integrity and good governance are summoned to the table as expression of the need to have the entire value systems synchronised. It was thus imperative that the 1<sup>st</sup> respondent allows the public to participate in the recruitment to ensure that the voice of the people is heard and input taken into account, so that the person appointed is not only qualified but also suitable on the yardsticks of leadership and integrity among other suitability tests. In this matter, there was express compulsion to involve the participation of the people at two levels; through the members of the assembly and directly. I see section 13 and 14 of the county government Act to dictate that the appointment of the Clerk of the County Assembly to be subjected to the approval of the Assembly, which is then commanded to undertake the same by first consideration by a committee of the Assembly whose recommendation is then tabled before the Assembly and both proceedings before the committee and the assembly must be open to the public. In order to achieve enhanced transparency, 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.

36. In this petition, while the petitioner and the 2<sup>nd</sup> interested party assert that the public was never called upon to participate at the approval hearing, the respondents and the 1<sup>st</sup> interested party chose to say very little on how public participation was conducted. I find that it was easier for the speaker to just exhibit a copy of newspaper adverts and minutes of the committee, say the committee on appointments. That was never done. When not done even after there had been a request for supply of the same coupled with an application in that regard, I do make the inference and finding that the public was never accorded the chance to participate in the process and therefore it lacked the approval of the sovereign will, thus affronted the mandatory requirement of the constitution, statute and the standing orders. As said by the Court of Appeal in **IEBC v NASA and 6 others (2017) eKLR**, such violation is not only justiciable but enforceable by the court by issuance

of appropriate and remedial reliefs. In the context of this matter and pleadings on record, I declare that the appointment of the 1<sup>st</sup> interested party was not conducted with required public participation. There was therefore lack of transparency and public participation which denied the public the right and opportunity to help with attainment of expected public input to ensure competence, suitability and integrity of the person so appointed. Such violates the constitution and being a creature of the constitution, the conduct and acts of the 2<sup>nd</sup> respondent are untenable, null and void, with the consequence that the resultant appointment is itself untenable and amenable to being vacated by nullification.

37. In coming to this conclusion, I make no determination on the suitability of the 1<sup>st</sup> respondent nor does the court take over the constitutional and statutory mandate of the Assembly. All the court is saying and holding is that the Assembly being a creature of the law has no otherwise but to comply with the dictates of the constitution, statute and its own formulated and set procedures under the standing orders. In doing so, the court passes no boundaries established by the doctrine of separation of powers but indeed executes a mandate under the constitution by way of each arm of state and the organs of state being bound to provide checks and balances to others as it exposes itself to being equally checked. The powers of the court under Article 165(3), to say the very least, are not set aside, limited or indeed capable of being taken away or limited by the provisions of section 10 of the County Assembly, Powers and Privileges Act, 2017. That statute, being purposed to give effect to Article 196(3) of the Constitution, can only serve the purpose of enhancing the holistic goal of the Constitution and not otherwise circumvent it. As said before, separation of powers always walks accompanied by the checks and balances between the arms of government. To agitate that separation of power forbid other arms of government from ever checking what each does is to court and invite a conflict akin to what doctors call autoimmune condition in human beings. I find that not to sit in consonance with the purpose of the constitution commanding among other values good governance and transparency in conduct of public affairs.

38. There was an assertion by the respondents that the recruitment of the Clerk to the County Assembly is governed exclusively by the County Service Act with no room for application of the Public Appointments (County Assembly Approvals) Act, which deserves my comment before I leave the subject of approval proceedings as an occasion of public participation. My task here must be limited to determining the extent of application of the latter Act in the recruitment of the Clerk to the County Assembly. I find the answer in the title to the Act, which describes it as providing for the procedure *'for the approval of public appointments by County Assemblies and for connected purposes.'* I consider that National statute to apply for all approvals mandated by the Constitution or other statutes and that the 2<sup>nd</sup> respondent had, at the time it purported to approve the appointment of the 1<sup>st</sup> interested party, and today has, no option but to put the law into application. By the same token, I find no procedure for approval hearing in the County Assembly Service Act.

#### **Is the Office of The 1st Interested Party, the Clerk of County Assembly, a Public**

#### **Office?**

39. This issue should actually be a non-issue in this petition when semantics and technical maneuvers are left out of litigation in matter as grave as compliance with the law by public bodies and servants. I see article 260 of the Constitution to define a public office to mean *'an office in the national government, a county government or the public service, if the remuneration and benefits of the office are payable directly from the consolidated fund or directly out of money provided by parliament.'*

40. It is to this court indubitable that the Clerk to County Assembly is a public officer holding a public office whose remuneration and benefits are payable from the funds availed to the county by parliament.

41. Lastly, there were arguments on the application for supply of information sought by the 2<sup>nd</sup> interested party. As said at the onset, the need for such information was to help with material for determination of the petition. Whatever I say now may not achieve much as there is no other purpose to adduce additional material now that the petition has been argued in full. It is however important to reiterate what the superior courts in Kenya have said on the right to information, that it is not a favour but a crystallised right. The duty is upon the person asked to give information to justify the reasons for denial, inability to avail or access to the sought information. Questions of expense on account of bulky nature of the documents can never be a reason to deny access, because the law says it must be done free of charge.

#### **Rendition.**

42. On the 2<sup>nd</sup> interested party's application for discovery, I reiterate that the respondents were under both a constitutional and legal obligation to allow the 2<sup>nd</sup> interested party to access all the information and/or documents in their possession. The right to access to information is an inviolable constitutional right as clearly expressed under Article 35 of the Constitution.

43. I do find that the petition is merited, was in pursuit of the public good in the need for compliance with the law by public bodies and officers. I find that the 1<sup>st</sup> respondent was improperly constituted at the time it set out to appoint the holder of the office of the Clerk to the County Assembly, a public office and that in conducting the approval proceedings, public participation was not conducted as the constitution, the statutes and Standing orders command. Based on such findings I now make the following orders; -

**a) A declaration that the composition of the Meru County Assembly Service Board as at the 21/ 02/2020 did not comply with the gender parity rule in that the male gender comprised more than two thirds of the membership and was therefore contrary to the Constitution.**

**b) Having so declared and for the sake of avoiding lacuna in the Board, I give to the 2<sup>nd</sup> respondent a period of 60 days from today, to correct the violation. If by the 21/12/2021, the Board will not have been reconstituted to comply with the Gender Equity Rule, it shall stand dissolved.**

**c) A declaration that the approval hearings for the appointment of the 1<sup>st</sup> respondent as Clerk to Meru County Assembly**

was done without the requisite public participation and was thus unconstitutional and thus null and void.

d) The application dated 2/7/2020 is wholly merited and the same is allowed.

d) On costs, having found that the petition was in public interest, I order that each party shall bear own costs.

DATED SIGNED AND DELIVERED AT MERU VIRTUALLY VIA MICROSOFT TEAMS THIS 22ND DAY OF OCTOBER, 2021

**PATRICK J.O OTIENO**

**JUDGE**

**In presence of**

Mr. Maheli for 2<sup>nd</sup> interested Party

Mis Kihara for Njenga for 1<sup>st</sup> interested party

Mr. Maranya for the 2<sup>nd</sup> respondent and 1<sup>st</sup> interested party

Mr. Kaumbi for petitioner

**PATRICK J.O OTIENO**

**JUDGE**