



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA
CONSTITUTIONAL PETITION NO. 3 OF 2018

IN THE MATTER OF COUNTY ASSEMBLY OF KENYA

BETWEEN

PHILIP WANYONYI WEKESA.....1ST PETITIONER
ALBERT SIMIYU WAMALWA.....2ND PETITIONER
JOHN MAJOR MUKENYA.....3RD PETITIONER

VERSUS

THE CLERK TO THE
COUNTY ASSEMBLY OF BUNGOMA.....1ST RESPONDENT
THE SPEAKER OF THE
COUNTY ASSEMBLY OF BUNGOMA.....2ND RESPONDENT
THE COUNTY ASSEMBLY SERVICE BOARD
BUNGOMA COUNTY ASSEMBLY.....3RD RESPONDENT
THE COUNTY ASSEMBLY OF BUNGOMA.....4TH RESPONDENT

AND

RACHELE RAEK NEKESA KHISA.....INTERESTED PARTY

RULING

Philip Wanyonyi Wekesa (1st Petitioner) Albert Simiyu Wamalwa (2nd Petitioner) and John Major Mukenya (3rd Petitioner) are residents of Bungoma County. The Respondents are officers of the County Assembly of Bungoma and the Interested Party Rachele, Rael Nekesa Khisa is the person whose approval for appointment is the subject of this petition.

The 3rd Respondent the County Assembly Service Board initiated and conducted a process of nominating suitable candidates for the position of the 4th and 5th Members of the Board. They invited applications for appointment. Sixteen candidates applied and shortlisted, interviews were conducted without giving the public 21 days notice to submit Memorandum or submissions regarding suitability of the shortlisted candidates. Despite this on 21.1.2018 one Matilda Nekesa Makana presented a Petition to the 1st Respondent opposing the candidature of Rachele Rael Nekesa Khisa the interested Party herein. In spite of the Petition the interviewing Panel recommended for approval of the County Assembly of Bungoma (the 4th Respondent) by a report of the Board dated January 2018 to which was tabled for debate and approval. The tabled report did not have annexed to it all the mandatory documents, no mention of the petition on unsuitability was made; and on 13.2.2018 the speaker of the County Assembly (2nd Respondent) convened a special sitting where the Interested Party and one Anthony Simiyu were approved. The Petitioners contend that the process of nomination and approval of the Interested Party to the Board was not undertaken in a manner contemplated by the constitution and was in violation of Article 1, 2, 3, 10, 21, 24, 73, 174 and 232 of the Constitution. In particular the petitioners contend;

1) That the Petitioners that the special sitting was irregular as it flouted Standing Order 26(3) of the 4th Respondent which requires the 2nd Respondent to publish and issue a notice for special sitting in the Kenya Gazette before such special sitting can be convened.

2) That since the 2nd Respondent did not publish such notice in the Kenya Gazette, the proceedings of 4th Respondent of 13/2/2018 were not only illegal but null and void ab initio.

3) That the 1st and 2nd Petitioners and residents of Bungoma County acting on behalf of Youth Forum for Good Governance on 7/2/2018 and 12/2/2018 respectively presented Petitions to the 1st Respondent challenging the legality of the nomination and appointment of the two members to the Board but the same received little attention from the 1st, 2nd and 3rd Respondents who were hell-bent on publishing the appointment of the interested party in the Kenya Gazette.

The Petitioners therefore approached this court seeking the following prayers;

a) A declaration that the appointment of Four (4) other members of the County Assembly constituting the interviewing panel to consider the applications, shortlist, conduct interviews and recommend nomination without rectification and or approval of the County Assembly as required did not adhere to the rule of law, was not conducted in a transparent manner and therefore unconstitutional.

b) A declaration that by failing to declare vacancy in the membership of the Board under Section 12(3) (d) of the County Governments Act by notice in the Gazette and in at least two daily newspapers of national circulation as required by law, the 1st, 2nd and 3rd Respondents omission is in breach of the Constitution.

c) A declaration that by failing to provide reasons why five candidates out of the 16 who had applied for consideration were not shortlisted, the 1st, 2nd and 3rd Respondents' omission is in breach of the Constitution.

d) A declaration that by conducting the interviews less than 21 days after inviting candidates for the interviews in disregard of Section 5 of the Public Appointments (County Assemblies Approval) Act, the 1st, 2nd and 3rd Respondents' actions are unconstitutional.

e) A declaration that by failing to invite the public to present their views, memoranda and submissions regarding suitability of the shortlisted candidates in the spirit of Public Participation in the newspaper advertisement of 8/1/2018, the 1st, 2nd and 3rd Respondents' omissions are in breach of the Constitution.

f) A declaration that by allowing the interested Party to participate as a candidate for appointment as member of the Board without requiring the interested party to resign her position as a member of the board, the 1st, 2nd and 3rd Respondents actions afforded the interested party undue advantage over other candidates therefore unfair and unconstitutional.

g) A declaration that the special sitting of the County Assembly on 13/2/2018 when the County Assembly was in recess and without a notice in the gazette notifying the public about the same, was unconstitutional null and void.

h) An Order of certiorari to be issued to bring into this Honourable Court for purposes of being quashed the decision by the 3rd Respondent recommending approval of the interested party herein and one Anthony Simiyu Mabele into Membership of the County Assembly Service Board by the County Assembly of Bungoma.

The 2nd Respondent filed a Replying Affidavit sworn by Emmanuel Mukhebi Situma, the Speaker of the County Assembly of Bungoma. He deponed that he is the Chairman of the County Assembly Service Board. He deponed that there was vacancy at the Board and they placed the 1st advertisement in Standard Newspaper of 20.10.2017 and another one on the 3.11.2018 inviting applications. Applicants applied. By advertisement on 8.1.2018 they shortlisted persons were invited to attend Interviews. The interviews were conducted on 15th – 16th January, 2018; all shortlisted candidates except one were interviewed including the Interested Party. The Selection Panel prepared a report which was tabled at a Special sitting of the Assembly on 13th February, 2018, which was gazetted. The Petition on the suitability of the Interested Party which was presented on 7/2/2018 and 12/2/2018 had been overtaken by events as the report had been prepared on 28.1.2018 to 31.1.2018.

John Mosongo the Secretary of the Bungoma County Services Board swore an affidavit sworn on 23rd February, 2018. Responding to the Petition he deponed the Interested Party did not conduct the business of the Board from October, 2017 as she had sought permission to be away as she had signified her intention to seek re-appointment. The advertisement for the appointment was made; applicants applied; invitations were made to parties to submit Memoranda or Petitions on suitability. In respect to Interested Party, three petitions were lodged. One by the Petitioners, another by a Youth Movement and another by Matilda Mukango. The petition of Matilda was considered by The Panel and they filed their report. In regard to the legality of the Special sitting of the Assembly he depones;

a) On the 12th February 2018, the Honourable Speaker of the County Assembly of Bungoma signed dated and submitted to the Government Printer a Notice for the Special Sitting, dated the 12th February; the Government Printer published the special setting in the Gazette notice No. 1533 of 16th February 2018; True copy exhibited and marked "JKM.1" and the Appointment of the Rael Nekesa Khisa as shown in the Gazette Notice which I signed on 13th February 2018 (true copy exhibited herewith and marked "JKM.2").

b) The said Gazette Notice, signed and dated on 12th February 2018 was submitted to the Government Printer for publication

immediately, but as is the practice, Gazette Notices are published weekly on Fridays, with very few exceptions in which publication may be made earlier than a Friday in the case of a National issue needed to be publicized urgently.

c) I am aware that a petition contesting the suitability of a candidate must be made on oath; neither the documents appearing at page 60, 61, or 62 of the petition are made on oath as required by law as per Section 7(10) of the Public Appointments (County Assemblies Approval) Act 2017.

The Interested Party filed an affidavit in Reply to this Petition. She deponed that she is a permanent Resident of Bungoma County born in Sitikho, and married in Tongaren Constituency where she has her matrimonial home. Her husbands' parents had a homestead in Malava constituency and later settled at Tongaren. She further deponed that having served in the County Assembly Service Board, she applied for re-appointment; she was shortlisted, attended interview and the panel made a report which was debated and 30 members voted to adopt the report and 29 did not support the report, and therefore the Assembly declined to adopt report in respect of the male member. On the Report by the Auditor – General she deponed that there is no pending investigation by any organ; that the petition against her was not made on oath, and the alleged petitioners are fictitious.

By consent the petition was to be disposed of by way of Written Submissions. Counsels for the parties filed respective written submissions.

Mr. Maloba for the petitioner submitted that this court under Article 165(3) (a) 1 of the Constitution 2010 is clothed with jurisdiction to hear and determine this petition. He submits that this petition is unopposed as the Respondent have not filed a Memorandum of appearance and either a Replying affidavit or Statement setting out grounds relied upon to oppose the application in contravention of Rule 15(2) of the Constitution of Kenya (Protection of Rights and Fundamental Freedom) practice Rules. That what they have filed is only the response to the application dated 19.2.2018 which had been disposed of.

On the substantive petition, Counsel for Petitioner submits that the Respondents jointly and severally acted ultra vires. Section 9 of the County Assembly Services Act and the first schedule spells out the procedure to be followed by Respondents in appointing the candidates to fill the position but the Respondents contravened both the Constitution and Statutory provisions in the process they used. In particular Counsel submits that the Appointment is to be done by the Board where the quorum is 3 members and not 7 members as in this case, it is also required that whenever a vacancy arises the Board shall by notice in the Gazette and at least 2 daily Newspaper invite Interested qualified person to apply. In this case the Respondent did not advertise in the Gazette and only advertised in one Newspaper. The candidates shortlisted must be given 21 days notice but in this case only 8 days notice was issued. Further, Counsel submitted that there was no public participation during the approval hearing and that even when petition was made by Matilda Nekesa Makana, it received no attention of the Respondents.

On the assessment criteria and approval hearing Counsel submits that the assessment form specified in the second schedule has to be used. In this case the Report tabled on the floor of the assembly lacked Minutes and criteria for vetting or approval but Panel only asked candidates questions on work experience and knowledge of public affairs leaving out the issues stated in questionnaire and assessment form. The candidates scores attached are not backed by objective criteria. Finally Counsel submits that the convening of the Special sitting was not gazetted and therefore the sitting of 13.2.2018 was unprocedural and the proceedings irregular and decisions made null and void. Counsel referred this court to the decision in **Nakuru High Court Petition No. 23 and 25/ 2013. John Kipngeno Koech and Nakuru County Assembly on appointment and others and NBI Constitution and Human Rights Division Petition No. 295/2015. Keroche Breweries Ltd. & Others -Vs- Attorney General & Others.**

Mr. Bw'Ochiri for the 2nd and 3rd Respondent submitted that the 2nd and 3rd Respondent duly complied with the provisions of Section 9 of the County Assembly Services Act No. 24 of 2017 read together with the first schedule of the same Act and thus no fundamental right had been breached. He referred to the decision in **Ernest & Young LLP -Vs- Capital Markets Authority NBI High Court Petition No. 385/2016.** Counsel for the Respondents secondly submits that this court lacks jurisdiction as the issue relates to appointment of a member of the County Assembly Service Board and therefore this should be a matter for the Employment and Labour Relations Court in line with Article 165(5) (b) of the Constitution. He invited the Court to be guided by the decision of **Wasilwa J in Okiya Omutata Okoit -Vs- President of Republic of Kenya & 4 Others NBI ELRC Petition No. 19/2016.**

Mr. Ocharo for the 4th Respondent Submits that the Petitioner in this Petition must before the Court acts show the Constitutional infractions breached by the Respondent and also show the prejudice suffered as a result thereof. He further submits that from their own pleadings in the petition, the Petitioners were aware of the interview, and they therefore cannot allege non-compliance with notification of the process and Court cannot nullify it for that reason. Finally Counsel submits that the Report was placed before the Assembly for debate but petitioners assert that there were insufficient details to enable the assembly have a qualitative debate. He submits that this court cannot interrogate into the quality of the debate but the outcome. He relies on the decision in **Mumu Matemo -Vs- Trusted Society of Human Right Alliance** for this contention. He urged the court to be guided in the comparative decision in Presidential Election Petition of Ghana **No. 51/6/2013 Nana Addo Daulwa Akuso & Others - John MRAMANI Mahama & Others.**

From the Petition, affidavits in Response and submissions, the issues that lend themselves for determination in my view are the following;

- 1) *Whether this court has Jurisdiction to entertain this Petition.*
- 2) *Whether the process of advertisement, shortlisting, composition of Panel interviewing, Reporting and Debate of the names of the candidates was procedural.*
- 3) *Whether there was Public participation and*
- 4) *whether the Interested Party was suitable coordinate for nomination.*

5) *What orders should this court issue.*

On the issue of jurisdiction Mr. Onchiri for the 2nd & 3rd Respondent submitted that this court lacks Jurisdiction pursuant to Article 165(3) 25 of the Constitution as the matter relates to the appointment of a number of the County Assembly Service Board, being an appointment issue and therefore the assignment of someone to employment, it is a matter to be handled by Employment and Labour Relations Court.

For the Petitioner Mr. Maloba submits that this court has jurisdiction by virtue of Article 165(3) (a) (1) of the Constitution. He submits that in as much as this Petition is to determine whether there were procedural improprieties as well as the legality of action or whether in accords with constitutional threshold, this court has Jurisdiction.

In determining jurisdiction of this court in relation to matters of Employment, this court in ***Bungoma Constitution Petition No. 8 of 2018*** Section 12 of the Employment and Labour Relations Act states that the court can deal with any matter arising out an employment relationship. Nduma J in ***Nick Githinji Ndichu Vs. Clerk Kiambu County Assembly and Another [2014] eKLR*** where he held as follows:

“It is clear from the foregoing that the law is not concerned with the method of acquiring an employment. The law does not concern itself with whether the person was appointed or elected.

Rather the person must:

Be having an oral or written contract of service,

Be receiving a wage/salary for the service rendered.....”

For one to access the jurisdiction at ELRC he must demonstrate that there exists an employer – employee relationship; that there is an oral or written contract of service or that the issue is a dispute falls within the provision of Section 12(1) of the ELRC Act. Though Advertisement, Shortlisting, Interviewing are all steps towards recruitment and steps towards creating an employer – employee relationship, they are not in my view envisaged in Section 12 and which will place this petition under the jurisdiction of the Employment and Labour Relations Court.

As Nduma J correctly observed in ***Nick Githinji Ndichu Vs. Clerk Kiambu County Assembly & Another***, employer/employee relationship exists when there is a “*contract of service*” as defined by Section 2 of the Employment Act, 2007. We concur with the learned Judge that the law is not concerned with the manner of engagement or assumption of the position of employee. What is important is the existence of a contract of service “*whether oral or in writing, and whether expressed or implied to employ or to serve as an employee for a period of time...for wages or a salary.*”

There being no contract of employment yet, between the interested party and Respondents, this is not a dispute envisaged in Section 12(1) of the ELRC Act which would oust the jurisdiction of this Court. I therefore find this court has jurisdiction and to hear and determine the Petition.

2 The second issue raised by the Petitioner is what they consider as Constitutional and Procedural violation by the Respondent in the process of appointment of the member of the County Assembly Service Board. The procedure for appointment is set out in Section 9 of the County Assembly Service Act and the first schedule. Section 12 of the County Government Act, Act No. 17 of 2012 creates the County Assembly Services Board. It provides Section 12;

The County Assembly Board

1) *There shall be a County Assembly Service Board for each County Assembly.*

2) *The County Assembly Service Board shall be a body corporate with perpetual succession and a common seal.*

Section 3. Amended vide Section 46 of County Assembly Services Board. The Board consists of -

a) *the speaker of the county assembly, as the chairperson;*

b) *a vice-chairperson elected by the Board from the members appointed under paragraph (c);*

c) *two members of the county assembly nominated by the political parties represented in the county assembly according to their proportion of members in the county assembly; and*

d) *one man and one woman appointed by the county assembly from amongst persons who are experienced in public affairs, but are not members of the county assembly.*

Section 9 of the County Assembly Service Board provides for qualification and procedure of appointment to the Board. It provides Section 9; **Qualifications and procedure of appointment**

1) A person shall not be qualified for appointment as a member of the Board under Section 12(3) (d) of the County Governments Act (No. 17 of 2012) unless such persons –

- (a) is a citizen of Kenya;*
- (b) holds a degree from university recognized in Kenya;*
- (c) has at least ten years experience in public affairs; and*
- (d) meets the requirements of leadership and integrity in Chapter Six of the Constitution.*

2) The procedure for the appointment of the members of the Board referred to in subsection (1) shall be as set out in the First Schedule.

The first schedule to the County Assembly Services Act enacted Order Section 9(2) of the Act provides for the procedure for appointment of a member of the Board. It provides;

Procedure for Appointment of a Member of the Board

- 1) Upon the convening of the first sitting of the County Assembly or whenever a vacancy arises in the membership of the Board under section 12(3)(d) of the County Governments Act, the Secretary to the Board shall, within fourteen days of that first sitting or the occurrence of the vacancy or within such time as would be reasonable, by notice in the Gazette and in at least two daily newspapers of national circulation, declare a vacancy and invite interested qualified persons to apply.*
- 2) Any person qualified in accordance with this Act may make an application to the Secretary within fourteen days of the publication of the notice.*
- 3) The Board shall, within fourteen days after the last date of submission of applications under paragraph 2, consider the applications, shortlist, conduct interviews and recommend the name of one applicant qualified for the position.*
- 4) The name of a person recommended under paragraph 3, the Secretary shall, within seven days after the approval, publish the name of the person in the Gazette.*
- 5) If the assembly does not approve a person recommended under paragraph 3, the Speaker shall communicate the decision at the assembly to the Board and shall request for a fresh nomination by the Board.*

The above legislation exhaustively provides on the creation of the Board; qualification of members and procedure for appointment. This procedures include declaration of vacancy vide a gazette Notice, invitation of applications, consideration of the applications and Shortlisting, Conducting of Interviews and Recommendation of the applicants qualified for the position.

In this Petition, the Petitioner submit there was no gazettement of declaration of vacancy; the shortlisting done did not give reasons why 5 applicants were not successful; Interviews were conducted within 8 days instead of 21 days and finally that the criteria for qualification of the interested party was not known as no questionnaire of the questions asked and answers given were provided; and finally that the debate in the chamber on suitability was shallow and irregular.

Emanuel Situma the 2nd Respondent deponed that advertisement for a vacancy was done on 20.10.2017 and another one on 3.11.2018 in the Standard Newspaper. The shortlisted candidates names were published on 8.1.2018 and interviews conducted on 15th - 16th January, 2018. A report was prepared and discussed in a Special sitting on 13th February 2018.

The Petitioners contention on this issue is that no publication was done in the Kenya Gazette and that the time lines provided were not adhered to. They submit that no evidence has been adduced to show that the declaration of vacancy was done in the Kenya Gazette as required. However the Speaker has annexed to his petition copies of the publication in the Standard Newspaper for the vacancy, applications, shortlisted listed candidates and interview dates.

The 3rd issue is whether there was public participation in the approval process and if the Interested Party was suitable.

The petitioners in their petition contend that their being residents of Bungoma County and acting on behalf of Youth Forum for Good governance presented petitions on 7.2.2018 and 12.2.2018 to the 1st Respondent challenging the legality of the nomination and appointments but their petition received little attention from the 1st, 2nd and 3rd Respondent.

The concept of Public participation is central in the democratic process of a Country, particularly when it relates to matters that affect the citizens. Public participation refers to the process by which the Public participates in governance or actions of governance which is a measure of transparency and accountability. Central in the concept of public participation is the affording the public the opportunity to give their input in decision making.

In the present petition the petitioners aver that there was no public participation. They have annexed a petition dated 7.2.2017 to the Clerk County Assembly signed by Philip Wanyonyi Wekesa and Albert Wamalwa. There was an annexed Petition by Matilda Nekesa Makana dated 12.1.2018. They have also annexed the Petition by Jane Khasali, Michael Marutu, Joan Bahati, Winnie Chebet and Janet Nangula opposing the nomination of the Interested Party to the County Assembly Services Board. In the Petition the petitioners aver that the petitions were not considered as the Respondent were in a rush to approve the nominations. From this annexures it is evident that opportunity was afforded to the petitioners who took it up and forwarded the petitions in respect of the appointment. Their main complaint is that their

petitions were not considered. They invite this court to interrogate the process and declare that since then their petition was not taken into account, the process was flawed. It is true in principle that the High Court can review appointments to public bodies to satisfy on procedure and legality of the appointments. The Court of Appeal in *Mumo Matemo -Vs- Trusted Society of Human Rights Alliance & 5 Others* 2013 KLRI in this aspect stated;

“Having heard from the parties, we agree in principle with the High Court’s finding that it may conduct review of appointments to State Public Office on grounds of procedural soundness as well as the legality of the appointment decision itself to determine if it meets the constitutional threshold, provided that it accords with this Court’s holding in Ex Chief Peter Odoyo Ogada (supra) that:

“A body or organ performing statutory duties had discretion when handling matters falling within its mandate. There is a margin of discretion conferred by the Constitution and the law upon those who make decisions and the test of rationality ensures that any legislation or official act is confined within the purposes set by the law. It is the insistence that decisions must be rational that limits arbitrariness and not discretion by itself. Where a body like IEBC applied its mind to constitutional requirements, regarding delimitation, reaching a rational conclusion, the courts should not review that decision.”

Was the Interested party suitable for nomination? In support of their petition, the petitioners raised issues against the Interested party, first that she is not a resident of Bungoma, having opted to contest as MCA Chemuche Ward of Malava Constituency in Kakamega County. The petitioner aver that being a member of the CAPSB one will have to be a resident of the said County. They dispute the assertion by the Interested party that she is a resident of Tongaren in Webuye West Constituency as misleading and false. On this issue the qualifications for candidates applying for membership are as set out in Section 12(3)(d) of the County Service Act. Which provides that the candidate must;

- 1) *is a citizen of Kenya;*
- 2) *hold a degree from university recognized in Kenya;*
- 3) *has at least ten years experience in public affairs; and*
- 4) *meets the requirements of leadership and integrity in Chapter Six of Constitution.*

While residence can be a factor, it is not a legal requirement for appointment to the Board. The Interested Party has annexed ID. No.22085805 showing place at Birth as Bungoma South.

The other ground for opposing the nomination of the Interested Party was that she did not meet the requirements of Chapter Six of the Constitution on Integrity as she lacked accountability when she served in the previous Board; and that she was a member of the Welfare Committee which is responsible for Car Loans and Mortgage funds when the Auditor General found that the Committee failed to recover Kshs.22,569,697/= from members of the County Assembly. They annexed copy of the Auditor General Report. I have perused the annexed report and the relevant part is paragraph 80 **Car loans and Mortgages**, where the Auditor observes that the Committee did not recover loans as expected and then recover loan arrears totaling Kshs.22,569,697/= as at 30.6.2016. He was not certain if the same would be recovered before the end of the term.

Nowhere in the report is it mentioned of the Interested Party as responsible for the delay in recovery. That was an observation on performance of car loan and Mortgage Scheme and no individual responsibility apportioned. If this is the only material relied on I am not satisfied that it is sufficient to state that the Interested Party is not a person of Integrity to serve in the Board.

After considering the Petition and Submissions. I find no merit in this Petition which is hereby dismissed. Each party to bear their own costs.

Dated and Delivered at Bungoma on this 24th day of October, 2018.

S.N. RIECHI

JUDGE