



REPUBLIC OF KENYA

IN THE CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

CONSTITUTIONAL PETITION NO 329 OF 2016

FEISAL HASSAN1ST PETITIONER

ADAN ALI2ND PETITIONER

BILLOW ISSACK3RD PETITIONER

VERSUS

THE PUBLIC SERVICE BOARD OF MARSABIT COUNTY1ST RESPONDENT

THE COUNTY GOVERNMENT OF MARSABIT2ND RESPONDENT

RULING

INTRODUCTION

[1] By a petition dated 29th July 2016, the Petitioners who have sued the Public Service Board and the County Government of the Marsabit County allege with respect to an on-going recruitment exercise of the 1st Respondent that failure to *‘publicize the list of all applicants for the advertised positions, failure to shortlist for all advertised positions, failure to ensure gender balance, equity, diversity, regional balance and inclusiveness, failure to strictly adhere to its publicized intentions by shortlisting candidates without the required qualifications as advertised seriously taints the whole recruitment process with illegality, procedural impropriety and the whole process is unconstitutional.’*

[2] On the basis of the allegations in the petition the petitioner seeks orders as follows:

“PETITIONERS’ PRAYERS DATED 29TH JULY 2016

- a) That a declaration be issued to the effect that the process of recruitment being undertaken by the 1st respondent and the shortlisting thereof contravenes the provisions of Articles 10 and 232 of the constitution, sections 65 and 66 of the County Government Act and is therefore unconstitutional and void ab initio.
- b) That an order be issued prohibiting the respondents from conducting the scheduled interviews of the shortlisted applicants until the 1st respondent has published the list of all applicants and a list of all the shortlisted applicants for all the advertised positions.
- c) That an order be issued compelling the respondent to strictly adhere to the provisions of the constitution and the County Government Act and ensure regional, gender and ethic balance as well

as equity, inclusiveness and good governance in the recruitment exercise and subsequent recruitment exercise.

d) That an order be issued compelling the respondents to provide a full list of all positions in the Marsabit County Public Service filled by the 1st respondent giving details of when the positions were advertised, list of the shortlisted candidates, dates when the interviews were conducted and dates of the appointments.

e) That the cost of this petition be borne by the respondents.

f) Any other relief or order that this court may deem fit in the special circumstances of this matter.”

[3] The petitioners were described at paragraphs 1 and 7 of the Petition as “male adults, citizens of Kenya and residents of Marsabit County [who] hold various profession qualifications [and who] being interested in some of the advertised positions and having the required qualifications for some of the posts advertised applied for the following positions.:

<u>Petitioner</u>	<u>Position Applied For</u>	<u>Qualifications”</u>
1 st Petitioner	Principal Transport Officer	Degree in Economics & Statistics
2 nd Petitioner	Principal Transport Officer	Degree in Economics”

[4] Although the petition is drawn in the names of three petitioners no averments were made in the petition or the application filed thereunder as regards the 3rd Petitioner’s candidature for any of the advertised positions, while the 1st and 2nd petitioners were said to have applied for the positions of Principal Transport Officer and Payroll Officer.

APPLICATION FOR CONSERVATORY ORDER

[5] Pending the hearing of the Petition, by a Notice of Motion dated the 29th July 2016, the petitioners seek interlocutory conservatory orders as follows:

“NOTICE OF MOTION DATED 29TH JULY 2016

1. That this application be certified urgent and service of the same be dispensed with and the application be heard ex parte in the first instance.

2. That upon hearing ex parte, this Honourable court be pleased to grant the petitioners conservatory orders barring the 1st and 2nd respondents from conducting the interviews scheduled to start from 1st August 2016 as per the list of shortlisted candidates for various positions in Marsabit County published by the 1st respondent on 21st July 2016 and/or any interviews whatsoever pursuant to the 1st respondent job advertisements on 22nd April 2016 and June 2016 pending the hearing and determination of this application.

3. That upon hearing inter parties, conservatory orders be issued barring the respondents from conducting interviews of the shortlisted applicants for 13 positions until shortlist of all 49 positions advertised by the 1st respondent has been done and publicized.

4. That this Honourable court be pleased to give further orders and/or directions as to the hearing hereof and the Notice of Motion filled herein.

5. That the petitioners/applicants be at liberty to apply for further orders and/or directions as this Honourable court may deem fit and just to grant.

6. *That the costs of this application be provided for.*

The Court while certifying the matter as urgent did not grant any order pending or upon hearing *inter partes*, and the prayer 3 of the Notice of Motion dated 29th July 2016 is therefore the principal relief sought by the petitioners at this stage.

[6] The application is based upon grounds set out in the application as follows:

a) *The 1st respondent is scheduled to commence interviews on 1st August 2016 of shortlisted candidates for some of the positions advertised by the 1st respondent in April and June 2016 pursuant to the 1st respondent's notice dated 21st July 2016.*

b) *The 1st respondent on 22nd April 2016 and early June 2016 advertised a total of 49 jobs/positions to be filled in the Marsabit County Public Service in the 2nd respondent website.*

c) *The 1st respondent has proceeded to shortlist candidates for only 13 out of the 49 positions advertised and the shortlisting exercise is shrouded in secrecy and the petitioners are apprehensive that the piece meal shortlisting is meant to give unfair advantage to some candidates who may fail in the positions already shortlisted.*

d) *The 1st respondent has failed the test of transparency and accountability in the shortlisting exercise for failing to publicize a full list of all applicants for the 49 advertised positions leaving room for abuse of the process by including in the shortlist people who did not apply for the positions.*

e) *The 1st respondent in a bid to circumvent the transparency of the recruitment exercise has refused to disclose how the shortlisting of the 13 positions was done noting some of that shortlisted lack the basic qualifications required for the positions and why shortlisting of the other 36 positions has been delayed.*

f) *The piece meal shortlisting for the 13 positions is tainted with discrimination, tribalism, clannism and nepotism and is a deliberate effort to lock out some clans in the Marsabit County from the County Public Service.*

g) *The 1st respondent in the shortlisting exercise as failed to ensure gender balance, equity diversity, regional balance and inclusiveness.*

h) *Out of the 105 shortlisted candidates, about 70 of them come from the same clan known as the Gabra clan which clan also holds over 70% of all the positions in the Marsabit County Public Service.*

i) *Earlier recruitments in the county by the 1st respondent have been marred by cronyism, clannism, nepotism and most have been done without advertisement of positions or interviews and the petitioners are apprehensive that the advertisements for positions done by the 1st respondent is just a sham and the 1st respondent has no intention of complying with constitutional requirements as the 1st respondent already has a list of the candidates it intends to fill the vacant positions with.*

j) *So far the recruitment exercise is tainted with illegality and procedural impropriety and allowing the continuation of this process is tantamount to condoning an illegal process.*

k) *It is imperative that this Honourable court urgently intervene to avoid further violation of the constitution by the respondents in this matter and issue conservatory orders to ensure that the recruitment exercise undertaken by the 1st respondent complies with the constitutional and statutory requirements.*

l) That unless conservatory orders are issued any success of this petition would be rendered nugatory.”

[7] The substance of the affidavits (largely in similar terms) filed in support of the Petition and the application for conservatory orders is that the 1st respondent has in April and June 2016 advertised for recruitment 49 positions of which the 1st and 2nd petitioner had applied for the position of Principal Transport Officer. By a notice in the 2nd Respondent's website, the 1st respondent gave a list of shortlisted for only 13 of the 49 positions and a schedule of interviews therefor set to start from the 1st August to 10th August 2016. The petitioners complained that the 1st respondent failed to publish a list of all the applicants and that the shortlisting was merely for 13 out of the advertised 49 positions for recruitment without disclosing how and the reason for the piecemeal shortlisting. It was asserted that the shortlisting for the 13 positions was done in a discriminative manner locking out some of the 14 clans of the County with only 3 out of the 105 persons shortlisted for the 13 positions being from the Garre Clan while the ruling Gabra Clan had over 70 some of whom did not qualify for the positions, and that the piecemeal shortlisting would allow the filling of the remaining 36 positions without following due process. Moreover, it was stated that only 13 applicants who are not from the dominant ethnic community in Marsabit County were shortlisted, and only 11 of the 105 shortlisted candidates were women and that some of the shortlisted applicants did not possess the required qualifications for the applicable positions.

[8] It was contended that the 1st respondent's actions were in contravention of constitutional requirements of integrity, transparency and accountability under Article 10 of the Constitution and statutory requirement of regional balance, diversity and inclusiveness under section 65 of the County Government Act, 2011 as well as gender balance under the Constitution.

[9] *For the Respondents, a replying affidavit was filed sworn by the Chief Executive Officer of the 1st Respondent on 8th August 2016 raises the following matters in opposition to the application for conservatory orders:*

i. Absence of a prima facie case with probability of success, a constitutional violation and a real danger of prejudice on the part of the applicants to justify grant of conservatory orders.

ii. Lack of specificity in pleading of the violation of the fundamental rights and contravention of constitutional rights as against the applicants.

iii. Criteria for consideration by County Public Service Board in appointments are set out in section 65 of the County Governments Act, and that by its subsection (2) in determining whether an appointment, promotion or re-designation has been undertaken in a fair and transparent manner the overriding factors shall be merit, fair competition and representation of the diversity of the County.

iv. The petitioners had not demonstrated that 1st respondent had used any other criteria other than the ones provided by law to shortlist any of the 105 applicants.

v. That the petition is pre-emptive as the constitution and the Act make reference to appointment a stage which had not been reached with regard to the application before the court, as shortlisting was just the first step in the process and the petitioners would still have recourse to the court in the instance that the law on appointments is breached.

vi. The petition is based on the petitioners' case that having been qualified for the positions of principal Transport Officer and Payroll Officer, the 1st and 2nd petitioners were not shortlisted yet they did not meet the basic requirements for the position of Principal Transport Officer and other candidates were more qualified than they were. In addition to a Bachelors degree in social sciences/operations management for the position of Principal Transport Officer, there was an extra requirement for experience in relevant field and driving licence, defensive driving certificate

among others. The 2nd petitioner graduated in December 2015 and lacked necessary experience while 1st petitioner did not qualify having graduated in July 2016.

vii. There was no discrimination on ground of clan as one Adan Bishar Noor who hails from the same clan, tribe and locality as the petitioners but who was more qualified was shortlisted for interviews.

viii. The 1st respondent had concluded shortlisting for all the 49 positions but publication of the shortlisted candidates was being done in stages 'so as to allow all the candidates an even playfield in preparing for the respective interviews.' The respondent attached a shortlist for positions of Enrolled and registered nursing officer III showing their names, identity card, year of birth, sex, clan, constituency, qualifications and time schedule for the interviews.

ix. The 1st respondent has a membership of seven (7) of whom only two (2) interviewing panels can be established which coupled with the fact of only one boardroom hampers the interviewing exercise hence publication of only 105 applicants in accordance with the scarcity of resources.

x. Citing the cases of the 10 county executive committee members and 14 county chief officers, the 1st respondent denied allegations of clannism, nepotism or tribalism and maintained that the appointment that have been made by the 1st respondent on behalf of the 2nd respondent have been a reflection of the diversity of the clans in the county – the Gabra being the largest and together with Borana, Rendile and Burji forming the big 4 who constitute 90% and the Petitioners' Garre Clan at less than 2%.

xi. That no evidence had been tendered to show that any of the shortlisted candidates are not qualified for the positions for which they were shortlisted.

xii. That public interest and good governance called for safeguarding proper husbandry over public resources already expended towards the scheduled interviews and the shortlisted applicants would be travelling from all over Kenya and it might be impossible to inform them of stoppage of the interviews in good time.

[10] Counsel for the parties Ms. Kangethe for the Petitioners and Mr. Walukwe for the respondents made oral submissions on 8th August 2016 and ruling was reserved.

THE LAW

[11] The principles for consideration of application for conservatory orders in constitutional litigation are as follows:

a. Arguability of the applicant's case. Sometimes a *prima facie* with 'probability' or 'likelihood of success' case is sought but in my view it is an arguable case that is relevant because at the interlocutory stage, the court does not attempt a final determination of the dispute and the arguable case does not mean a case that must succeed.

b. Prejudice of the applicant.

c. Public Interest.

[12] In Nairobi Constitutional Petition No. 206 of 2016 *Satinderjit Singh Matharu v. Armajit Singh Gahir & 5 Others* this court said that:

"Despite varied nomenclatural expressions, the principles upon which the High Court considers application for conservatory orders in constitutional litigation are now settled by several decisions on the point, and may be condensed as follows:-

1. The applicant must demonstrate *prima facie* case, or an *arguable* case, for the grant of the relief sought.
2. The applicant must stand to suffer an *irreparable harm*, injury or loss not remediable by any other relief; and
3. As a remedy in constitutional litigation, the conservatory order calls for consideration of the *public interest* in the matter, and the balance of convenience between the petitioner's and the respondent's case must favour the grant of the conservatory order."

[13] Similar considerations were put forth by the Courts in *Republic v. County Public Board & Anor. ex. p. Hulbai Gedi Abdille* (2015) eKLR (per Odunga, J.), *John Mining Temol & Anor. v. Governor of Bungoma County & 17 Ors.* (2014) eKLR (Mabeya, J.), *Sammy Ndungu & 5 Ors. v. Governor, Laikipia County* (2016) eKLR (per Ngaah, J.), *Gatirau Peter Munya v. Dickson Mwendwa Kithinji & 2 Ors.* (2014) eKLR (Supreme Court) and *Wanjiru Gikonyo & 2 Ors. v. National Assembly of Kenya & 3 Ors* (2016) eKLR (per Onguto, J.) cited by Counsel for the Petitioners and *Andrew Omtatah Okoiti v. AG & 2 Ors* (2011) eKLR (per Musinga, J. as he then was) cited by Counsel for the Respondents.

[14] In *Andrew Omtatah Okoiti v. AG & 2 Ors* (2011) eKLR, on 28th June 2011, Musinga, J. (as he then was) in a matter relating to the recruitment by the Judicial Service Commission of the Chief Justice, Deputy Chief Justice and Judges of the Supreme Court said:

"I agree that the short listing stage is very critical one in the recruitment process and the highest degree of transparency ought to be exhibited. The JSC exercises discretion in short listing the applicants. However, the parameters of exercise of that discretion by the JSC has been defined by Regulation 13. The JSC cannot be accused of having abused its discretion unless the petitioner demonstrates otherwise by way of an affidavit sworn by one who alleges that he/she had met all the stipulated requirements, applied and was not short listed."

[15] It is also trite that an applicant who approaches the constitutional court for redress of violations of the Bill of Rights must with specificity particulars of the constitutional provisions alleged to be violated and the manner of the violation.

DETERMINATION

[16] The petitioner contended that Articles 10, 27 and 56 of the Constitution are offered as the provisions of the constitution as having been infringed and being threatened with further infringement and alleged a contravention of section 65 and 66 of the County Government Act, 2012

[17] Sections 65 – 68 of the County Government Act provide as follows:

"65.(1) In selecting candidates for appointment, the County Public Service Board shall consider —

- (a) *the standards, values and principles set out in Articles 10, 27 (4), 56 (c) and 232 (1) of the Constitution;*
- (b) the prescribed qualifications for holding or acting in the office;
- (c) the experience and achievements attained by the candidate;
- (d) the conduct of the candidate in view of any relevant code of conduct, ethics and integrity;
- (e) the need to ensure that at least thirty percent of the vacant posts at entry level are filled by candidates who are not from the dominant ethnic community in the county;
- (f) *the need for open and transparent recruitment of public servants; and*

(g) individual performance.

(2) In determining whether an appointment, promotion or re-designation has been undertaken in a fair and transparent manner, the overriding factors shall be merit, fair competition and representation of the diversity of the county.

66. If a public office is to be filled, the County Public Service Board shall invite applications through advertisement and other modes of communication so as to reach as wide a population of potential applicants as possible and especially persons who for any reason have been or may be disadvantaged.

67. No appointment or assignment of a duty in a county public service shall be valid unless it is evidenced in writing.

68. Subject to the relevant legislation, the County Public Service Board shall, for a specified period, maintain a record of all applications received in response to advertisements inviting applications and such record may be inspected by any person.”

[18] Article 232 of the Constitution provides as follows:

232. (1) *The values and principles of public service include—*

(a) high standards of professional ethics;

(b) efficient, effective and economic use of resources;

(c) responsive, prompt, effective, impartial and equitable provision of services;

(d) involvement of the people in the process of policy making;

(e) accountability for administrative acts;

(f) transparency and provision to the public of timely, accurate information;

(g) subject to paragraphs (h) and (i), fair competition and merit as the basis of appointments and promotions;

(h) representation of Kenya’s diverse communities; and

(i) affording adequate and equal opportunities for appointment, training and advancement, at all levels of the public service, of—

(i) men and women;

(ii) the members of all ethnic groups; and

(iii) persons with disabilities.

(2) *The values and principles of public service apply to public service in—*

(a) all State organs in both levels of government; and

(b) all State corporations.

(3) *Parliament shall enact legislation to give full effect to this*

Article.”

[19] Parliament has indeed enacted legislation to give effect to the constitutional provisions by the Public Service (Values and Principles) Act 2015.

[20] Article 10 (2) of the Constitution provides that –

“10 (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 marginalised;

(c) good governance, integrity, transparency and accountability;

and

(d) sustainable development.”

Article 27 (4) of the Constitution provides as follows:

“(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.”

Article 56 (c) provides –

“56. The State shall put in place affirmative action programmes designed to ensure that minorities and marginalised groups—

(c) are provided special opportunities for access to employment;”

Locus standi of the Petitioners

Can the petitioners maintain a constitutional suit notwithstanding their non-qualification in accordance with the requirements for the positions advertised by the Respondent?

[21] The answer lies in the principles contained in constitutional provisions of Articles 10, 22 and 258 of the Constitution that the rule of law is national value and principle of Governance and that there is locus standi for every person to enforce the Bill of Rights and the Constitution not just in relation to his own interest but in public interest as well. Moreover, it is cardinal principle of law that the Court cannot countenance breach of law or right without remedy.

[22] There were questions as to whether the 1st and 2nd petitioners were qualified for the positions that they applied for as Principal Transport Officer, with the respondents contending that the respondents contending that the 2nd petitioner graduated in December 2015 and lacked necessary experience while 1st petitioner did not qualify having graduated in July 2016. The petitioners did not rebut this assertion.

[23] There can be no proprietary interest in being selected for appointed to an advertised position of employment as there can be no guarantee that the candidate would be the successful applicant. Indeed, there is no proprietary interest in a public position; all there can be is the legitimate expectation that once a person applies for an advertised position there shall be due process in the consideration of the application and subsequent interview for the job for the qualified applicants.

[24] However, the applicants as citizens of Kenya living in the Marsabit County they are entitled to file a *suit in public interest* for the enforcement of the Constitution in terms of Articles 22 and 258 of the Constitution. In addition, the Court of Appeal has emphasized the expanded locus standing under the Constitution of Kenya 2010 in a recent decision *Randu Nzai Ruwa & 2 others v Secretary, the Independent Electoral and Boundaries Commission & 9 Others* [2016] eKLR, of 8th July 2016, where Ouko, JA with whom Musinga, Kiage, Minoti and J. Mohamed, JJA. agreed, said:

“The Constitution today gives standing to any member of the public who is not a mere busy-body or a meddling interloper, and who acts in good faith to institute proceedings challenging any violations under the Bill of Rights.”

[25] Although the petitioners were said not to have met the qualifications required in the advertisement for failure to possess a degree certificate with the requisite years of experience, they cannot be said to be mere busybodies or meddling interlopers because the rule of law is an ingredient of Article 10 principles of Governance and every citizen or indeed inhabitant of Kenya (the Constitution gives this right to ‘every person’) has a direct public and personal interest, right and benefit in the enforcement of the rule of law which may be actualized by a suitable petition under Articles 22 and 258 of the Constitution.

[26] Article 22 of the Constitution grants locus to a person suing on behalf of another and in public interest as follows:

“22. (1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.

(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.”

[27] In the same terms Article 258 of the Constitution is in terms 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.”

[28] Every person, the petitioners included, has an interest in the maintenance of the rule of law as a national value and guiding principles under Article 10 of the Constitution. *The petitioners have a further nexus to the matters subject of the suit where they described themselves as citizens of Kenya and residents of Marsabit County holding various profession qualifications and some of whom had being interested in*

some of the advertised positions and having the required qualifications for some of the posts advertised applied for employment by the 2nd Respondent.

Arguable case

Shortlisting of candidates for interviews before selection of suitable candidates.

[29] With respect, the submission by counsel for the respondent that the petitioners 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 shortlisted, that is the shortlisting 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 a non-qualified person is eventually 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 shortlisting erroneously keeps out qualified candidates, the end result of the recruitment exercise will remain that suitable qualified candidates are not considered for the jobs.

Errors in the Shortlist

[30] An attempt was made by Counsel to introduce a correction of errors alleged to exist on the shortlist presented by the Petitioners by presenting an official of the respondent to adduce oral testimony in the course of counsel's reply to the submissions of counsel for the petitioners. The Court considered that such explanations should have been given on oath and set out in the respondents replying affidavit filed in court and, therefore, rejected the unprocedural request.

[31] The shortlist is shown as the document of the respondent and their own admission of error fortifies the petitioners' case that the process is flawed and in need of corrective measures for conservatory order to restrain the on-going recruitment exercise.

[32] Section 65 appear to address the two situations of the appointment process by the use of selection in 65(1) and appointment section 65 (2) of County Government Act, as follows:

“65.(1) In selecting candidates for appointment, the County Public Service Board shall consider —

a. the standards, values and principles set out in Articles 10, 27 (4), 56 (c) and 232 (1) of the Constitution;”

“65(2) In determining whether an appointment, promotion or re-designation has been undertaken in a fair and transparent manner, the overriding factors shall be merit, fair competition and representation of the diversity of the county. ”

Reference to “selecting candidates for appointment” in subsection (1) imports the process leading to the appointment and it applies to challenges on the shortlisting for appointment.

[33] Section 65 (1) of the Act requires that the selection of candidates for appointment regard be had by the 1st respondent of –

“(f) the need for open and transparent recruitment of public servants.”

The need for transparency is reiterated in Article 232 of the Constitution by which in accordance with section 65 (1) all recruiting Boards are bound as one of the *values and principles of public service* in terms as follows:

“(f) transparency and provision to the public of timely, accurate information;”

[34] More importantly, from the affidavits and submissions of both parties, it is clear that the issue of diversity by way of clans in the Marsabit County is an important consideration in the allocation of county resources including job opportunities in the County Government. While I accept the position by the respondents that it is not possible to tell of one's clan by reference to the name, the fact that the respondent has in the shortlist for nurses attached in the replying affidavit filed in response to the petition set out in detail the particulars of the applicants including their identity cards, year of birth, clan, among other demonstrates that such demographic information is available to the respondents and may be published in respect of all the applicants. Needless to state the 1st respondent as the recipient of applicants has in special knowledge of the gender and clans of the applicants in terms of section 112 of the Evidence Act, which provides as follows:

“112. Proof of special knowledge in civil proceedings

In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”

[35] It would appear that the respondents are in breach of the rule of law and principle of open and transparent recruitment of public servants in their failure to give information as to the full list and particulars of the candidates complete with gender and clan membership, in the circumstances of this case, who applied for the advertised jobs and the whole shortlisted candidates.

[36] Accordingly, I find that the petitioners have an arguable case for the enforcement of the constitutional and statutory provisions of the County Governments Act 2012 and the Public Service (Values and Principles) Act, 2015. On the materials before the court at this stage, in the absence of the information as to the full list of applicants and the full list of shortlisted applicants, the court is not able to, and it is not required so to do, to hold at this stage that the petitioners have been discriminated against or the gender rule has been violated.

Risk of prejudice

[37] As I have found that the petitioners, in common with every person, have an interest in the observance by public bodies of constitutional and statutory provisions despite their failure to hold qualifications, as alleged by the respondents, for the positions that they applied, there is a real risk of prejudice as regards the public interest in the observance of the Rule of Law.

Balance of convenience

[38] Public interest would require that the process of appointment of the officers of the 2nd Respondent be done in accordance with the law. As citizens enforcing that public interest, the petitioners despite their personal interest, have the every person's right and interest in the Rule of Law. There is, therefore, really, no divergence and need for any balancing of public interest versus the petitioners' personal interest.

[39] As pointed out by counsel for the petitioners, there is no guarantee that the recruitment body will stop the exercise if it finds the process to have been faulty. By the time the respondents discover the error of their ways, if any, and cancel the recruitment exercise the same costs sought to be avoided by opposing the stopping of the exercise would then have escalated in the resultant commencement of the recruitment exercise from the start. There is merit in halting the exercise at this stage before more costs, both monetary and emotional, that will be incurred by both the recruiting body and the expectant candidates attending the interviewees.

[40] In the interest of efficient disposal of government business that may be affected by delayed recruitment of officers of the 2nd respondent by the 1st respondent, the court must direct that the petition be heard on priority basis on a date to be fixed in consultation with counsel for the parties.

[41] In the meantime, in the public interest for the promotion of the rule of law as regards the selection of candidates for appointment into public service of the County Government of Marsabit, a conservatory

order will issue to hold the status quo in the matter of the process of appointment of the applicants to the advertised jobs in the County.

Orders

[42] Accordingly for reasons set out above, the court grants an order in terms of prayer no. 3 of the Notice of Motion dated 29th July 2016.

[43] Costs in the Cause.

DATED AND DELIVERED THIS 16TH DAY OF AUGUST, 2016.

EDWARD M. MURIITHI

JUDGE

Appearances

Mr Kibe Muigai holding brief for M/S Kangéthe Waitere & Company, Advocates for the Petitioners.

Mr Walukwe of M/S Okongo Omogeni & for the Respondents.

Mr. Kazungu - Court Assistant.