



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 200 OF 2018

JOHN WAIGI MIGWI.....PETITIONER

VERSUS

H. E. GOVERNOR MIKE MBUVI SONKO.....1ST RESPONDENT

THE COUNTY ASSEMBLY OF NAIROBI.....2ND RESPONDENT

JUBILEE PARTY.....INTERESTED PARTY

JUDGMENT

The parties

1. The petitioner herein, **JOHN WAIGI MIGWI**, describes himself as an indigenous Kenya, a resident of Nairobi County and a member of the Jubilee Party.
2. The 1st respondent is the Governor of Nairobi City County established under Article 6(1) of the First Schedule of the Constitution of Kenya.
3. The 2nd respondent is the County Assembly of Nairobi established under Article 6(1) of the First Schedule of the Constitution.
4. The Interested Party is a political party registered under the Political Parties Act.

Background

5. Following the August 2017 General elections, the 1st respondent and one **Mr. Polycarp Igathe** were elected Governor and Deputy Governor respectively of the County of Nairobi.
6. By a letter of resignation dated 11th January 2018, the said **Mr. Polycarp Igathe** tendered his resignation as Deputy Governor of Nairobi County with effect from 31st January 2018. The said resignation set in motion of sequence of events that led to the filing of this petition.
7. Following the resignation of Mr Polycarp Igathe the 1st respondent on 16th May 2018, while citing the Supreme Court's advisory, nominated one Mr Miguna Miguna to be vetted by the County Assembly of Nairobi for the position of a Deputy Governor.

The Petitioner's case

8. The petitioner filed his petition against the respondents seeking the following orders:

1. A declaration order that the 1st respondent has violated the mandatory provisions of the law by failing to nominate a qualified candidate to the office of Deputy Governor within 14 days from 9th March 2018 when the decision in Supreme Court of Kenya Reference Number 1 of 2015 was delivered.

2. A declaration order that Mr Miguna Miguna is not qualified for nomination to the office of Deputy Governor of Nairobi.

3. A declaration order that the vacancy created in the office of the Deputy Governor Nairobi County, by reason of the resignation of Mr. Polycarp Igathe from the said office on 31st January 2018 shall only be filled by a qualified member of Jubilee Party.

4. A declaration orders that the Nairobi County Executive Committee is not properly constituted in the absence of a Deputy Governor.

5. An order of certiorari to quash the 1st respondent's decision of 16th May 2018 to nominate Mr. Miguna Miguna for vetting to fill the vacancy in the office of Deputy Governor of Nairobi.

6. An order of certiorari to quash any proceedings of the 2nd respondent on the vetting or interviews of Mr. Miguna Miguna for purposes of filling the vacancy in office of Deputy Governor of Nairobi.

7. An order of mandamus compelling the 1st respondent to nominate a qualified person to fill the vacancy of a Deputy Governor for the County of Nairobi within 7 days of the date of this court's decision.

8. An order of certiorari to quash all the decisions of Nairobi County Executive Committee made between 31st January 2018 at 1pm until the date another Deputy Governor is sworn into office.

9. Any other and further orders as the Honourable Court may deem fit; and

10. The 1st respondent to personally meet the costs of these proceedings, to be deducted from his salary.

9. The petitioner challenges the nomination of Mr. Miguna Miguna on the basis that the said nominee is not a member of the Jubilee Party having contested in the said 2017 General Elections for the position of the Governor of Nairobi County as an independent candidate after which he joined a proscribed grouping christened National Resistance Movement (NRM) which was associated with the opposition Coalition National Super Alliance (NASA).

10. It is petitioner's position that the 1st respondent, having been elected as a Governor on a Jubilee Party ticket and his previous Deputy Governor having been a member of the Jubilee Party, ought to appoint/nominate a Deputy Governor from Jubilee Party and not a person associated with other political parties that are not in a coalition with Jubilee Party.

11. The petitioner argues that the position of a Governor and a Deputy Governor is a joint ticket in which there is no separate election for the Deputy Governor and that on assuming office the Deputy Governor assists the Governor in running the office and fills the vacancy in the latter office in the event the office holder ceases to hold office through circumstances that are well set out under the law.

12. The petitioner contends that it is inconceivable and against the spirit of the Constitution of Kenya for the respondent to nominate a person who does not subscribe to the manifesto, policies and obligations which accrue on members of the Jubilee Party.

13. He states that considering that the 1st respondent appears to be deliberately refusing to nominate a qualified person to the office of the Deputy Governor this court ought to compel him to nominate a qualified person for vetting by the 2nd respondent in enforcement of the Supreme Court of Kenya Reference No. 1 of 2015 which binds the 1st respondent.

14. It is the petitioner's case that the Nairobi County Executive Committee is illegally constituted as the Deputy Governor is a member of the committee hence the absence of a substantive holder of that office implies that it is not properly constituted under Article 179(2) of the Constitution, and that by extension, the decisions of the said Executive Committee are illegal and all subsequent actions flowing from such decisions ought to be quashed.

15. According to the petitioner the 1st respondent's deliberate delay in nominating a qualified person to the office of the Deputy Governor exposes the County to further disruption in service delivery in the event that a vacancy occurs in the Office of the Governor.

16. At the hearing of the petition, Mr. Waithaka, learned counsel for the petitioner intimated to the court his intention to withdraw prayers 2,, 5, and 6 of the petition for the reason that the 2nd respondent had rejected the nomination of Miguna Miguna for the position of Deputy Governor and submitted that the issue of qualification of a person to be nominated the still vacant position of Deputy Governor was still awaiting this court's determination.

17. Counsel submitted that pursuant to the Supreme Court's advisory opinion in **Re Speaker of the County Assembly of Meru [2018] eKLR** the court held that in the event of a vacancy in the office of the Deputy Governor, the Governor shall nominate a person to fill the vacancy within 14 days and forward the name to the County Assembly which shall vote on the same within 60 days from the date of receipt of the nomination.

18. Counsel submitted that no reasons had been advanced for the 1st respondent's refusal to name his deputy despite the existence if the Supreme Court's advisory opinion in the matter of the Independent Commission and Boundaries Commission wherein it was held that the Supreme Courts decision is binding and ought to be obeyed.

The 1st respondent's case.

19. The 1st respondent opposed the petition through the Grounds of Opposition filed on 22nd June 2018 in which he listed the following grounds:-

- 1. The petition is incompetent, being premised on the wrong bases of the law;*
- 2. The claim is justiciable, being a premature speculation of a prospective event;*
- 3. The claim has been overtaken by events and is moot as the 2nd respondent has already declined on the matter;*
- 4. The petition is a gross abuse of the court process;*
- 5. The petitioner has not exhausted all other available mechanisms to ventilate his perceived grievance, hence the petition ought to be struck out;*
- 6. The petitioner has not laid sufficient material before the court to justify a grant of the relief sought.*

20. The 1st respondent also filed a replying affidavit sworn on 22nd November 2018 wherein he avers that the instant petition falls within the jurisdiction of the Political Parties Dispute Resolution Tribunal (PPDRT) and not this court in view of the fact that the petitioner filed the petition as a member of the Jubilee Party and quoted the Rules of the Jubilee Party Constitution. He states that the petitioner has not established the peculiar circumstances surrounding the nomination of the Deputy Governor and adds that the instant petition is a red herring intended to achieve a collateral political purpose other than enforce the Constitution.

21. He further avers that the 1st respondent has already forwarded the names of 4 nominees to the office of the Deputy Governor for approval and that the instant petition is therefore frivolous, vexatious and unworthy of adjudication. He states that the proposed nomination of one Miguna Miguna as the Deputy Governor having been rejected by the 2nd respondent, is now a spent issue in which case, the entire petition now remains a purely academic exercise which is not in the domain of this court.

22. The 1st respondent blames the delay in the appointment of the Deputy Governor on the interested party who he alleges has failed to pick the names of one of the 4 nominees that he presented to the party for the said post. He highlighted the 4 names/nominees as former Starehe MP. Hon. Margaret Wanjiru, Mrs. Agnes Kagure, Lawyers Ms Karen Nyamu and Ms Jane Weru. He further states that the Constitution is silent on the nomination of a Deputy Governor and hence the petitioner cannot ask the court to redraft the Constitution so as to insert an interpretation that suits him.

23. At the hearing of the petition Mr. Kinyanjui, learned counsel for 1st respondent submitted that having withdrawn prayers 2, 5 and 6 of the petition and taking into account the fact that the petition was precipitated by the nomination of one Miguna Miguna as the Deputy Governor, it follows that the petition cannot stand as presented as the court will have to delete paragraphs 6, 7, 8, 9, 10, 11, 12, 13, 22 and 23 of the petition which informs the withdrawn prayers with the result that the petitioner ought to have considered amending the petition in view of the fact that Miguna Miguna is no longer a prospective candidate for the nomination.

24. Counsel faulted the petitioner for failing to amend the petition so as to align it with the prevailing facts following the rejection of the nomination of Miguna Miguna by the 2nd respondent and that the petition therefore remains theoretical, incompetent and fatally defective for being supported by an affidavit that remains a shell if the paragraphs containing the averments touching on Miguna Miguna are removed.

25. Counsel submitted that under Article 90 of the Constitution nominations are done by political parties and that there was a distinction between the lack of an appointment and the delay in making such an appointment. It was the 1st respondent's case that the Supreme Court's advisory opinion referred to by the petitioner was in respect to the filling of a vacancy in the office of the County Speaker and not the Deputy Governor and that the said court's opinion does not state what should happen in the event that the names nominee is rejected by the County Assembly.

The 2nd respondent's case

26. The 2nd respondent opposed the petition through the replying affidavit of its clerk one **Murengei Jacob Ngwele** who avers that the 2nd respondent's constitutional role under Section 8(1) of the County Government Act, 2012 is to vet and approve nominees for appointment to county public offices. He avers that Mr. Miguna Miguna was not vetted by the 2nd respondent as he did not satisfy the legal and constitutional requirements to be a Deputy Governor and that the order sought in the petition cannot be granted as it would have the effect of stopping the respondents from carrying out their statutory and constitutional mandates.

Analysis and determination

27. I have considered the pleadings filed herein and the parties' respective submissions together with the authorities that they cited. I find that the main issue for determination are as follows:

- a) Whether this court has the jurisdiction to hear and determine the petition.*
- b) Whether the petition has been overtaken by events.*

c) *Whether the petition meets the threshold test of a constitutional petition, and depending on the answer to the above questions.*

d) *Whether the petitioner is entitled to the orders sought in the petition.*

Jurisdiction

28. Courts have held, time without number that jurisdiction is everything without which the court cannot make even one more step but must down its tools. It is in this context that Nyarangi J. observed as follows in the case of **Owners of Motor Vessel Lillian”S” v Caltex Oil (Kenya) Limited [1989] 1 KLR 1:-**

“Jurisdiction is everything. Without it, a court has no power to make one step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence and a court of law downs its tools in respect of the matter before it, the moment it holds the opinion that it is without jurisdiction.”

29. Further, in **Macharia And Another Vs Kenya Commercial Bank Ltd And 2 Others Civil Application No. 2 of 2011** the Supreme Court further stated thus:

“A court’s jurisdiction flows from either the Constitution or legislation or both. Thus a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second Respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it is not one of mere procedural technicality; it goes to the very heart of the matter for without jurisdiction the Court cannot entertain any proceedings.”

30. The most fundamental of all the issues raised is that of the jurisdiction of this court to determine this Petition. The Respondents have submitted that in the instant Petition, this Court has no jurisdiction to grant the Petitioner the orders. The respondent maintained that since the Petitioner’s case was premised on Jubilee Party nominations, the petitioner had to exhaust all available legal mechanisms and avenues and that he ought to have filed his claim with the Political Parties Disputes Tribunal (PPDT) before coming to this court. On his part, the petitioner argued that Article 165(3) of the Constitution grants this court the jurisdiction to hear and determine the petition the said Article stipulates as follows:

3) Subject to clause (5), the High Court shall have--

(a) unlimited original jurisdiction in criminal and civil matters;

(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;

(c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;

(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

(iv) a question relating to conflict of laws under Article 191; and

(e) any other jurisdiction, original or appellate, conferred on it by legislation.

31. Section 39 (1) of the Political Parties Act establishes a Tribunal to be known as the Political Parties Disputes Tribunal. The jurisdiction of the Tribunal is provided for under Section 40 of the said Act as follows:

The Tribunal shall determine—

a) disputes between the members of a political party;

b) disputes between a member of a political party and a political party;

c) disputes between political parties;

d) disputes between an independent candidate and a political party;

e) disputes between coalition partners; and

f) appeals from decisions of the Registrar under this Act.

Notwithstanding subsection (1), the Tribunal shall not hear or determine a dispute under paragraphs (a) (b), (c) or (e) unless the dispute has been heard and determined by the internal political party dispute resolution mechanisms.

32. In the instant case, the petitioner contended that the Jubilee Party constitution precluded the 1st respondent from nominating a person who is not a member of the said party to the position of a Deputy Governor. Strictly speaking, one can say that the petitioner reduced the instant dispute to a political party nomination affair for which the provisions of section 40 of the Political Parties Act that I have highlighted hereinabove would be applicable. It therefore follows that where any person has a dispute relating to or arising from any nominations, as the Petitioner in the instant does, the first port of call is ideally as set out hereinabove. In the case of **International Centre For Policy And Conflict & 5 Others V Attorney General & 4 Others (2013) eKLR** as referred to in the case of **Diana Kethi Kilonzo & Another –V- IEBC & 10 Others (2013) eKLR** it was stated:

“An important tenet of the concept of the rule of law is that this court before exercising its jurisdiction under Article 165 of the constitution in general must exercise restraint. It must first give an opportunity to the relevant constitutional bodies or state organs to deal with the dispute under the relevant provision of the parent statute. If the court were to act in haste, it would be presuming bad faith or inability by that body to act. For instance, in the case of IEBC, the court would end up usurping IEBC’s powers. This would be contrary to the institutional independence of IEBC granted by Article 249 of the constitution. Where there exists sufficient and adequate mechanism to deal with a specific issue or dispute by other designated constitutional organs, the jurisdiction of the court should not be invoked until such mechanisms have been exhausted.....”

33. My take is that the existence of Articles 165 and 258 of the Constitution is not a substitute or a means of excluding such other dispute resolution organs and agencies from exercising their statutory duties. I find that the circumstances of this case dictate that this Court, despite its wide jurisdiction under the Constitution, does not assume such jurisdiction. Having approached this court on the basis of membership of a political party, it follows that the dispute herein is clearly a dispute that falls within the mandate of the institutions in which the Political Parties Act vests jurisdiction. It involves a member of a political party and his political party. That party has an internal dispute resolution mechanism. The law requires that the said mechanism be exhausted; that a party dissatisfied with the outcome of the internal party dispute resolution process takes his grievance to the Political Parties Tribunal, and if unhappy with the outcome, has a right to appeal to the High Court.

34. My above findings on the issue of jurisdiction notwithstanding, I am still minded to determine the other issues raised in the petition. On whether the petition has been overtaken by events. As I have already stated in this judgment the instant petition was precipitated by the nomination of one Miguna Miguna, by the 1st respondent as the proposed Deputy Governor following the resignation of the Deputy Governor elected during the 2017 General Election. It turned out that the said nomination of Mr. Miguna Miguna was subsequently rejected by the 2nd respondent and was therefore a non –issue in this petition thereby prompting the petitioner to withdraw prayers 2, 5 and 6 of the petition. According to the 1st respondent, the withdrawal of the prayers touching on Miguna Miguna spelt doom on the entire petition as the claim that his nomination was unlawful formed foundation/basis for the petition. The petitioner, on the other hand argued that the court could still determine the remaining prayers sought in the petition despite the withdrawal of the 3 prayers cited herein above.

35. My finding is that considering that the petition was mainly premised on the grounds that one Miguna Miguna was nominated to be appointed Deputy Governor without the requisite qualification for such nomination, it behoved the petitioner, upon withdrawing the claim and prayers touching on Miguna Miguna to amend his petition, if indeed he still intended to pursue it on other prayers, so as to bring it in tandem with the remaining prayers sought. In the present scenario, I concur with the position of the 1st respondent that we have a situation where the reasons cited in the affidavit in support of the petition and the facts of underpinning the petition are totally at variance with the orders sought.

36. I find that this scenario is not acceptable as we cannot have a case where the facts of the case do not support the prayers sought. My humble view is that an amendment of the petition was necessary following the withdrawal of prayers 2, 5 and 6 of the said petition. It is therefore my finding that the petition herein has been overtaken by events.

37. I further find that the instant petition does not meet the threshold of a constitutional petition. It is trite law as was expressed in the landmark case of **Anarita Karimi Njeru v Republic (No. 1) [1979] 1 KLR 154** that the petitioner approaching this court must set out, with reasonable precision, the rights and/or fundamental freedoms alleged to be infringed, the constitutional provisions alleged to be infringed and the manner of such infringement. In the instant case, the petitioner is aggrieved by the 1st respondent’s failure to nominate a person to the office of the Deputy Governor following the resignation of one Mr. Polycarp Igathe. The 1st respondent on his part states that he has since the rejection of the nomination of Miguna Miguna proposed the names of at least 4 nominees to the Jubilee Party for nomination to the said office. This assertion by 1st respondent was not controverted by the petitioner and I find that as matters stand before this court, no material has been placed before me to show that there has been a failure by the 1st respondent to perform his duty of nominating a person to the office of the Deputy Governor.

38. In the absence of a clear provision in the Constitution governing the issue of nomination of a Deputy Governor following a resignation coupled with my earlier finding that dispute, arising from party nominations fall within the jurisdiction of the Political Parties Dispute Resolution Tribunal, I am unable to find that the petitioner has established that he is entitled to the orders sought in prayers 1, 3, 4 and 7 of the petition.

39. Turning to the prayer for order of certiorari to quash the decisions of Nairobi County Executive Committee on the basis that the said decisions were made without a Deputy Governor sworn in office, I note that the petitioner relied on the provisions of Article 179(1) and (2) of the Constitution to support this prayer. The said Article stipulates as follows:

(1) The executive authority of the county is vested in, and exercised by, a county executive committee.

(2) The county executive committee consists of--

*(a) the county governor and the deputy county governor;
and*

(b) members appointed by the county governor, with the approval of the assembly, from among persons who are not members of the assembly.

40. My finding is that while Article 179(1) and (2) provides for the composition of the County Executive Committee, nowhere in the said Article is it stated that the absence of the Governor or his Deputy renders the decisions of the said committee null and void. In any event, the petitioner has not demonstrated with certainty the specific decisions of the Nairobi County Executive Committee to be quashed through an order of certiorari.

41. Having regard for the above finding and observation, I find that the instant petition is not merited and I therefore dismiss it with no orders as to costs.

Dated, signed and delivered in open court at Nairobi this 30th day of April 2019.

W. A. OKWANY

JUDGE

In the presence of:

Mr Waithaka for the petitioner

Mr Kinyanjui for the 1st respondent

Court Assistant - Ali