REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CONSTITUTIONAL PETITION NO. 67 OF 2014

IN THE MATTER OF ARTICLE 22, 23, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49,183 & 199 OF THE CONSTITUTION OF KENYA 2010, COUNTY GOVERNMENT ACT SECTION 55, 56, 57 & 66.

AND

IN THE MATTER OF THE CIVIL PROCEDURE RULES 2010 ORDER 1 RULE 6, 8, 13 AND IN THE MATTER OF APPOINTMENT OF COUNTY EXECUTIVE COMMITTEES (CEC's), CHIEF OFFICERS AND OTHER OFFICERS – NAKURU COUNTY

SHARACK KOSGEI ..... 1ST PETITIONER

GEOFFREY NYANG'AU NYAHANGA..... 2ND PETITIONER

VERSUS

THE GOVERNOR OF NAKURU COUNTY ..... 1ST RESPONDENT

NAKURU COUNTY SERVICE BOARD ..... 2ND RESPONDENT

THE DEPUTY GOVERNOR OF NAKURU COUNTY..... 3RD RESPONDENT

JUDGMENT

The Petitioners herein **SHADRACK KOSGEI** (hereinafter referred to as the 1st Petitioner) and **GEOFFREY NYANG'AU NYAHANGA** (hereinafter referred to as the 2nd Petitioner) jointly filed before the High Court in Nakuru the Amended Petition dated 17th January, 2015, seeking to challenge the appointment of the County Executive Committees (CEC's) and Chief Officers by the Respondents. The Petitioners allege that the said appointments are limited to only two communities, residing in Nakuru County and are therefore not diverse as required by the Constitution and by Statutory Law. As such the Petitioners through their Petition sought inter alia the following orders

> ***"4(a) That the appointment of County Executive Committees (CES's) and Chief Officers be nullified for being unconstitutional, unlawful and/or illegal.***
>
> ***(5) That Proper appointment to both County (CEC's) and Chief Officers be conducted as per the county Government Act"***

The Respondent did on 17th February, 2015 file a Replying Affidavit sworn by one **MR. JOSEPH MOTARI** the Head of the County Public Service Board of Nakuru County Government in which he

averred that the recruitment process did not in any way violate the Constitution or any other written law.

The petition was disposed by way of written submissions. Both parties duly filed their written submissions. Thereafter on 26th January, 2016 the mater came up for highlighting of said written submissions. **MR. MONGERI** Advocate appeared for the Petitioners whilst the Respondents were represented by **MR. OPONDO**.

Briefly the Petitioner submitted that Nakuru being a cosmopolitan county all public appointments must reflect the ethnic diversity of the county and must also be regionally inclusive. They relied upon the requirements for inclusion of marginalized communities in public appointments as provided for by Articles 10, 56, and 90(c) of the Constitution of Kenya as well as by Section 7(1) of the National Cohesion and Integration Act and the County Government Act under which the said appointments were made.

It was submitted for the Petitioners that out of the nineteen (19) posts for Chief Officers, 13 appointments were from the Kikuyu community, 4 from the Kalenjin community 1 from the Meru community and 1*'woria'* from Somali community. Counsel submitted that these appointments were skewed as they excluded members of the other communities who reside in Nakuru County. It was further alleged by the Petitioners that additionally the appointments made were not regionally representative as all the persons appointed were either from Nakuru Town East Constituency where the Governor of Nakuru County (the 1st Respondent hailed from) or from Kuresoi sub-county which was the home area of the Deputy Governor (the 3rd Respondent). In so far the appointments only favoured the Kikuyu and Kalenjin communities and denied other regions in the county representation, it was contended that the said appointments were made contrary to the law and to the Constitution were null and void and ought to be nullified.

The Respondents on their part submitted that the appointments were made after a fair, open and transparent recruitment process. Advertisements were placed in the local dailies seeking applications from qualified candidates. Invitations for the position of County Chief Officers were advertised in the Daily Newspapers of 11th June, 2013. Interested applicants were interviewed. Public participation was ensured through a vetting process. The successful candidates were eventually approved and appointed.

The Respondent contended that they could only make appointments from amongst the pool of applicants who responded to their public advertisement. The Respondents contended that they could not compel people to apply and were not obliged to reserve posts for certain communities. The Respondents submitted that their only duty was to exercise their discretion in making the appointments in a rational and reasonable way. They also had an obligation to uphold the principles of fair competition, merit, accountability and transparency in addition to seeking to achieve diversity. The Respondents submitted that no evidence had been advanced to show that they acted arbitrarily and/or capriciously in making the appointments.

The Respondents also submitted that the appointed candidates are all Public Servants who are protected by Article 236(b) of the Constitution from being removed from office without due process of the law. They can only be removed pursuant to Article 179(7) of the Constitution and Sections 35 and 45 of the County Government Act. This petition was therefore merely an attempt to remove them from office without adherence to law. Additionally the Respondents submitted that during the vetting of the candidates, the county assembly did invite the public to tender their opinions and any objections they may have to the appointment of the shortlisted candidates. The petitioners failed to present their grievances during that time and are therefore estopped from doing so after the appointments have been made. Counsel for the Respondents finally submitted that this petition was filed in bad faith and was an attempt to interfere with the operations of the County Government. They prayed that the same be dismissed with costs.

BACKGROUND

The offices of County Executive Committees and Chief Officer are established by Article 179(1) of the

Constitution and Section 45 of the County Government Act, 2012 respectively. The powers to recruit appoint and approve these officers are vested in the Respondents and the County Assembly. In exercising their powers they are vested with the discretion to appoint the candidate they deem most suitable. However, this discretion is not absolute it must be exercised in accordance with the law. The doctrine of pleasure no longer applies to public offices. The appointment, service and dismissal of any person occupying such an office is governed by the rule of law. Therefore an appointing authority must comply with the prescribed procedures as set out by Statute and by the Constitution and must also ensure that all appointments meet the legally required criteria.

The courts do have the power and authority to review any appointment that fails to meet the legal threshold. In the case of **TRUSTED SOCIETY OF HUMAN RIGHTS ALLIANCE –VS- ATTORNEY GENERAL & OTHERS [2013] eKLR** the court held that

> ***"It follows therefore that those organs and officials to whom authority to select officials to certain state organs and institutions are delegated have an obligation to ensure that the persons selected for the various positions meet the criteria set out in the Constitution and other legislation for those positions. Where there are allegations that these organs have failed to discharge this obligation, the court is obligated to step in, when called upon to do so, to investigate whether the process of recruitment and the individuals recruited meet the constitutional requirements..... whereas the appointment is a preserve of the executive and the right of concurrence is given to parliament, the enforcement of the Constitution is left to the High Court....."***

The court is not required to reappraise the decision of the appointing authority, nor may it substitute its own determination of who the most suitable and/or competent candidate would be. The courts purpose is to ensure that in the appointment process there has been fidelity to the law and to the constitution (See **JOHN WAWERU WANJOHI & 2 OTHERS –VS- ATTORNEY GENERAL & 3 OTHERS [2012 eKLR]**. In the exercise of this oversight role courts must carry out a fine balancing act and be careful not to usurp the powers and functions of the appointing authority.

In **KENYA NATIONAL COUNCIL OF EMPLOYMENTS AND MIGRATION AGENCY & ANOTHER –VS- NATIONAL POLICE SERVICE COMMISSION & 6 OTHERS [2016]. Hon. Justice David Majanja** held that the duty of any court in reviewing the process of appointment is only to ensure that said appointment meets the test of legality. This is achieved when due process is followed in the manner of recruitment. In the **Trusted Society Case,** it was held that the court's role is to investigate the recruitment process for any procedural infractions as well as legality. It was held that

> ***"The Constitutional standard emerging from the cases, which we now adopt is that the court is entitled to review the process of appointments to state or public offices for procedural infirmities as well as for legality. A proper review to ensure the procedural soundness of the appointment process includes an examination of the process to determine if the appointing authority conducted a proper inquiry to ensure that the person appointed meets the constitutional requirements. The absence of any evidence that such an inquiry was conducted or the availability of evidence that such an inquiry was, in fact not conducted, would lead to the conclusion that the procedural aspects of this constitutional test have not been satisfied. Additionally the court must review the appointment decision itself to determine if it meets the constitutional threshold for appointment".***

From the above cited cases it is very clear that the role that the court performs is entirely different from the role and function of the County Assembly which would vet the candidates for approval. The County Assembly when vetting candidates would consider the merits of the selecting bodies and would factor in considerations such as who was the most suitable and/or competent candidate for the particular position. The court on the other hand would only be concerned with the legal aspect of the appointment and would be seeking only to inquire **whether the correct procedure for appointing was followed** – did the appointing authority fail to take into account matters which it was required by law to take into account or did the appointing authority take into account matters prohibited by law. This is the review power which

the court exercises which power it derives from Article 165(d) (ii) of the Constitution.

Where having examined and analysed the process of appointment the court finds that the appointment did not meet the constitutional criteria the court is vested with powers to set aside that appointment. In the case of **KENYA YOUTH PARLIAMENT & 2 OTHERS –VS- ATTORNEY GENERAL [2012] eKLR** it was held as follows

> ***"We state here with certain affirmation that in an appropriate case, each case depending on its own peculiar circumstances facts and evidence, this court clothed with jurisdiction as earlier stated, would not hesitate to nullify and revoke an appointment that violates the spirit and letter of the Constitution. But the court would hesitate to enter into the arena of merit review of a constitutionally mandated function by another organ of State that has proceeded with due regard to procedure....."***

Similarly in **CONSTITUTION PETITION NO. 102 FEDERATION OF WOMEN LAWYERS KENYA (FIDA-K) & 5 OTHERS –VS- ATTORNEY GENERAL & ANOTHER,** the court held that

> ***"In actual fact it is this court's sole mandate to provide checks and balances for the Executive and the court will not hesitate to interfere when called upon to interpret the Constitution and supervise the exercise of constitutional mandates. We find that to do otherwise would be a dereliction of our constitutional mandate"***

Having set out this general background I will now proceed to give my determination on the matters raised in the present petition.

DETERMINATION

I have carefully considered the submissions made by both counsel. I have also perused all the attached documents and authorities. The petition herein raises two main issues for determination.

1. ***Are the petitioners estopped from taking issue with the appointments at this stage?***
2. ***Do the appointments of the County Executive Committees and County Chief Officers reflect the ethnic and regional diversity of Nakuru County?***

I will now proceed to deal with each of the above issues individually.

1. **Competence of The Petition**

The Respondents in their submissions argued that a vetting process was conducted before the appointments were made. This vetting allowed for public participation at which stage the public were invited to raise any objections to the persons being considered from appointment. The petitioners did not at this vetting stage submit any objections. Counsel for the respondents submits that having failed to take advantage of the vetting process and having failed to participate in the same thereby presenting their grievances **before** the appointments were made, the Petitioners are barred or estopped from raising those issues now **after** the appointments have been made. With respect I cannot agree. Certainly the appropriate time for any person and/or body to raise issues or grievances relating to an intended appointee would be during the vetting period when public participation is invited and indeed is called for. That is precisely the reason why these vetting sessions exist. However, if the constitutional criteria were not met, that renders the appointment null and void and the court when moved at any stage either before or after the appointments have been made has the powers to declare so. If the court were to so find then the removal of the 19 appointed officers would be a consequence of a judicial finding of unconstitutionality in the procedure and manner of appointment and not as a consequence of any procedure for removal from office. Therefore notwithstanding the fact that the Petitioner failed to raise any objection during the vetting of the candidates by the County Assembly they are **not** in my opinion barred or estopped from raising those concerns at any juncture subsequent to the appointments.

2. **Did the Appointments Reflect the Diversity of Nakuru County**

The Petitioners have claimed that the 19 appointments made did not reflect the ethnic diversity of Nakuru County. They further allege that marginalized groups and disabled person were excluded in the said appointments. Article 10(2) of the Constitution of Kenya provides for the national values and principles of governance that bind all State organs, public officers and all person whenever, they apply or interpret the Constitution, enact, apply or interpret any law or make or implement public policy decisions. Article 10(2) provides

> ***(2) The national values and principles of governance include-***
>
> ***(a) Patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;***
>
> ***(b) Human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized.***
>
> ***(c) Good governance, integrity, transparency and accountability; and***
>
> ***(d) Sustainable development"***

Article 56(c) of the Constitution also mandates the State to put into place affirmative action programmes designed to ensure that minorities and marginalized groups **"are provided with special opportunities for access to employment".** These provisions requiring diversity are also echoed in the **National Cohesion and Integration Act, No. 12 of 2008** which provides at Section 7 that

> ***"7(1) All public establishments shall seek to present the diversity of the people of Kenya in the employment of staff.***
>
> ***(2) No public establishment shall have more than one third of its staff from the same ethnic community"***

The appointments being challenged in this petition were made under the **County Government Act**. Section 35(1) of that Act provides that the Governor shall when nominating members of the executive communities –

> ***"(a) ensure that to the fullest extent possible, the composition of the executive committee reflects the community and cultural diversity of the county, and***
>
> ***(b) take into account the principles of affirmative action as provided for 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 and communities, and***
>
> ***(c) community and cultural diversity within the counties"***

Therefore it is quite clear that in making these appointments, the respondents had an obligation to comply with both Section 35(1) of the County Governments Act as well as Article 10(2) of the Constitution.

The petitioners allege that the appointments complained of failed to meet the above threshold in two

respects

- ***The appointments did not reflect the ethnic diversity of Nakuru County as they were dominated by persons from two communities. The Kikuyu and Kalenjin communities***
- ***The appointments failed to take into account marginalized groups within Nakuru County.***

There exists a rebuttable prescription that a body vested with a mandate exercises this mandate with due regard to procedure and law. The burden would lie on the person alleging non compliance to prove the nature and extent of that non compliance.

In support of this claim the Petitioners attached two documents headed 'A' and 'B' on which the names, designations and community (tribe) of each appointed candidate was indicated. However it has not been made clear to the court exactly how the Petitioners made a determination of the ethnicity of each appointed person. In other words no proof of the ethnicity of the 19 has been availed to the court. Presumably the petitioners relied upon the surnames of these persons in order to deduce or presume their ethnic extraction. The name of any individual is not in my view a sure fire way to determine their ethnicity.

In this country many communities *eg* Luo, Luyha and Kisii, Kikuyu, Meru, Embu and to some extent Kamba are known to have names in common. What is it that identifies the persons named as members of the Kikuyu and Kalenjin communities as opposed to say Meru, Embu, Kamba, Pokot or Turkana. It is a well established principle in law that **'he who alleges must prove'**. If the Petitioners allege that the 19 appointees belong to certain ethnic groups, they are required to prove this as a fact. This court is being invited by the Petitioners to presume the ethnicity of the 19 appointed persons solely on the basis of their given names.

In the case of **ANARITA KARIMI –VS- REPUBLIC** as restated in **MUMO MATEMU –VS- TRUSTED SOCIETY OF HUMAN RIGHTS ALLIANCE & 5 OTHERS [2013] eKLR** the court held that a petition alleging a breach of the Constitution must state the provision of the Constitution that has been contravened and the manner in which it has been contravened. The petition must contain sufficient information to enable the other side to understand and respond to the case against them. The court proceeded to hold that the petitioner failed to meet this threshold as they had not provided proof of ethnicity as the names of the candidates alone cannot be used to determine their ethnicity. On this ground the petitioners claim was found to be unproven.

The same situation pertains in this present petition. No proof of the ethnicity of the 19 appointed persons has been availed to this court. A mere allegation of ethnicity without substantive evidence to prove the same will not suffice. The names of the appointed persons are not sufficient basis upon which this court can impute their ethnicity.

It is highly likely and I have no doubt that information showing the true ethnic extraction of each appointed person is in fact in the custody of the Respondents. However the Petitioner made no application to have that information availed to them or to the court. There was nothing barring the Petitioners from making such an application. Their failure to do this leaves their allegations of ethnic bias unproven. In the case of **COMMUNITY ADVOCACY AWARENESS TRUST & 8 OTHERS –VS- ATTORNEY GENERAL [2012] eKLR Hon. Justice Majanja** found that determining ethnicity is difficult because there are no policy or legislative guidelines on what constitutes ethnic or regional background of a person. How is ethnicity to be determined? Is it by birth yet many citizens are born and raised in cosmopolitan cities and not necessarily in their rural homes, is it by parentage yet persons may well be the product of a mixed marriage, is it by virtue the person's marriage even if to a foreigner or is it by choice as determined by where a person decides to make a home? The difficulty in presuming ethnicity from name alone are clearly rife not to mention unreliable.

The other claim made by the Petitioners in challenging these appointments were that the same were regionally biased. It was alleged that the majority of the appointed persons hailed from the Nakuru East Constituency where the Governor comes from or form Kuresoi sub-county alleged to be the home area of

the Deputy Governor of Nakuru County. These claims meet the same fate. No proof is tendered to show that the Governor or Deputy Governor hails from the regions stated and more pertinently no proof is tendered *e.g* in the form of copies of identity cards to show the regions from which the 19 appointed person hail. Again the court is being invited to rely on presumptions.

In any event the appointing authority could not have been expected to have each of the 42 Kenyan communities or all indeed all communities in Nakuru represented in these appointments. The best that could be required of them was to accommodate diversity in all its forms. This was a recruitment exercise in which people were invited to apply. No person was barred from applying. Emerging jurisprudence in this question of diversity shows that courts will not look only at the ethnic or regional composition of a body. In the case of **JOHN WAWERU WANJOHI & 27 OTHERS Vs HON. ATTORNEY GENERAL & 6 OTHERS [2012] eKLR** a complaint was made regarding the over-representation and under-representation of certain communities in the National Land Commission. The court held that it was not possible for all the 42 tribes and counties to be included in every single public office. In addition it was not the intention of the Constitution that certain positions be retained, exclusively for certain communities. All that is required is that there be an attempt to accommodate diversity in all its forms. In the present situation where no concrete proof of ethnicity has been adduced, this court cannot accept at face value the Petitioners contention that only two communities were considered in making the appointments.

This is a case where applications were invited, candidates shortlisted and interviews as well as vetting was conducted. The obligation on the appointing authority was to balance all constitutional and legal criteria, ethnic and regional diversity representation of minorities and persons with disabilities amongst those who have been found competent and qualified for the post. **(see John Waweru Case)**. The method used in generating a short list out of all the qualified candidates lies exclusively within the province of the appointing authority. The obligation placed upon the appointing authority is to adopt a procedure that is rationally connected to the constitutional objectives and statutory requirements. Such a procedure is one which is transparent, open competitive and inclusive.

In **MATHEW LEMPURKEL –VS- JOSHUA WAKAHORA IRUNGU COUNTY GOVERNOR, LAIKIPIA COUNTY & 2 OTHERS 2013 eKLR** the court held as follows-

> ***"the constitutional obligation that is to adopt a process that is rationally connected to meet the outcome of the diversity. Such a process does not demand a seat for each community nor does it require the use of mathematical precision to allocate seats. What is required is a process that shows all these factors were taken into account and that the end product was rational in light of the constitutional objectives".***

This rationality test was further expounded in the **Trusted Case** as follows

> ***"The test here is one for rationality: can it be said that the appointing authority, after applying its mind to the constitutional requirements, reached a rational conclusion that the appointee meets the conditional criterion? While the appointing authority has a sphere of discretion and an entitlement to make the merit analysis and determination of the question whether the appointee actually meets the constitutional criteria, courts will review that determination where rationally, a reasonable person would not have reached that determination. The test then is one of reasonableness substantively the court will defer to the reasonable determination of the appointing authority that a proposed appointee has satisfied the constitutional criterion. Where such a determination is unreasonable or irrational however the court will review it. To this extent therefore the constitutional review is not for error but for legality"***

This criteria of reasonableness and rationality is also provided for in Section 65(2) of the County Governments Act which requires the County Public Service Board to ensure that appointments, promotions or re-designations are undertaken in a fair and transparent manner, with the overriding factors being merit, fair competition and representation of the diversity of the counties.

The County Executive Committees are nominated by the Governor and approved by the County Assembly in line with Section 30(1) of the County Governments Act. Section 45 of the Act provides for the procedure in appointing Chief Officers. Section 45(1) provides

"45(1) the governor shall

a. ***Nominate qualified and experienced county chief officers from among persons competitively sources and recommended by the County Public Service Board and***
b. ***With the approval of the county assembly, appoint county chief officers"***

It would appear that the above provisions were properly complied with. The positions were publicly advertised, the candidates were competitively sourced and the County Assembly approved the appointments after a vetting process which allowed for public participation.

No allegations has been made by the Petitioners that the above procedures were not followed by the Respondent in making the appointments in question. The contention by the Respondents that all the positions including those for County Executive Committee members were competitively sourced has not been refuted by the Petitioners at all. It was not even alleged much less proved that any person from the marginalized groups applied for any of the posts and despite being properly qualified was not appointed. Further the Petitioners did not in any way challenge the qualifications suitability and/or competence of any of the 19 appointed persons.

Based on my above analysis I find that the Petitioner failed to prove its case in this petition. The petition was premised on claims made without any evidence to substantiate those claims. The Petitioner failed to prove the ethnicity of any of the appointed persons or their residence. There was no evidence tendered to show that the process of appointment was flawed in anyway, or that the decisions made by the Respondents were irrational and/or arbitrary. There is no evidence that the 19 appointments failed to meet the constitutional threshold. For these reasons this constitutional petition fails and the same is hereby dismissed in its entirety. Each party to meet its own costs for the petition.

Dated in Nakuru this 17th day of June, 2016.

MAUREEN A. ODERO

JUDGE