



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CONSTITUTIONAL PETITION NO. 4 OF 2019

IN THE MATTER OF ARTICLE: 2 (1), 3(1), 10, 19, 20, 21, 22(1) & (2), 23, 73 AND 260 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF SECTION 35(3) (b) OF THE COUNTY GOVERNMENTS ACT, NO. 17 OF 2012

AND

IN THE MATTER OF CHAPTER SIX OF THE CONSTITUTION OF KENYA ON LEADERSHIP AND INTEGRITY

AND

IN THE MATTER OF ANTI-CORRUPTION AND ECONOMIC CRIMES ACT NO. 3 OF 2003

AND

IN THE MATTER OF DANIEL KIOGORA M'INOTI THE POSITION OF COUNTY EXECUTIVE COMMITTEE MEMBER FOR YOUTH AFFAIRS AND SPORTS

AND

IN THE MATTER OF CONSPIRACY BY THE GOVERNOR KIRAITU MURUNGI TO IMPROPERLY CONFER BENEFIT TO THE SAID DANIEL KIOGORA M'INOTI AGAINST SECTION 43 AS READ WITH SECTION 48 OF THE ANTI-CORRUPTION AND ECONOMIC CRIMES ACT NO. 3 OF 2003

BETWEEN

SETH MUTUGI.....PETITIONER

VERSUS

DANIEL KIOGORA M'INOTI.....1ST RESPONDENT

GOVERNOR KIRAITU MURUNGI.....2ND RESPONDENT

ETHICS AND ANTICORRUPTION COMMISSION....1ST INTERESTED PARTY

R U L I N G

1. By a petition dated 18th February, 2019, the petitioners contended, *inter alia*, that, the 2nd respondent had appointed the 1st respondent a member of the Meru Executive Committee in charge of Youth Affairs and Sports. That the appointment was unlawful as it was in breach of **section 35 of the County Government Act, 2012** which provides, *inter alia*, that such an individual must be a holder of at least a first degree recognized from a University in Kenya.

2. It was further alleged that, whilst the 1st respondent presented himself that he held a Bachelor's degree in Commerce, 2nd Upper Accounting Option from the University of Nairobi, the 1st respondent actually has never enrolled in that university.

3. For the foregoing reason, the petitioner alleged that the 2nd respondent had breached both the law and the Constitution in appointing the 1st respondent a Member of the Meru Executive Committee. As a consequence thereof, the petitioner prayed for orders, *inter alia*, that the continued occupation of the 1st respondent as Member of the Meru County Executive Committee for Youth Affairs and Sports was unlawful and that he was ineligible to hold that position as it was in breach of **section 35(3) (b) of the County Government Act, No. 17 of 2012**.
4. On being served with the petition, the respondents filed a Notice of Preliminary Objection dated 21st February, 2019. In the objection, the respondents contended that; the petition was defective as it was premature since the court lack the jurisdiction to entertain the same; that issues and complaints being raised can only be reported first to the 1st Interested Party as stipulated by the **Anti- Corruption and Economic Crimes Act, (ACECA No. 3 of 2003)** and that the 1st and 2nd respondent had not been tried and convicted of the allegations complained of.
5. The application was supported by the 1st interested party vide the replying affidavit of Benson Wambua Kyeli, Legal Officer for the interested party, sworn on 8th March 2019. He stated that the interested party was made aware of the allegations or complaint when it was served with the pleadings in this matter. That there was no evidence that the petitioner had reported the matter to it neither had it refused or failed to discharge its legal mandate. The interested party indicated that it was ready and capable of investigating the allegations and thereby communicate the findings thereof to the relevant state agencies including the petitioner.
6. The matter was canvassed by way of written submissions. The 1st and 2nd respondent submitted that without jurisdiction, the entire process of the court becomes a nullity. By this court entertaining this petition, it would be stepping into the arena reserved for EACC.
7. Mr. Kiogora, Learned Counsel for the respondents submitted that, the issues of breach of chapter six of the **Constitution** and offences under **Anti-Corruption and Economic Crimes Act** should be handled by EACC at the onset. The cases of **Francis Curukia vs. Peter Gatirau Munya & 2 Others [2017] eKLR, Isaiah Kithinji vs. Peter Gatirau Munya Meru Pet. NO. 8 of 2017 (UR), Michael Wachira Nderitu vs. Mary Wambui Munene Aka Mary Wambui & 4 Others [2013] eKLR and International Centre for Policy and Conflict & Others vs. The AG. NBI Pet No.552 of 2012 (UR)** were cited in support of those submissions.
8. On the other hand, the petitioner submitted that it had already been established through precedence that this court has jurisdiction to entertain issues challenging the appointment of a county executive member. That petition only sought the scrutiny of the procedure, and the legality of the appointment of the 1st respondent. Further, to scrutinize whether in making the said appointment, the 2nd respondent acted constitutionally. Finally, whether the appointment met the constitutional and statutory threshold.
9. It was submitted that in view of the foregoing, the preliminary objection lacked merit. The cases of **John Kipng'eno Koech & 2 Others vs. Nakuru County Assembly & 5 Others [2013] eKLR, Trusted Society of Human Rights Alliance vs. AG & 2 Others [2012] eKLR, Speaker of the National Assembly & Others vs. De Lille M.P. & Another [297/298] [1999] ZASCA, the Supreme Court , CA of SA and Faith Syokau Wathome Kithu & Others vs. Machajos County Assembly & 3 Others [2018] eKLR** were cited in support of those submissions.
10. Having considered the petition, the preliminary objection and the submissions of learned Counsel, the issue for determination is, whether this court has jurisdiction to determine the petition and whether the petition is so hopelessly defective that it should be struck out.
11. Jurisdiction is defined in the **Black's Law Dictionary, Ninth Edition, Butterworths, at page 980** as: -
- “A court's power to decide a case or issue decree”.***
12. In the celebrated case of **The Owners of the Motor Vessel 'Lillian S' v Caltex Oil Kenya Ltd [1989] KLR 1**, the Court of Appeal asserted that; jurisdiction is everything and without it a court has no authority to make any further step. Certainly, if this court lacks jurisdiction, the matter must come to a halt and it must down its tools and take no further step.
13. For a court to have jurisdiction to entertain a matter, it must be ascertained from either the Constitution or legislation or both. This was so emphatically held by the Supreme Court in **Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR**. The court stated: -
- “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... Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation.”***
14. In this regard, all this court has to do is to look at the **Constitution of Kenya, the County Governments Act, No. 2012, the Leadership and Integrity Act, 2012 and the Anti-Corruption and Economic Crimes Act** to see whether it has jurisdiction to enforce what is complained of.
15. A keen reading of the constitution and the foregoing statutes shows that, where a public act or transaction is alleged to infringe on **Chapter 6 of the Constitution**, the procedure of remedying the same is to be found in the **Leadership and Integrity Act, 2012**. Indeed, all the cases relied on by the respondents enunciate the principle that, where the law provides for a particular procedure of remedying a wrong, that procedure must be exhausted first before the route of the court can be resorted to. That is the law.

16. In the present case, what is the complaint? This is to be found in paragraphs 5, 6 and 7 of the petition. Simply put, the petitioner's complaint is that, the 2nd respondent had appointed the 1st respondent as a Member of the Meru County Executive Committee contrary to **section 35 of the County Governments Act**. To my mind, that is the main complaint, that the 1st respondent was not qualified to be appointed as such.

17. In this regard, the issue of whether the conduct of the respondents amounted to a breach of **Chapter 6 of the Constitution** and therefore the application of the **Leadership and Integrity Act**, is but secondary to the real issue, which is, did the 1st respondent possess the educational qualification to be appointed a member of the Meru County Executive Committee? Period.

18. To this end, I do not understand the petition to inquire whether the 1st respondent is in breach of Chapter 6 of the Constitution and therefore unfit to hold office. As I have already stated, that issue is secondary which will therefore require the invocation of the **Leadership and Integrity Act**. Prayers 1 and 2 of the petition are clear about it. It should be noted that prayer Nos.1 and 2 of the petition are the principal prayers to the petition and that prayer 3 is only consequent to those principal prayers. The principal prayers seek declarations that the 1st respondent was not eligible to be appointed to the position he holds.

19. To my mind therefore, this court has the jurisdiction to inquire to the complaint that has been submitted to it, to wit, *did the 1st respondent possess the requisite academic qualification set out under the law before being appointed to the position he holds?* Under Article 163 (5) of the constitution this court is entitled to review the actions undertaken by the 2nd respondent, not the interested party. The interested party will come in subsequent to prayers 1 and 2 of the petition. All the other issues in my view are periphery and or secondary to that question.

20. Accordingly, the preliminary objection has no merit and is dismissed with costs.

DATED and DELIVERED at Meru this 25th day of April, 2019

A. MABEYA

JUDGE