



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT HOMA BAY**

**CONSTITUTION PETITION NO.17 OF 2017**

**IN THE MATTER OF ARTICLES 10, 27, 179 AND 197 OF THE CONSTITUTION OF KENYA  
2010**

**AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS OR FUNDAMENTAL  
FREEDOMS**

**UNDER ARTICLE 27 OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF SECTION 35 (1) AND 35 (2) OF THE COUNTY GOVERNMENT ACT  
2012**

**BETWEEN**

**EVANCE OTIENO OLOO ..... 1<sup>ST</sup> PETITIONER**

**WICKLIFFE ODHIAMBO ..... 2<sup>ND</sup> PETITIONER**

**AND**

**GOVERNOR HOMA BAY COUNTY ..... 1<sup>ST</sup> RESPONDENT**

**HOMA BAY COUNTY ASSEMBLY..... 2<sup>ND</sup> RESPONDENT**

**RULING**

**1. EVANCE OTIENO OLOO (1<sup>st</sup> Petitioner) and WICKLIFFE ODHIAMBO (2<sup>nd</sup> Petitioner) have filed this constitutional petition under Article 27 of the Constitution of Kenya, and Section 35 (1) and 35(2) of the County Government Act (2012) seeking that the court –**

**a) declares that the list of nominees made by Governor of Homa Bay County (1<sup>st</sup> Respondent) is discriminating against the petitioners, youths and other minority groups within the County.**

**b) declaration that the Governor of Homa Bay County conducts fresh nominations adhering to the relevant provisions of the Constitution and the County Government Act.**

c) issue a permanent injunction restraining the Homa Bay County Assembly (2<sup>nd</sup> Respondent) from approving the purported list of nominees.

d) costs of this petition.

2. The governor of Homa Bay is described as the nominating authority of the County Executive Committee Members, while the 2<sup>nd</sup> Respondent is the approving authority of nominees to the County Executive Committee. It is their contention that on 4<sup>th</sup> October 2017, the 1<sup>st</sup> Respondent nominated ten individuals for consideration for the position of County Executive Committee Members under **Article 179 (2)** of the **Constitution** namely:-

- **DR. DAVIS OKEYO**
- **DICKSON NYAWINDA**
- **ALFONSE WERA**
- **AGUKO JUMA**
- **NICHOLAS KORIKO**
- **CARELUS ADEMABA**
- **ROSELINE ANYANGO ODHIAMBO**
- **PROF. RICHARD MUGA**
- **BEATRICE ATIENO ASYAGO**
- **BEATRICE AKINYI AYOMO**

3. The list is said to violate the provisions of **Article 197 (2)** of the **Constitution** as read with **Article 179 (2)** and **Section 35** of the **County Government Act**, because members of the marginalized groups/minority sections within the County such as the youth had not been included in the list. The list is said to have been prepared unilaterally and exclusive of the participation of the people of Homa Bay County.

4. This list is described as betraying the ideals of equality, non-discrimination and protection of the marginalized and it also lacks transparency and accountability which are important national values under **Article 10** of the **Constitution of Kenya**.

5. The petitioners state that the principles of governance set out under **Article 10** of the **Constitution** are binding upon all State organs, State Officers, Public Officers and all persons, to include participation of the people, equality, non discrimination and protection of the marginalized.

Further that the composition of the County Executive Committee must respect the  $\frac{2}{3}$  gender rule and ensure community and cultural diversity.

The affidavits sworn by the petitioners basically are a repeat of the contents of the petition.

6. In opposing the petition, **GEORGE ILLAH** who is the Governor's Principal Legal Counsel deposes in the replying affidavit that the 1<sup>st</sup> Respondent in nominating members of the County Executive Committee was guided by **Section 35 (1) A** of the County Government Act because the final list submitted for approval represented the cultural and ethnic diversity of the County.

7. He explains that in coming up with the impugned list, the 1<sup>st</sup> Respondent took into consideration the provisions of **Article 197 (2)** of the **Constitution of Kenya** and ensured that the total number of members appointed did not exceed  $\frac{1}{3}$  of the number of members of the County Assembly and the list represented inclusiveness and protection of both gender and the marginalized.

The claims that the list does not factor the youth is described as unfounded, false and intended to mislead the court.

8. The 2<sup>nd</sup> Respondent's Clerk, **OTIENO BOB KEPHAS** has deposed in a replying affidavit that on 4<sup>th</sup>

October 2017, the 1<sup>st</sup> Respondent lodged with the Clerk of the County Assembly a notification of nomination of the ten individuals pursuant to **Section 6** of the **Public Appointments (County Assemblies Approval) 2017**.

9. On 10<sup>th</sup> October 2017, the Deputy Speaker via a communication of a similar date, reported the notification to the County assembly and the same was presented to the Select Committee on Appointments for purposes of approval under **Section 7** of the **Public Appointments (County assemblies Approval) 2017**.

The issues the Select Committee considered in relation to the nomination are:-

**a) the procedure used to arrive at the nominees including the criteria for short listing of the nominees.**

**b) any constitutional or statutory requirements relating to the office in question.**

**c) suitability of the nominees for the appointment proposed having regard to their credentials, abilities, experience and qualities that meet the needs of the body to which the nomination is being made.**

10. The Select Committee upon deliberation subsequently presented its report to the County Assembly for debate and decision on 7<sup>th</sup> November 2017 – and the same was approved on the said day.

11. At the hearing of the petition, **MR. NYAUKE** appeared for the 1<sup>st</sup> Respondent while **MRS DHIKUSOKA** acted for the 2<sup>nd</sup> Respondent. The petitioners appeared in person. The 1<sup>st</sup> Petitioner submitted that the list did not include the youth saying the nominees ages range between 58-39 years and in his view anyone over 35 cannot qualify to be referred to as a youth. It is their contention that without someone from the youth category being included in the County Executive Committee members, then the issues affecting the youths will not be considered when meetings are carried.

12. The 2<sup>nd</sup> Petitioner submitted that the Respondents did not invite members of the public to Participate in the nomination exercise, although the County Assembly was required to hold its sittings in public, and even conduct civic education to create awareness among the youth. He argued that the Respondents failed to adhere to the provisions of **Section 8** of the **Public Appointments Approval Act** and once the 2<sup>nd</sup> Respondent noticed that there was a certain age group not represented in the list of nominees, it ought to have rejected that list.

13. He pointed out that youth fall in the age bracket of 18-35 years and there can be no two ways about it – they were left out. He however concedes that there was regional and gender balance.

14. In response, **MR. NYAUKE** on behalf of the 1<sup>st</sup> Respondent urged the court to consider the issue of affirmative action policy which is gender based and Kenya's vision 2030 – which does not place emphasis on Youth, Women or the marginalized and disadvantaged groups only. He argues that **Section 35 (1) (6)** of the **County Government Act** provides that the Governors shall take into account affirmative action based on provision of the Constitution – which is broad and includes women, the disable, children and the aged. It is on this basis that he states that the impugned list is wholesome as it has both male and female.

15. Counsel also argues that there is no provision either in the Constitution or the County Government Act requiring the Governor to nominate the youth to the County Executive Committee and urges the court to consider the provisions of **Article 55** and **56** of the **Constitution** which places responsibility on the State to accord fair opportunities in employment.

16. The petitioners are faulted for failing to demonstrate that an applicant deemed to be a youth applied, met the qualification and was rejected – posing the question – what if no youth applied, would that stop

the Governor from nominating persons? Further, that the petitioners did not present any evidence to show how the short listing was done and that they do not have full knowledge of what they are talking about.

17. It is also drawn to the court's attention that **Article 197** of the **Constitution** refers to gender diversity in County assemblies, not youth and so the provision cited is not relevant to the application. Further that the nomination actually took into consideration gender and representation of the minorities and marginalized.

18. It is argued that the petitioners have not shown how they will be injured by the appointments and how their inputs have not been taken into account as there is a County Executive Committee nominee responsible for Tourism, Gender Youth and Sports in the person of Roseline Anyango Odhiambo.

19. Further, that the Ministry of Culture and Social Services is divided into two:-

**a) Tourism, Culture and Sports.**

**b) Women, Youth affairs and Social Services.**

20. Counsel also explains that each Department at the County offices has been re-organized to factor in the interest of youth, and it has not been shown that the only place where their concerns can be addressed is within the County Executive Committee.

**21. MRS DHIKUSOKA** on behalf of the 2<sup>nd</sup> Respondent submitted that **Section 8** of the **Public Appointments Approval Act 2017** provides issues for consideration by the Committee on appointments, one of them being the procedure used to arrive at the nominee, including the criteria for short listing, and suitability to hold the office – these issues were considered by the Select Committee.

She points out that in line with the Act, the Clerk to the County Assembly caused to be published a notification of an approval hearing on the Daily Nation and the Standard Newspapers of 13/10/2017 where members of the public were invited, and those with objections were invited to send written memorandae or go to the County Assembly offices and present their objections.

22. On 23<sup>rd</sup> and 24<sup>th</sup> October, members of the public were in the Public Gallery and notably the petitioners were not present, and Mrs. Dhikusoka argues that it was at this approval hearing that the petitioners should have articulated their issues which were in the written memorandum. Emphasis is made that the onus falls on the person writing the memorandum to appear during the hearing of the approvals and it's not for the committee to fish for those objecting to the nominees.

23. The court's attention is drawn to the fact that during the public hearings, several members of the public articulated different issues, which are infact recorded in the Hansard, and the 1<sup>st</sup> petitioner having drafted a memorandum ought to have attended. It is the respondent's contention that there is no legal provision making it mandatory that the County Assembly must only address issues of the youth, nor is there any legal requirement for conducting civil education, as the 2<sup>nd</sup> respondent only undertakes approval hearings on a working day, during working hours, in a place accessible to the public.

24. Counsel reiterates that matters concerning the youth are covered within the structure of governance within the Homa Bay County particularly in the Department of Tourism, Sports, Gender Culture and Social Services which have a directorate for Women, Youth Affairs and Social Services, and its director reports to an Executive Committee member responsible for Gender and Culture therefore youth affairs is well catered for.

25. Counsel concedes that indeed the constitution provides for programs to be undertaken to ensure the youth have jobs but being in the County Executive Committee is not an affirmative action programe.

26. The 1<sup>st</sup> petitioner's response is that the advertisement carried qualification which was contrary to

provisions of **Section 35 (3) (d)** as it required an applicant to have at least 5 years experience, and this discouraged the youth from applying. It's his contention that having submitted their memorandum the 2<sup>nd</sup> Respondent ought to have sent out summons to them and he insists that the person representing the youth interest in the County Executive Office must be a youth aged between 18 – 35 years. To this the 2<sup>nd</sup> petitioner adds that youth is not the same as gender and there is no clear structure at Homa Bay County Government providing for the youth.

27. There is no dispute that there was an advertisement published in the daily Nation of 8<sup>th</sup> September 2017 calling for persons to apply to be nominated as members of the Homa Bay County Assembly Executive Committee. Subsequent to that the Governor nominated 10 persons all aged over 35 years and the names were submitted to the Committee on Appointment for purposes of vetting the nominees in fulfillment of **Article 179 (2) (b)** of the **Constitution of Kenya** which provides as follows:-

**“179(2) The County Executive Committee consists of –**

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

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

**Article 197 (2) of the Constitution of Kenya** further provides –

**“(2) Parliament shall enact legislation to –**

**(a) ensure that the community and cultural diversity of a county is reflected in the county assembly and county executive committee.**

**(b) prescribe mechanism to protect minorities within counties.”**

28. Certainly the youth form part of the community in Homa Bay. Do they constitute the marginalized or minorities? No demographic evidence has been presented to demonstrate what percentage of the Homa Bay populace is comprised of the youth, so as to determine whether they fall in the category of the minorities. Who qualifies to be considered as a youth?

29. The Concise Oxford English Dictionary (Eleventh Ed. Revised) [scoanes and Stevenson eds: 1675] defines Youth as the period between childhood and adult age, young in people. Of course young is relative but the constitution under **Article 260** defines youth to mean:-

**“the collectivity of all individuals in the Republic who –**

**(a) have attained the age of eighteen years;**

**(a) have not attained the age of thirty five years.”**

30. This would mean that indeed the petitioners have a genuine concern although the question I will later address is whether the youth must be included in the County Executive Committee for their interests to be addressed.

31. Do the youth in Homa Bay constitute the marginalized group or community? Again the Oxford English Dictionary (supra) as being in the periphery.

**Article 260** of the **Constitution** defines marginalized group to mean a group of people who because of laws or practices before, on or after the effective date, were or are disadvantaged by discrimination on one or more of the grounds in **Article 27 (4)**.

Article 27(4) provides that:-

**“The State shall not discriminate directly or indirectly against any person on any ground including race, sex, pregnancy, marital status, health status, ethnic or social origin, age, disability ....”**

The petitioners have not presented any evidence to demonstrate that the Youth in Homa Bay County are marginalized.

32. Did the Respondents discriminate against the youth on account of their age? Did any youth apply? Section 21 (3) of the Constitution states:-

**“21(3) All State organs and all public officers have the duty to address the needs of vulnerable groups within society, including women, older members of society, persons with disabilities, children, youth, members of minority or marginalized communities, and members of particular ethnic, religious or cultural communities.”**

The advertisement for the position made no restriction on the age of the applicants. No evidence has been presented that there were applicants aged between 18-35 years who met the qualifications set out in the advertisement, and were left out on account of their age.

In the Indian case **Centre for PIL and another –vs- Union of India and another – Petition Writ No.348 of 2010**, the Supreme Court stated:-

**“The classification permissible must be based on some real and substantial distinction bearing a just and reasonable relation to the objects sought to be attained and cannot be made arbitrarily and without any substantial basis. ....Thus the Legislature may fix the age at which persons shall be deemed competent to contract between themselves but no one will claim that competence to contract can be made to depend upon the stature or colour of the hair – such a classification for such a purpose would be arbitrary and a piece of legislative despotism.”**

Section 35 (3) of the **County Governments Act** provides that qualifications required for one to be appointed a member of the impugned committee.

33. Section 35(1) The governor shall when nominating members of the

**executive committee –**

**(a) ensure that to the fullest extent possible, the composition of the executive committee reflects the community and cultural diversity of the county.**

**(b) take into account the principles of affirmative action as provided in the Constitution.**

**(2) The County Assembly shall not approve nominations for appointment to the Executive Committee that do not take into account –**

**(a) not more than two thirds of either gender;**

**(b) representation of the minorities marginalized groups;**

**(c) community and cultural diversity.**

34. Must the interest of the youth only be represented by the youth? **Article 55** of the **Constitution** provides that:-

**“The state shall take measures including affirmative action programme to ensure that the youth –**

**(a) access relevant education and training;**

**(b) have opportunities to associate, be represented and participate in political, social, economic and other spheres of life;**

**(c) access employment;**

**(d) .....**

35. Certainly the youth must be given opportunities as described under **Article 55 (b)** of the **Constitution** but this provision cannot be read in isolation – it must be read alongside the threshold set by **section 35 (3)** of the **County Government Act**, which is a fulfillment of what **Article 197 (2) (a)** of the **Constitution** requires in terms of legislation. In the case of **MAQOUN –VS- ILLINOIS TRUST BANK (1898) 170 US 283 to BAYSINE FISH CO. –VS- GENTRY (1936) 297 US 422** it was held:-

**“The rule of equality permits many practical inequalities. And necessarily so. In a classification for governmental purposes, there cannot be any exact exclusion or inclusion of persons and things.**

**In other words, a classification having some reasonable basis, does not offend against the clause merely because it is not made with mathematical nicety, or because, in practice, it results in some inequality.**

**Government is not a simple thing. It encounters and must deal**

**with the problems which come from persons in an infinite variety of relations. Classification is recognition of those relations and, in making it a legislature must be allowed a wide latitude of discretion and judgment.”**

36. I have no doubt that what is of importance and for consideration is adequately addressed by **Section 8** of the **Public Appointments (County Assemblies Approval) Act No.5 of 2017** to include:-

**(a) Procedure used in short listing the nominees;**

**(b) Constitutional or statutory requirements (hence any reference to Section 35 (3) of the County Governments Act.**

**(c) Suitability of the nominees for appointment proposed having regard to credential, abilities, experience and qualities that meet the needs of the body to which the nomination is being made.**

37. Was there anyone in the age bracket of 18-35 years who met these three considerations and was left

out purely on account of age? If there was then the petitioners have not demonstrated that. Was the selection or appointment arbitrary and without any rational basis? I think not – and to borrow from the remarks in **STATE OF KERALA –VS- N. THOMAS & OTHERS CIVIL APPEAL NO.1160 OF 1974** which stated that:-

**“equality of opportunity need not be infused and recognized the need to prescribe reasonable rules for selection to employment or appointment to any office – so the minimum requirement Article 35 (3) (d) cannot be said to be unconstitutional.”**

38. Yes to be fair to the 1<sup>st</sup> Petitioner he did submit a memorandum to the Respondents expressing his concern about the youth. However he did not attend the public hearings which invited members of the public to articulate their issues. A notice of the hearings was duly placed in the two local dailies with the widest national circulation, and the issue of not being issued with summons is a non starter. The petitioners for reasons best known to them did not attend the hearings.

39. Consequently the petition has no merit and is dismissed.

40. No orders on costs.

**Delivered and dated this 22<sup>nd</sup> day of January, 2018 at Homa Bay**

**H.A. OMONDI**

**JUDGE**