



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII

PETITION NO. 34 OF 2014

BRIAN MANWA MOGAKA.....PETITIONER

VERSUS

THE COUNTY ASSEMBLY SERVICE BOARD,

NYAMIRA COUNTY.....RESPONDENT

JUDGMENT

1. The suit herein was commenced by a petition filed by the petitioner on 11th August, 2014 seeking orders as follows:

a) An injunction do issue restraining or prohibiting the Respondent from appointing the County Assembly clerk for Nyamira without embracing the presented law on appointment and constitutional requirements.

b) The Respondent be condemned to meet the costs of this petition.

2. The petition was supported by a supporting affidavit from the petitioner herein Brian Manwa Mogaka averring that the respondent advertised for the position of county Assembly on 17th May, 2014, that the advertisement was in a non-descript page of the newspaper that could not have been noticed by an ordinary citizen of the county of Nyamira. Moreover, that section 13(1) of the County Governments Act provides that the assembly shall be appointed by the County Assembly Service Board with the approval of the County Assembly.

3. He further contended that the County Assembly Service Board constituted should always meet the threshold set out in section 12(2) of the County Government Act meaning it is comprised of:

a) The speaker of the County Assembly as the chairperson

b) Leader of the majority party or a member of the County Assembly deputed by him or her as the vice Chairperson.

c)The leader of the minority party or a member of the County Assembly deputed by him or her and

d) One person resident in the county.

4. Thus he contended that the respondent is not properly constituted in as much as there is no leader of majority in the County Assembly of Nyamira, that there is no provision for the County Assembly Service

Board to delegate its mandate to independent professionals, the procedure of appointing the panelists to conduct interviews for the position of County Assembly clerk was not transparent to the Constitution of Kenya the supreme law and any at that contravenes it is illegal, null and void.

5. The above petition was opposed by respondent vide a reply to the petition dated 6th October, 2014. In the reply the respondent has denied in total the contents averred in the petition and contended particularly that there is no provision for the County Assembly Service Board to delegate its mandate to independent professionals, that the proper procedure was followed in the advertising and appointment of the position of the clerk in the County Assembly of Nyamira and that they indeed formed a special committee whose mandate was to interview prospective candidates for the position of the clerk in the County Assembly of Nyamira County.

6. Thus they contended that after the special committee had selected a candidate to occupy the office, they (respondent) further conducted further investigations and decided to appoint the clerk who is currently in office and thus this petition has been overtaken by events as there is already in office a clerk in the County Assembly of Nyamira County.

7. In addition to the above reply to the petition the respondents also filed grounds of opposition and preliminary objection dated 19th September, 2014 stating that:

GROUND OF OPPOSITION

1) The application is not meritorious

2) The application is an abuse of court process

3) The applicant has no locus standi to bring forth the petition

4) The court's jurisdiction to hear and entertain such kind of application is expressly ousted by the constitution of Kenya and legislation.

5) The respondent is privileged from litigation arising out of the circumstances complained of herein by dint of the provisions of the law.

6) The petition and application are incurably defective.

8. When the matter came before me on 19th September, 2014 it was agreed that the above petition proceeds by way of filing and exchanging written submissions which I have read. The following are the issues to be addressed by this court:

WHETHER THE PETITIONERS HAVE LOCUS STANDI TO PROSECUTE THE PETITION(S)

The Respondent in the grounds of opposition argued that the Petitioner herein lacked *locus standi* to institute the Petition.

9. In *John Kipkeng'eno Koech and 2 others v. Nakuru County Assembly & 5 others* (2013) Eklr Anyara Emukule J: held

The case of ANARITA KARIMI NJERU (1979)KLR 154 and (1979)KLR 162 settled the proposition that where a person is alleging a contravention or threat of contravention of a constitutional right, he must set out the right infringed and the particulars of such infringement or threat.

However as recent decisions have shown, that the case of Anarita Karimi Njeru though laying an important principle must be seen in the context of Section 84(1) of the Constitution of Kenya (1969

– Consolidated) and now repealed). That section provided -

“84(1) Subject to subsection (6), if a person alleges that any of the provisions of Section 70 to 83 (inclusive) has been, is being or is likely to be contravened in relation to him (or) in the case of a person who is detained, if another person alleges a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may apply to the High Court for redress.”

Locus standi under Section 84(1) was established in two respects. Firstly, if the contravention related to the Petitioner personally, and Secondly if the contravention related to a detained person. Those were the only instances where locus standi was conferred upon an individual, under the said Section 84(1) of the repealed Constitution. That is the extent in my humble view of the authority of ANARITA KARIMI NJERU.

In contrast, the Constitution of Kenya, 2010 confers upon every person in Kenya, the obligation to respect, uphold, protect and defend the Constitution of Kenya, and any attempt to establish a government otherwise than in compliance with this Constitution is unlawful (Article 3), and 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, (Articles 22(1) and 258(1) & 2). In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by persons, acting in the public interest (Articles 22(2)(c) and 258(2)(c).

Articles 22(1) & (2) and 258(1) & (2) of the Constitution 2010, thus confer upon any person the right to bring action in more than two instances firstly in the public interest, and secondly (where a breach of the Constitution is threatened in relation to a right or fundamental freedom.

The national values and principles of governance which bind all state organs, state officers, public officers and all persons whenever any of them makes or implements public policy decisions, and these national values and principles of governance include patriotism, national unity sharing and devolution of power, the rule of law, democracy and participation of the people, good governance integrity transparency and accountability (Article 10, (1)(2)).

Consequently the Constitution of Kenya 2010, grants the individual much wide scope in terms of locus standi than Section 84(1) of the repealed Constitution. The comment in TRUSTED SOCIETY OF HUMAN RIGHTS ALLIANCE VS. AG. & 2 OTHERS [2012] eKLR regarding the decision in Anarita Karimi Njeru is very apt. The Judges said -

“We do not purport to overrule Anarita Karimi Njeru as we think it lays down an important rule of constitutional adjudication; a person claiming constitutional infringement must give sufficient notice of the violations to allow her adversary to adequately prepare her case and to save the court from embarrassment on issues that are not appropriately phrased as justifiable controversies. However we are of the opinion that the proper test under the new Constitution is whether a Petition as stated raises issues which are too insubstantial and so attenuated that a court of law properly directing itself to the issue cannot fashion an appropriate remedy due to the inability to concretely fathom the constitutional violation alleged.

The test does not demand mathematical precision in drawing constitutional Petitions. Neither does it require talismanic formalism in identifying the specific constitutional provisions which are alleged to have been violated. The test is a substantive one and inquires whether the complaints against the Respondents in a constitutional petition are fashioned in a way that gives proper notice to the Respondents about the nature of the claims being made so that they can adequately prepare their case.”

In other words under the new Constitution, the Court is bound to inquire and determine matters on their merit, and where the matter in issue could be deciphered from the pleadings, then the court was bound to determine such matter even when the particulars of breach had not been specifically

pleaded.

Emphasizing the point, the Court of Appeal in MUMO VS. TRUSTED SOCIETY OF HUMAN RIGHTS ALLIANCE & 5 OTHERS (supra), said -

“Our commitment to the values of substantive justice, public participation, inclusiveness, transparency and accountability under Article 10 of the Constitution by necessity and logic broadens access to the courts. In this broader context, this court cannot fashion nor sanction an invitation to a judicial standard of locus standi that places hurdles on access to the courts, except only when such litigations is hypothetical abstract or is an abuse of the judicial process.”

However, we must hasten to make it clear that the person who moves the court for judicial redress in cases of this kind must be acting bona fide with a view to vindicating the cause of justice. Where a person is acting for personal gain or private profit or out of political motivation or other oblique consideration, the court should not allow itself to be seized at the instance of such person and must reject the application at the threshold.”

10. In addition, Article 258(1) grants every person the right to institute court proceedings claiming that this constitution has been contravened, or is threatened with contravention. Court proceedings may also be instituted by any person acting in the public interest (Article 258(2)).

11. In the present case, the Petitioner filed his Petition on his own behalf as a resident of the County of Nyamira and also in the public interest. He has a genuine interest in the functioning of the County Assembly and in particular over the appointment of a person as the County assembly clerk of Nyamira whose functions not only impact on him, but also the other ordinary residents of the County of Nyamira.

12. There was no evidence of any bad faith or political motivation, in filing the Petition. Thus the Petitioner has the necessary *locus standi*.

OF WHETHER THE COURT HAS JURISDICTION TO DETERMINE THE ISSUES RAISED

By definition, “*jurisdiction is the practical authority granted to a formally constituted legal body to deal with and make pronouncements on legal matters and by implication to administer justice within a defined area of responsibility. It is the scope, validity, legitimacy or authority to preside or adjudicate upon a matter.* In the case of OWNERS OF MOTOR VESSEL “Lillian S” vs CALTEX OIL (K) LTD [1989] KLR 1 the Court defined jurisdiction thus -

“By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or take cognizance of matters presented in a formal way for its decision.”

13. In John Kipng’eno Koech (supra) justice Emukule stated:

It therefore follows that jurisdiction of a court is fundamental and goes to the root of the matter, and without it the court cannot take any step, make any determination or issue any orders thereon, and the entire proceedings would be null and void ab initio. In the case of SAMUEL KAMAU MACHARIA VS. KENYA COMMERCIAL BANK LTD & 2 OTHERS [2012] eKLR the Supreme Court of Kenya held -

“A court's jurisdiction flows from either the constitution or legislation or both. Thus a court of law can only exercise jurisdiction as conferred (to it) by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by the law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter for without jurisdiction, the court cannot entertain any proceedings.

This court dealt with the question of jurisdiction extensively in, “In the Matter of Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. Where the Constitution exhaustively provides for the jurisdiction of a court of law, the court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a court of law beyond the scope defined by the Constitution. Where the constitution confers power upon Parliament to set the jurisdiction of a court of law or tribunal the legislature would be within its authority to prescribe the jurisdiction of such court or tribunal by statute law.”

14. In the Owners of the Motor Vessel “Lillian S” vs. Caltex Oil Kenya Oil (*supra*), the court said -

“where a court has no jurisdiction there would be no basis for a continuation of the proceedings – a court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

15. Under Article 165(d) of the Constitution of Kenya 2010, the High Court is vested with the jurisdiction to hear and determine any question respecting the interpretation of the Constitution including the determination of inter alia -

1. the question whether any law is consistent with or in contravention of the Constitution,

2. the question whether anything said to be done under the authority of the Constitution or of any law is inconsistent with, or in contravention of, the constitution, or

3. any matter relating to the constitutional powers of state organs in respect of county governments and any matter relating to the constitutional relationship between levels of government.”

16. In addition thereto, the High Court is also vested with jurisdiction under Article 23 to hear and determine applications for redress of a denial, violation, or infringement of, threat to, a right or fundamental freedom in the Bill of Rights. Therefore, all persons and institutions are subject to review by the High Court in exercise of its jurisdiction to safeguard the principles and values of the constitution and to uphold its supremacy. In the case of MUMO MATEMU VS. TRUSTED SOCIETY OF THE HUMAN RIGHTS ALLIANCE & 5 OTHERS [2013] eKLR the Court of Appeal held -

“It is not in doubt that the doctrine of separation of powers is a feature of our constitutional design and a pre-commitment in our constitutional edifice. However separation of powers does not only prescribe organs of government from interfering with other functions. It also entails empowering each organ of government with counter veiling powers which provide checks and balances on actions taken by the other organs of government. Such powers are, however, not a licence to take over functions vested elsewhere. There must be judicial legislative and executive deference to repository of the function. We therefore cannot agree with the High Court's dicta in the Petition, subject of this Petition that -

[“Separation of powers must mean that the courts must show deference to the Independence of the legislature as an important institution in the maintenance of our constitutional democracy as well as accord the executive sufficient latitude to implement legislative intent. Yet as the Respondents concede, the courts have an interpretive role including the last word in determining the constitutionality of all government actions”].

17. In its decision the subject of appeal in the above, the three judge bench in Trusted Society of Human Rights Alliance vs. Attorney-General & 2 others [2012] eKLR the Court said -

“The doctrine of separation of powers did not disentitle the court from entertaining the controversy surrounding the appointment of the Interested Party. A constructive reading of the Constitution, case law on the question, and comparative jurisprudence from other jurisdictions on the question

have led us to the conclusion that the High Court of Kenya would properly review both the procedure of appointment of the Interested party as well as the legality of the appointment of itself – including determining whether the Interested Party met the constitutional threshold, for appointment to the position.

The constitution consciously delegates the sovereign power under it to the three branches of government and expects each will carry out those functions assigned to it without interference from the other two ... this must mean that the courts must show deference to the independence of the legislature as an important institution in the maintenance of our constitutional democracy as well as accord the Executive sufficient latitude to implement legislation intent. Yet ...the courts have an interpretive role, including the last word in determining the constitutionality of all governmental action. That too is an incidence of the doctrine of separation of powers.”

18. In SPEAKER OF THE NATIONAL ASSEMBLY & OTHERS VS. DE LILLE, M.P. & ANOTHER [297/298] [1999] ZASCA, the Supreme Court, Court of Appeal of South Africa held -

“This inquiry must crucially rest with the Constitution of South Africa. It is supreme not Parliament. It is the ultimate source of all lawful authority in the country. No Parliament, however bonafide, or eminent, its membership, no President, however formidable be his reputation or scholarship and no official however efficient or well meaning can make law or perform any act which is not sanctioned by the constitution. Section 2 of the Constitution expressly provides that law or conduct inconsistent with the constitution is invalid and the obligations imposed by it must be fulfilled. It follows that any citizen adversely affected by any decree, order or action of any official or body, which is not properly authorized by the Constitution is entitled to the protection of the courts. No Parliament, no official and no institution is immune from judicial scrutiny.”

19. In conclusion, the comparative analysis of case law, the High Court's decision in MUMO MATEMU's case where it is said -

“In our view, the test is whether the means applied by the organs of appointment to meet their legal duty has been performed in compliance with the objective and purpose of the Ethics and Anti-Corruption Act as construed in light of Article 79 of the Constitution of Kenya. Under this Act, the courts will not be sitting in appeal over the opinion of the organ of appointment, but will only be examining whether the relevant material and vital aspects having a nexus to the constitutional and legislative purpose of integrity were taken into account in the actual process. Stated otherwise, the analysis turns on whether the process had a clear nexus to the constitutional nexus with a determination that the candidates meet the objective criteria established in law rather than a judgment over the subjective state of the mind of the decision maker. This in our view, provides a fact dependent objective test that is judicially administrable in such cases.”

20. The Court is thus vested with the jurisdiction to determine the constitutionality of the process of appointments by the County Assembly Service Board. The scope of the court's jurisdiction extends to the procedural improprieties, as well as the legality of the appointment decision to determine whether it accords with the constitutional threshold. The court applies an objective test where each case is determined on its own merit.

21. Since the issue of locus and jurisdiction has been determined above, the next issue is to determine whether or not the manner in which the County clerk of Nyamira County was appointed was constitutional.

22. Section 12(3) of the County Government Act provides as follows:-

a) *The County Assembly service board shall consist of:*

b) *The speaker of the county assembly as the chairperson.*

c) *The leader of the majority party or a member of the county assembly deputed by him or her as the vice chairperson*

d) *The leader of the minority party or a member of the county assembly deputed by him or her; and*

e) *One person resident in the county appointed by the county assembly from among persons who have knowledge and experience in put in public affairs, but who is not a member of the county assembly.*

23. Under subsection (7) of the same section it deals with responsibilities of the County Assembly Service Board within under paragraph (b) is responsible for:

b) *Constituting offices in the County Assembly service and appointing and supervising office holders.*

24. Furthermore, Section 13 (1) of the County Government Act No. 17 of 2012 which stipulates:

1) *There shall be a clerk of the County Assembly appointed by the County Assembly Service Board with the approval of the County Assembly (my emphasis).*

25. According to the documents filed by the respondent, they revealed the following about the people who conducted interviews for the position of County Assembly clerk.

'the County Assembly Services Board in an effort to conduct a fair, impartial and professional process, sought the services of independent professionals to sit on the interview panel. Professionals from diverse disciplines were invited by the CASB(County Assembly Service Board. The professionals requested to perform the interview were:

- *George Mboya- Logistics specialist.*
- *Bob Ndubi- Finance specialist.*
- *Jacqueline Kenani- Human Resource specialist*
- *Osoro Mogikoyo- legal Expert*
- *Rodgers Onguti- Procurement specialist*
- *William Momanyi- Religious leader.*

26. The above action by the County Assembly Service Board of Nyamira of (recruiting) professionals to conduct interviews on their behalf was clearly contrary to section 12(3) and subsection (7)(b) of the County Government Act 12 of 2012. What the Act has stipulated is the simple fact the County Assembly Service Board shall appoint the clerk of the County Assembly. The fact that the Nyamira County Assembly Service Board went ahead to (select) a few individuals with specialized experience in Human Resource and the recruitment process was not wrong but the members of the County Assembly Service Board of Nyamira had to sit with them in that interview panel since the provisions of section 2 as read together with section 13 are mandatory and not optional.

27. It is therefore unfortunate that this petition though successful has been overtaken by events in the sense that the County clerk of Nyamira has already taken office and the fact that there is no prayer in the petition to declare the said swearing in of the County Clerk of Nyamira void ab initio.

28. For the foregoing reasons the petitioner's prayers cannot succeed as they have already been overtaken by events. Each party shall bear their own costs.

Dated and delivered at KISII this 20th day of February, 2015

C.B. NAGILLAH,

JUDGE.

In the presence of:

Moseti holding brief for Ochoki for the petitioner

M/s Asati holding brief for Nyachiro for the respondent

Edwin Mongare Court Clerk.