



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

PETITION 1 OF 2018

SAMUEL CHEGE THIARI & ANOTHER.....PETITIONERS

V E R S U S

NYANDARUA COUNTY PUBLIC SERVICE

BOARD AND 8 OTHERS.....RESPONDENTS

R U L I N G

The two petitioners, Samuel Chege Thiari and Douglas Kamau Ngotho filed the petition dated 20/12/2017 seeking the following orders:

- (a) A declaration be issued that the 1st respondent is improperly and unlawfully constituted;***
- (b) That a declaration be issued that the 2nd, 3rd and 4th respondents are not suitable to hold office as members of the County Public Service Board;***
- (c) That a declaration be made that the recruitment by the 1st respondent for the position of Chief Officer is unlawful;***
- (d) That a declaration be made that the conduct of the 1st respondent by failure to keep proper records, failure to hold and attend board meetings and lack of accountability is unlawful and a gross violation of Chapter 6 of the Constitution;***
- (e) That an order be hereby issued disbanding the 1st respondent for incompetence and unlawful composition;***
- (f) That an order be issued directing the 9th respondent to ensure reconstitution of the 1st respondent with competent and qualified members;***
- (g) That the Hon. Court be pleased to order for compensation and general damages to issue for violation of the petitioner's rights and an inquiry into quantum be undertaken;***
- (h) That the petitioners be paid costs.***

The 1st respondent is a Board established Under Section 57 of the County Government Act, 2012 and recruits on behalf of the County Government. The 2nd, 3rd, 4th, 5th and 6th respondents are members of the 1st respondent, duly appointed to sit as such. The 7th respondent is an office established Under Article 178 of the Constitution and is the head of the County Assembly. The 8th respondent is an authorized officer of the County Assembly pursuant to Section 13 of the County Government Act, 2012.

The 9th Respondent is the Nyandarua County Government, established Under Article 176 of the Constitution as read with the County Government Act, 2012.

The petitioners are represented by Mr. Ngotho; the 1st, 2nd, 3rd, 4th, 7th and 8th respondents by Mr. Karanja; Mr. Odhiambo appears for the 5th and 6th respondents while Mr. Wachira appears for the 9th respondent.

On 3/1/2018, a notice of preliminary objection was filed by the 1st, 2nd, 3rd, 4th, 7th and 8th respondents seeking to have the whole petition struck out. The grounds of objection were twofold:

- (1) That this court has no jurisdiction to deal with the matters raised in the petition pursuant to Section 58(5) of the County***

Government Act, 2012, since all matters raised in the petition are supposed to be raised before the Nyandarua County Assembly;

(2) The petition violates the Constitutional principle of separation of powers.

Mr. Karanja filed submissions in support of the Preliminary Objection. The 1st petitioner filed an affidavit opposing to the preliminary objection as well as submissions filed in court on 24/1/2018.

The other respondents also filed their respective submissions opposing the preliminary objection.

The gist of the objection as submitted by Mr. Karanja is that this matter arises from the recruitment process for the position of Chief Officers Under Section 45 of the County Government Act; that the petitioners who had applied, were not shortlisted for the said positions and are aggrieved by that decision; that they wrote to the County Public Service Board seeking reasons for not being shortlisted and were given the reasons. It is contended that if at all their rights were breached, then the proper forum for them to urge their rights is the Employment and Labour Relations Court which has jurisdiction conferred to it by Article 162(2) of the Constitution.

Counsel also argued that the petitioner's action to petition this court is premature because the recruitment process has not been completed as no appointment has been made by the Governor to the position of Chief Officer, yet the petitioners seek to bring the process to an end by this petition. For the above submissions counsel relied on the decision of Hon. **Samwel Otara Arama v Nakuru County Public Service Board and 2 others Nakuru ELCRC Cause No.420/2017** where the ELRC court held that it has jurisdiction to intervene where rights touching on employment were breached and that filing such application was premature.

It was also the objector's contention that there is a procedure provided Under Section 58(5) of the County Government Act as read with Article 251 of the Constitution, for removal of a member of the 1st respondent by petitioning the County Assembly Under Section 88 of the County Government Act; that in recognition of that procedure, the petitioners did petition the County Assembly but were asked by the clerk to amend the said petition after which it would be forwarded to the Speaker of the Assembly to deal; that instead, the petitioners filed this petition, seeking disbanding of the Board. According to counsel, the petitioners should have amended the petition or moved this court for an order of mandamus to compel the County Assembly to act. It was counsel's further submission that once there is a procedure provided by the Constitution or statute for doing a particular act, that procedure must be followed. For that submission, counsel relied on the decisions *inter alia* **Arama's case Supra, Peter Ngoge v Francis Ole Kaparo & others Misc.C/App.22/2004 (2007) KLR** and **The Speaker of the National Assembly v The Hon. James Njenga Karume C/App.192/1992.**

It was further submitted that this petition violates the principle of Separation of Powers in that it offends Section 77 of County Government Act which provides for appeal to the Public Service Commission on issues of recruitment, selection, appointment and qualification; that the petition is therefore premature as the Governor and County Assembly have not been allowed to perform their functions in the appointment of Chief Officers.

Counsel relied on the decisions of **Simon Wachira Kagiri v County Assembly of Nyeri and 2 others. Petition.7/2013 (2015) KLR** and **John Mining Temoi and another v Governor of Bungoma and 17 others Petition 2/2017** where the courts held that the courts will only intervene where the Assembly has refused or is abusing its powers.

Mr. Odhiambo, counsel for the 5th and 6th respondents, in opposing the objection, considered three issues: The gist of his argument is whether the petitioners adopted the correct procedure in coming to this court; whether the procedure is conducted in mandatory terms and whether the objection has merit. He urged that for this court to determine whether the petitioners' rights have been breached, it must look at the facts which have been deposed at paragraphs 13, 14, 15 & 17 of the petitioners supporting affidavit and paragraphs 34 – 36 and 42 of the petition; that those facts can only be contradicted by evidence by the court hearing the parties to ascertain whether the proper procedures were followed or not; that the Preliminary Objection is therefore premature; that this court has the jurisdiction to protect the rights of the petitioners that the objection is a mere procedural technicality which the court should overlook Under Article 159 2(d) of the Constitution. For the above proposition the counsel relied on the decision in **Kiluwa Ltd & another Commissioner of Lands and 3 others (2015) KLR** which considered the case of **Kenya Bankers Association v Minister of Finance (2002) KLR 61**, where the issue of standing in Public Interest Litigation was considered and the court held:-

“.....the procedural trappings and restrictions, the preconditions of being an aggrieved person and other similar technical objections CANNOT bar the jurisdiction of the court or let justice bleed at the altar of technicality and restraints and procedures and reliefs have to be moulded according to the facts and circumstances of each case and each situation.”

Counsel further urged that prayer (e) in the petition seeks to disband the 1st respondent for incompetence and unlawful composition which can only be established by facts and the court should not turn a blind eye to a Board that may be sitting contrary to the law.

Relying on the decision of **Centre for Rights Education and Awareness & 2 others v Speaker of National assembly (2017) KLR**, the court held that it is the final arbitrator on adherence to the Constitution and its values and that ***“Courts are required by the Constitution to ensure that all branches of Government act within the law and fulfill their Constitutional obligations.”***

As to whether the procedure Under Section 251 is couched in mandatory terms, counsel argued that the word used is 'may' and is not couched in mandatory terms and therefore one can seek removal of a Member of the Board through the Assembly or any other legal forum.

As to whether the objection has merit, counsel submitted that, Articles 165(1) and 23 of the Constitution confer the jurisdiction on the High Court, to hear and determine matters relating to threats or breach of fundamental rights.

He urged the court to find that this court has jurisdiction to hear and determine this petition.

Mr. Wachira joined issue with the submissions of Mr. Odhiambo in opposing the objection and added that Section 58 (5) of County Government Act only addresses itself to removal of members of the Board but not disbandment of the Board; counsel also argued that in the prayers sought, the petitioners do not seek to be shortlisted; that there is a lacuna in the law on disbanding of the Board and the court has jurisdiction to intervene. For position of Chief officer this court has jurisdiction Under Article 165(3)(d) of the Constitution to intervene; that the Clerk to the Assembly indicated to the petitioners that there had been other petitions of the same nature which had been defeated and this one was likely to suffer the same fate (See paragraph 36 of the petition) and therefore the jurisdiction of the Assembly had been spent.

Mr. Ngotho, counsel for the petitioner joined issue with Mr. Wachira and Mr. Odhiambo and added his voice to objecting to the Preliminary Objection. He submitted that the petitioners submitted their petition to the County Assembly but for flimsy grounds based on technicality, the clerk sent the petition back for amendment and the petitioners' recourse was to come to this court. Counsel submitted that this petition has nothing to do with recruitment of Chief Officers; that the 1st petition sought the criteria for short listing of the candidates; that petitioners found the number of the Board to be unqualified and recommendations made by a committee to cure the problem had not been acted upon; that two other petitions by worker touching on the same issues had been rejected and the petitioners feared their petition would suffer the fate and hence the decision to come to the High Court; that the speaker and clerk to the assembly did not show commitment to bring the petition to the Assembly for discussion by reason of the reply to the Governor's letter to which the clerk declined to stop the process saying there was no provision in law to do so.

The Governor had sought the suspension of the process of recruitment under his letter of 4/12/2017 where he cited inter alia, complaints from the public and internal conflicts in the Board. For the above submission, counsel relied on the decision of J. Muriithi in Feisal Hassan and 2 others v Public Service Board of Marsabit Pet.329 of 2016 where the court faulted the submission that the petitioners should have waited for the recruitment process to be concluded before moving the court for breach of fundamental rights.

Counsel further submitted that under Article 23 of the Constitution, this court has the jurisdiction to hear and determine issues arising from allegations of breach of fundamental freedoms and rights. Counsel also submitted that the County Assembly has been reluctant to deal with the illegalities and illegal composition of Public Service Board whereby though 3rd respondent was not qualified, was appointed as a member; that the Ad hoc Committee on Justice Legal Affairs and Public Service failed to uphold the rule of law as it failed/neglected to disclose material facts on academic qualifications of members; that the speaker of the County Assembly approved appointment of the 2nd – 4th respondents when they were unqualified and therefore only this court can serve justice to the parties pursuant to Article 50 (1) of the Constitution which grants all the persons with a right to approach the court for resolution of their disputes. Counsel supported his grounds with the decision in Protus Arambe Mandi & another v Speaker of the County Assembly Kisii and 2 others Pet.13/2016.

In a rejoinder Mr. Karanja submitted that the facts herein are not disputed; that there is no specific prayer for declaration and no specific violation has been pleaded as required of Constitutional petitions. As respects prayer (3) for disbursement of the 1st respondent for being incompetent and unlawful is the duty of the County Assembly and if all members are to be removed, each must know what they did or what they did collectively as a Board.

Counsel also urged that the Assembly was not been sued as there is no prayer against it and also it is not shown how the Board abrogated its duties and counsel further argued that the petitioners request for information under Article 35 of the Constitution did not infringe rights of others; that the petition takes away the independence of the Assembly and he still argued that this petition be taken to the County Assembly to deal and if it does not; then they can move this court.

What is before me for determination is a Preliminary Objection raised by counsel for 1st, 2nd, 3rd, 4th, 7th and 8th respondents to determine whether this court has jurisdiction to entertain this petition. The celebrated decision in Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd (1969) E.A. also has been the leading decision of defining what constitutes a preliminary objection. In the said case, Law J.A. stated as follows (pg.700):

“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point, may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

In the same case, Sir Charles Newbold P. Stated:

“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A Preliminary Objection is the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that the facts pleaded by the other side are correct; it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessary increase in costs and on occasion, confuse issues.”

From a reading of the above decision, a preliminary objection has to be a pure point of law and the facts must not be in dispute and if sustained by the court, the Preliminary Objection will determine the suit.

I will go ahead to consider all the point raised in the objection.

It was contended that the petitioners are aggrieved by the failure to be shortlisted as Chief Officers after they applied pursuant to Section 45 of the County Government Act. It was Mr. Karanja's submissions that they should have moved the ELRC Court Under Article 162(2) of the Constitution.

I have read through the petition and the prayers sought and nowhere are the petitioners seeking to be short listed as Chief Officers.

It is during the process of recruitment that the petitioners' rights were allegedly breached and the other alleged breaches unearthed. I do appreciate the decision in *Arama's case (Supra)* where the court held that it has jurisdiction to hear and determine matters relating to employment even where an employee/employer relationship was not yet matured but clearly, this case cannot be classified as one falling under that category.

Whether this petition offends Section 58(5) of the County Government Act as read with Article 251 of the Constitution;

Section 58(5) provides as follows:

“(5) the members of the Board may only be removed from office:

(a) On grounds set out for removal of members of a Constitutional Commission Under Article 251 of the Constitution and

(b) By a vote of not less than Seventy Five percent of all the members of the County Assembly.”

On the other hand, Article 251 of the Constitution on removal from office provides:

“251

(1) A member of a commission (other than an ex officio member), or the holder of an independent office, may be removed from office only for:-

(a) Serious violation of this Constitution or any other law, including a contravention of Chapter Six;

(b) Gross misconduct, whether in the performance of the member's or office holder's functions or otherwise;

(c) Physical or mental incapacity to perform the functions of office;

(d) Incompetence; or

(e) Bankruptcy.”

From a literal interpretation of Section 58(5) and Article 251(above), it is my view that the above provisions address the removal of an individual member of the Board but not disbanding the whole Board. In this case, the petitioners seek the disbanding the Board at prayer (e).

As submitted by counsel opposing the Preliminary Objection, it seems there is a lacuna in the law as regards the removal of the Board which the petitioners seek and the question then is whether this court can intervene. That can only be determined after hearing all the parties on the issue.

This petition is expressed to be brought pursuant Articles 10, 27, 28, 35, 50 176, 179, 233, 235 and 258 of the Constitution.

Article 165(1) of the Constitution establishes the High Court.

Article 165(3)(b) of the Constitution confers on the High Court jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been breached or is threatened. Under Article 165 3(d) the High Court is further clothed with jurisdiction to determine any question whether a law is inconsistent with the Constitution; the question whether anything said to be done under the authority of this Constitution or any law is inconsistent with or contravention of the Constitution and any matter relating to Constitutional process of State Organs in respect of County Governments and any other matter relating to Constitutional relationship between the levels of Government.

Article 23 of the Constitution affirms the jurisdiction of the High Court on the Bill of Rights where it states:

“The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation, or infringement of or threat to a right or fundamental freedom in the Bill of Rights.”

The petitioners recognized the jurisdiction under Section 58(5) of the County Government Act as read with Article 251 of the Constitution and Under Section 88 of the County Government Act, filed a petition before the County Assembly but the same was returned to them by the clerk to make amendments. The petitioners complain that the refusal to hear their petition was a decision based on a technicality and they apprehended a further breach of their rights bearing in mind that two similar petitions from the County employees against the members of the Board had not seen the light of day. The Constitution grants an individual a right to approach the court for protection of rights which are breached or threatened with breach. One need not wait until the rights are breached. This position was properly explained in the decision of ***Feisal Hassan and 2 others v Public Service Board of Marsabit County and another Pet.329/2016 (2016 KLR)*** where the court observed:

“With respect the submission by counsel for the respondent that the petitioner ought to wait for the process of appointment to be

concluded and to file suit if aggrieved by the outcome of the appointments is faulty. Selection of persons to be short listed, that is the short listing exercise is perhaps the most important part of the appointment process as the eventual appointment can only be done from the shortlisted candidates. If a qualified candidate is not shortlisted, his candidature is defeated by the very act of non-shortlist and if an unqualified one is shortlisted. It may be that nonqualified person may eventually be appointed irregularly and unlawfully. In the ordinary course of things, if a person is not shortlisted for a position, he cannot be selected even if he is qualified for the job. So if the short listing erroneously keeps out qualified candidates, the end result of the recruitment exercise will remain that suitable qualified candidates are not considered for the jobs.”

I agree with the above finding that the aggrieved party does not need to await the completion of the process in order to seek redress for breach or threatened breach of fundamental rights because the damage may be irreversible.

The petitioners have also invoked Article 258 of the Constitution which provides for public interest litigation.

It reads as follows:

“258.

(1) Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.

(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by:-

(a) A person acting on behalf of another person who cannot act in their own name;

(b) A person acting as a member of, or in the interest of a group or class of persons;

(c) A person acting in the public interest; or

(d) An association acting in the interest of one or more of its members.”

In the pleadings it is disclosed that County employees had earlier filed petitions before the Assembly and the same had not been considered. Further, a letter dated 4/12/2017 from the Governor Nyandarua seeking to stop the process of recruitment of Chief Officers due to complaints from members of the public over internal conflicts in the Board, complaints of unqualified persons in the Board and criteria of short listing of the Chief Officers, was addressed to the Clerk of the Assembly who replied that there was no provision in law **“to suspend or stop the process midstream.”** It meant that those complaints had no redress from the County Assembly and had to wait till the process was over yet under Article 165 and 23 of the Constitution, one can seek redress for a threat to a right meaning the process could be halted midstream if it was necessary. That being the case, the people who were aggrieved had only one option, that is, to approach this court for redress.

The petitioners have filed this petition on behalf of the public too and this court has jurisdiction to hear and determine the petition.

The 2nd leg of the objection was that the petition violates the principle of separation of powers as each Arm of Government is given its role in the Constitution and in this case, it is the County Assembly that was given the role of removal of members of the Public Service Board not the court. Reliance was made on the decision of **Speaker of National Assembly v the Hon. James Nyaga Karuma and C.A.192/1995 Nakuru Pet.17/2014 James Akalaru alias Miguru and another v Moses Kasaine Lenolkalal** where the court held that:

“Where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or any Act of Parliament that procedure should be followed.”

I do agree with the above statement. However, the court through its supervisory powers Under Article 165 of the Constitution has power to intervene where the parliament or other public body abrogates its duty.

In the case of **Simon Wachira Kagiri Supra** the court said:

“The doctrine of separation of powers applied with equal measure to County Governments which were structured and ordered in line with traditions and principles that governed the National Government. The court could only interfere with the proceedings and decision of the County Assembly and Parliament on extreme situations when those bodies acted or conducted their proceedings in a manner that amounted to abrogation of the Constitution.”

I would also echo what the court said in the case of **Centre for Rights Education and Awareness (Supra)** where the court held that the courts have to ensure that all branches of Government act within the law and fulfill their Constitutional obligations.

In **Protus Aramba Supra** – the court relied on **The Speaker of the Senate and another v Attorney General and another Supreme Court Advisory Opinion No.2/2013** where the court said:

“County Assemblies are this behoved to operate under the Constitution which is the Supreme Law of the Land and if they violated the procedural requirements of the Supreme Law, it is for the Courts of Law to assert the authority and Supremacy of the Constitution.”

Under Article 1 of the Constitution, the sovereign power of the people is delegated *inter alia*, to parliament, legislative assemblies, the Judiciary and Independent Tribunals. In the exercise of their powers the above institutions have to uphold the National Values and principles of Governance Under Article 10 as read with the values vested the Chapter 6 of the Constitution. If the County Assembly in exercise of the delegated authority acts in excess of its power or contrary to the Constitution, then this court would have jurisdiction to intervene under Articles 165 of the Constitution.

Allegations of breach of fundamental rights Under the Constitution have been leveled against the County Assembly and this court has the jurisdiction to enquire into the said allegations and it does not amount to violation of the doctrine of Separation of Powers.

I therefore do not agree with the objection that this petition is premature and this court has the jurisdiction to deal. For a preliminary objection to succeed, it must be on a pure point of law and the facts must not be in dispute. Though the objector contended that all the facts are not in dispute, I find that the facts as pleaded are not all admitted by the respondents.

Whereas the petitioners allege that the petition to the Assembly was rejected on flimsy grounds, the objectors contend that it was done procedurally. Several allegations have been made in the affidavit in support of the petition on incompetence of the Board members; on unqualified members of the Board, (paragraph 13 – 18 of the petitioner’s affidavit). The respondents are yet to file a reply to these allegations. These are facts that require answers and will require the court to enquire into them at a hearing into the alleged threats to breaches or breaches of fundamental rights.

In the end I find that the preliminary objection is not merited. It is dismissed.

Dated, Signed and Delivered at NYAHURURU this **31st** day of **May**, 2018.

.....

R.P.V. Wendoh

JUDGE

Present:

Mr. Kihoro holding brief for Mr. Karanja for 1, 2, 3, 4, 7 & 8 respondents

Ms. Gikonyo Holding brief for 5th & 6th respondents

Mr. Wachira for 9th Respondent

Soi – Court Assistant