



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**CONST. PETITION NO. 43 OF 2013**

**ENG. PIUS KATHUKYAH.....PETITIONER**

**VERSUS**

**DR. ALFRED MUTUA- GOVERNOR MACHAKOS.....RESPONDENT**

**RULING**

1. The petitioner through a petition dated the 4<sup>th</sup> of September, 2013 averred that the respondent in breach of **Article 22(1) (3)(e)** of the Constitution declined to respond to his application seeking the position of the Minister for Industrialization in Machakos County. He alleges that the selection of qualified people for the position was through nomination instead of competitive selection. Consequently, he prays that the court revokes the appointment of Minister for Industrialization in Machakos County, to either replace him directly or compel the Governor to advertise the position and carry out a competitive selection.

2. In response thereto the respondent filed a Statement of grounds of opposition stating that: The petitioner failed to specify the right or fundamental freedom alleged to have been denied; He failed to indicate which provisions of the Bill of rights of the Constitution of Kenya has been infringed in appointing any of the members of the County Executive Committee of Machakos County.

3. That according to **Article 79(2)(b)** of the Constitution and **Section 30(2)(b)** of the County Government Act, the appointment of the Members of the County Executive Committee is constitutionally the preserve of the Respondent. The Petitioner has not demonstrated that in the appointment of the Members of the County Executive Committee of Machakos County, the respondent acted outside the confines of the law. Such appointment is a political process within the sole discretion of the respondent subject to approval by the County Assembly and the conditions and qualification laid out in **Section 35(3)** of the County Government Act.

4. That the court lacks the requisite jurisdiction to address a political question to replace a Minister or compel the Governor to advertise the position and select competitively and the petitioner has not demonstrated that he possesses all the qualifications as laid down in Section 35(3) of the County Government Act. Removal of the County Executive Committee is provided for by **Section 40** of the County Government Act and tenure of the member is also provided for by statute.

5. In reply the Petitioner alleged that the respondent was in breach of **Section 45(1)** of the **Devolution Act** and **Article 22(3) (e)** and **(4)** of the Constitution.

6. I have duly considered rival arguments and the submissions of both parties, alongside authorities cited.

7. The Petitioner herein claims that the respondent in breach of Article 22(1) and (3) (e) of the Constitution declined to respond to his application where he was seeking the position of the Minister for

Industrialization in Machakos County. He reached the conclusion because according to him the selection of qualified people for the position was through nomination by the Governor instead of competitive selection. It is for this reason that he seeks revocation of the Members of executive Committee of Industrialization in Machakos County and the court to exercise its discretionary authority by replacing the Members of the Executive Committee directly or compel the Governor to advertise the position so as to carry out direct selection.

8. The Law alluded to by the Petitioner, Article 22(1) and (3)(e) of the Constitution provided thus;

***“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.***

***(3) The Chief Justice shall make rules providing for the court proceedings referred to in this Article, which shall satisfy the criteria that—***

***(e) an organisation or individual with particular expertise may, with the leave of the court, appear as a friend of the court.”***

9. As correctly argued by counsel for the respondent, Article 22(1) of the Constitution merely gives the aggrieved party leeway to seek reprieve from the court of law where a right they are entitled to has been breached. Article 22(3)(e) refers to rules that are made by the Chief Justice and where a petition is filed in court an Individual or Organization with expertise in the matter at hand may seek leave from court to appear as a friend of the court. Indeed the petitioner has not specified which of his rights have been breached. He has also not quoted which provisions of the law in regard to the Bill of Rights as provided under the Constitution has been violated.

10. Without specification this court’s hands are tied. The court cannot be asked to speculate as to which provision of the law may have been contravened. The petitioner ought to have categorically specified which article of the Constitution that provides for his rights has been violated by the respondent, failure to be precise in his averment is fatal to the petition.

11. Secondly, it is argued by the respondent that this court lacks jurisdiction to deal with appointment of the Members of the County Executive Committee. The respondent derives his powers of making various appointments from Article 179(2)(b) of the Constitution and Section 30(2) (b) of the County Government Act.

12. Article 179(1) (2) of the Constitution provides;

***“179. (1) The executive authority of the county is vested in, and exercised by, a county executive committee.***

***(2) The county executive committee consists of—***

***(a) the county governor and the deputy county governor; and***

***(b) members appointed by the county governor, with the approval of the assembly, from among persons who are not members of the assembly.”***

13. Section 30(2) (b) of the County Government Act provides;

***“30(2) Subject to the Constitution, the governor***

***shall -***

***(b) perform such State functions within the county as the President may from time to time assign on the basis of mutual consultations.”***

The above provisions of the law gives the Governor the authority to discharge duties that are discharged by the President at the National level. Looking at Section 35 of the County Government Act, nomination of the County Executive Members is a preserve of the Governor. The main consideration is for the composition to reflect the community and cultural diversity of the county; then the principles of affirmative action as provided by the Constitution. The person eligible must be a Kenyan citizen, a holder of a degree from a University recognized in Kenya, and a person of integrity with knowledge and experience in a distinguished career of not less than five (5) years.

14. The discretion bestowed on the Governor cannot be questioned by the court. This court could only intervene if the appointment/nomination is not procedural or where the precincts of the law were not observed to the letter. There is no requirement that the position of the County Executive Member should be competitive.

15. This court indeed lacks the requisite jurisdiction to grant the order sought by the petitioner of making a replacement of the person serving as the County Executive Member of Industrialization, Machakos County.

16. The petitioner has not alleged that there are grounds necessitating removal of the person sitting as the Member of the Executive Committee for Industrialization. He has not alleged that the person is incompetent or is guilty of gross misconduct as provided by Section 40 of the County Government Act. Even if this had been proved the jurisdiction to remove such person resides with the County Assembly.

17. From the foregoing it is apparent that the petition lacks merit. Accordingly the same is dismissed with no orders as to costs.

18. It is so ordered.

**DATED, SIGNED and DELIVERED at MACHAKOS this 28<sup>TH</sup> day of APRIL, 2015.**

**L. N. MUTENDE**

**JUDGE**