



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

CONSTITUTIONAL PETITION NO.3 OF 2018

BETWEEN

WICKLIFFE ODHIAMBO OKEYO 1ST PETITIONER

EVANCE OTIENO OLOO 2ND PETITIONER

AND

THE CLERK HOMA BAY COUNTY ASSEMBLY..... 1ST RESPONDENT

SPEAKER HOMA BAY COUNTY ASSEMBLY..... 2ND RESPONDENT

HOMA BAY COUNTY ASSEMBLY COMMITTEE

AND PUBLIC SERVICE ON ADMINISTRATION..... 3RD RESPONDENT

THE DAPRI CONSULTANT..... 4TH RESPONDENT

RULING

[1] This petition dated 4th June 2018, was presented by **WICKLIFFE ODHIAMBO OKEYO** and **EVANCE OTIENO OLOO**, who describe themselves as Youths residing in Homa Bay Town within Homa Bay County.

They seek declaratory and injunctive orders against the clerk of the Homa Bay County Assembly (first respondent) and two nominees to the County Assembly Service Board representing the public Viz:- **LILLIAN ELIZABETH OGENO** and **JOSEPH OKOTO AJWANG**.

[2] The Speaker of the Homa Bay County assembly and the County Assembly’s Committee on Public Service and Administration were enjoined in the petition as the second and third respondents respectively, while a firm known as Dapri Consultant was included as the fourth respondent but did not participate in these proceedings for want of service of the petition upon them by the petitioners.

[3] Vide a chamber summons dated 4th June, 2018, filed contemporaneously with the petition, the petitioners sought conservatory orders to restrain the aforementioned nominees from being in office to carry out the duties of the County Assembly Service Board as representatives of the public. It would however, appear that the chamber summons was held in abeyance and/or disregarded altogether to pave way for the hearing and determination of the petition.

[4] In that regard, the parties filed their respective written submissions as directed by the court and these were orally highlighted by the petitioners and the first, second and third respondents on the 24th October 2018. This ruling is therefore in respect of the main petition and is intended to dispose of the dispute in its entirety.

[5] For avoidance of doubt, the petitioners are specifically applying for a declaratory order against the first respondent to the effect that he conducts a fresh nomination in accordance with the Constitution and the County Government Act 2012 and an injunctive order against the subject nominees or appointees to permanently restrain them from reporting to their office and undertaking their duties.

With regard to the first prayer, there seems to be nothing to declare in terms of ordering a fresh nomination of nominees to represent the public. This is because the nomination has since been undertaken and the two nominees have since been appointed as Members of the County Assembly Service Board.

They are now employees of the County Assembly Service Board and not the County Public Service Board established under **Section 57** of

the **County Governments Act No.17 of 2012**.

[6] Any dispute regarding the nomination and subsequent appointment of the two nominees to the County Assembly Service Board ought therefore be referred to the Employment and Labour Relations Court rather than this court.

If the petitioners wanted to invalidate the nomination prior to appointment, they should have sought for a declaratory order to the effect that the nomination of the two subject nominees was unlawful and an order that a fresh nomination be conducted in accordance with the law. This petition as it stands, is therefore a misconception.

[7] With regard to the second prayer, it is clearly overtaken by events as the two nominees were sworn into office and have been discharging their duties since then. Clearly, there is nothing to injunct at this juncture.

In sum, this petition is wanting in terms of clarity in the prayers sought and the manner in which the respondents breached the constitutional rights and requirements under **Articles 27 and 196** of the **Constitution** or the applicable statutory requirements.

[8] Nonetheless, the innuendo arising from the facts of the matter is that the impugned nomination of the two nominees to the County Assembly Service Board was conducted without adherence to Constitutional Principles and Statutory requirements and was therefore null and void “**ab initio**”.

Other than the constitutional provisions alluded to in the petition, the petitioners also mentioned **Sections 7(4), (5), (6), (8), (9) and 10** of the **Public Appointments (County Assemblies Approval) Act, 2017**.

[9] In their supporting affidavits dated 23rd May 2018, the petitioners aver that on the 12th September 2017, the first respondent advertised two positions for Members of County Assembly Service Board to represent the public.

It was their belief that the list of the nominees discriminated against the residents of Homa Bay County. The said advertisement was made in the newspaper publication annexed to the supporting affidavit. It was in effect an invitation to qualified residents of Homa Bay County to apply for the advertised positions.

[10] Those qualified had to be Kenyan citizens, residents of Homa Bay County with a university degree from a recognized university. They were also required to have knowledge and at least ten years’ experience in public service. There is nothing in the supporting affidavits and/or written submissions to show that the two subject nominees were unqualified for the advertised positions. There is also nothing to show that the impugned list of nominees discriminated against the petitioners and/or residents of Homa Bay County who were all accorded equal opportunity to apply for the advertised positions.

[11] It was the petitioners’ contention that the nomination process was null and void from the beginning inasmuch as the necessary notice and/or advertisement was not published in the official gazette as required by the first schedule of the **County Assembly Board Act No.24 of 2017** and inasmuch as the necessary provisions of the **Public Appointments (County Assemblies Approval) Act 2017** were disregarded by the respondents. In other words, the petitioners are saying that the constitutional principle of public participation was violated and/or breached by the respondent in the nomination and appointment of the two subject nominees.

[12] In his replying affidavit dated 9th June 2018, the first respondent averred that a total of forty two (42) candidates submitted their applications and after due consideration of the same on the 10th October 2017, a total of eighteen (18) candidates were shortlisted and interviewed on the 24th and 25th of January 2018.

Thereafter, on the 26th January 2018, the necessary report was submitted by the contracted consultant (i.e. 4th respondent) and was considered by the County Assembly Service Board which approved it and recommended the subject nominees for appointment. This was followed by the approval of the County Assembly on the 28th February 2018 and the taking of the oath of office by the two nominees/appointees on the 8th March 2018.

[13] The foregoing facts remained undisputed but the petitioners maintained that the entire process was devoid of public participation as provided under the **Public Appointments (County Assemblies approval) Act, 2017**.

However, it was the respondents’ contention that the said Act did not apply in the circumstances as the procedure for the appointment of the Members of the County Assembly Service Board is governed by the County Assembly Service Act, 2017.

[14] In public participation, the word “**public**” refers to persons or people with an interest in or are likely to be affected by a decision made either positively or negatively. Thus, public participation seeks and facilitates the involvement of those potentially affected by a decision or interested in a decision. Those who are affected by a decision have a right to be involved in the decision making process by way of public participation. Such right is constitutionally ordained to give powers of self-governance to the people and enhance the participation of the people in the exercise of the powers of the state and in making decisions affecting them.

[15] The legal framework for public participation in this country apart from being provided in the Constitution is also found in the **County Governments Act** by dint of **Sections 87, 88, 89, 90, 91, 94, 95, 96, 100, 101 and 113** of the **Act** as well as other statutes such as the **Urban Areas Act** and the **Public Procurement and Disposal act, 2015**.

Undoubtedly, public participation is now a new guaranteed process in Kenya but is yet to be institutionalized in a big chunk of the Country’s devolved units. A County such as Laikipia has taken remarkable action to institutionalize and systematize public participation process in the

County by the enactment of the Laikipia County Public Participation Act by the County Assembly of Laikipia. It is not certain whether such initiative has been made by the County of Homa Bay.

[16] Be that as it may, considering that the petitioners have not satisfactorily demonstrated their actual interest in the impugned nomination of the two subject nominees for appointment as Members of the County Assembly Service Board and how a decision in that regard would affect or affected them given that they never personally applied for such nomination and/or appointment, it cannot be said that their rights to public participation was violated and/or breached by any of the respondents.

[17] In any event, the two nominees have since been appointed and taken office as Members of the County Assembly service Board. They are effectively employed by the County Assembly Board as opposed to the County Public Service Board which is equivalent to the Public service Commission of Kenya at the national level. The equivalent of the County Assembly Service Board at the national level would be the Parliamentary Service Commission.

It is therefore clear that the County Assembly Service Board and the County Public Service Board are two distinct entities with different recruitment procedures.

[18] The County Assembly Services Act No.24 of 2017, makes provisions on the County assembly Service Board and the County Assembly Service as established under the County Government Act in relation to each county and for connected purposes.

Section 5 (1) of the **Act** provides for the values and principles of the County assembly Services in terms of the Values and Principles of Public Service set out under **Article 232 (1) and (2)** of the **Constitution** and include the involvement of the people in the process of policy making and transparency as well as provision to the public of timely and accurate information.

[19] **Section 9** of the **Act** provides for qualifications and procedure for appointment as a Member of the County Assembly Service Board. Thus, under **Section 9 (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 he/she is a citizen of Kenya,

holds a degree from a university recognized in Kenya, has at least ten (10) years' experience in public affairs and meets the requirements of leadership and integrity in Chapter Six of the Constitution.

Under **Section 9 (2)**, the procedure for the appointment of the members of the Board referred to in **Sub Section (1)** shall be as set out in the first schedule.

[20] This is the procedure which was herein applied by the Homa Bay County Assembly Board in the nomination and subsequent appointment of the two subject nominees/appointees as members of the board. The role of the County Assembly in that regard was conducted in accordance with the provisions of **Article 196 (1)** of the **Constitution** thereby incorporating the concept of public participation.

Nobody, the petitioners included, was excluded from the sittings of the County Assembly or those of its committees with regard to the impugned nominations and/or appointments. There was nothing substantial to suggest that the public was denied access to accurate and comprehensive information pertaining to the nomination and appointment.

It is instructive to note that the Constitution under Article 35 guarantees the right to access information by citizens. This is an important pillar in public participation in County Governments (See **Section 87 of County Government Act**).

[21] **Article 196 (1) (b)** of the **Constitution**, requires that the County Assembly facilitates public participation in the legislative and other business of the assembly. It is the county representatives to the County Assembly who are expected and required to present the views of the Public to the Assembly with regard to any matter that affects them. In that way, their right to public participation in decision making is realized over and above any other modality prescribed for public participation. If their representatives do not competently and/or effectively perform their roles as expected, they (public) are always at liberty to seek for their removal from office as by law established.

[22] Apparently, the petitioners' case was hinged on the fact that the nomination and subsequent appointment of the subject nominees was to be done in accordance with the procedure provided under **the Public Appointments (County Assemblies Approval) Act No.5 of 2017**, rather than the **County Assembly Services Act No.24 of 2017**. They however, imply that both Acts could apply at the same time. As noted hereinabove, the County Assembly Service Board is distinct from the County Public Service Board. So, it would follow that nominations and appointments done by the County Assembly Service Board have to be done under the procedure provided in the County Assembly Services Act and those done by the County Public service Board have to be done under the procedure provided in the Public Appointments (County Assemblies Approval) Act which essentially provides for the procedures for the approval by the County Assemblies of Public Appointments. These are not strictly recruitment procedures but approval procedures in which case candidates have to undergo a public vetting on suitability of nomination as well as an approval hearing.

[23] The petitioners in arguing their case cited a matter concerning the Kiambu County Assembly in which the procedure under the Public Appointments (County Assemblies Approval) Act was applied respecting the appointment of a member of the County's service Board. However, the procedure was used as a supplement to that under the County Assembly Service Board Act, 2017 and was seemingly a method adopted by the County towards institutalization and systemizing Public Participation Process in the County.

[24] From all the foregoing facts and observation it is the ultimate finding of this court that this petition was lacking in merit and was clearly erected on a foundation made on "**quick sand**". It must and is hereby dismissed but each party shall bear their own costs.

Ordered accordingly.

J.R. KARANJAH

JUDGE

[Read and signed this **28th** day of **November, 2018**].