



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CONSTITUTIONAL PETITION NO.4 OF 2014

JOEL ONSAREPETITIONERS

VERSUS

THE GOVERNOR T/NZOIA COUNTY & OTHERS.....RESPONDENTS

J U D G M E N T

1. This is the humble petition of **Joel Onsare** (Petitioner) seeking declaratory orders that the nomination and appointment by the Governor, Trans-Nzoia County (**first Respondent**) of the county Executive committee, the Public Service Board, the county Secretary and the county chief Officers (**Interested parties**) was unconstitutional, illegal, null and void.
2. Further that, the action of the Governor of putting his clan of Bukusu of the Luhya community ahead of all other diverse ethnic communities residents of Trans-Nzoia county is unconstitutional, illegal, null and void and also that the Kisii community is a minority group residents of Trans-Nzoia county and ought to be treated as such in the governance of Trans-Nzoia County.
3. The petitioner also seeks order of certiorari to recall and question the decision of the first respondent appointing the County Executive Committee (**second respondent**) members, County Public Service Board (**fifth** respondent) County Secretary and the Chief county Officers and a declaratory order that the first respondent and the clerk of the Trans-Nzoia county Assembly (**third respondent**) are unfit and incompetent to hold a public office and should therefore be subjected to the applicable disciplinary procedure relevant to their offices.
4. The petitioner further seeks an order of prohibition to prohibit the interested parties from taking up the office of the County chief Officers and an order that the entire exercise of nomination, vetting and appointment be conducted freshly in a fair, transparent, competitive, legal and constitutional manner and also an order that at least 30% of the vacant posts at entry level be reserved and / or filled by the minority ethnic communities residing in Trans-Nzoia County.
5. The petition is based on several provisions of the **Constitution of Kenya, 2010, including Articles 2, 3, 10, 19, 20, 22, 23, 27, 28, 47, 159, 160, 165, 235 and 259 as well S.65 of the County Governments Act** and is grounded on facts that on the 9th July 2013, the first respondent nominated and with the approval of the fourth respondent (The County Assembly of Trans-Nzoia) appointed nine (9) county Executive committee members of which 55.55% came from the Bukusu Clan of the Luhya community, 33.33% came from the Kalenjin community while 11% came from other diverse ethnic communities residing in Trans-Nzoia County. The minority group of the Kisii Community was left out.
6. The first respondent also nominated seven (7) persons to the office of the county Public Service Board and with the approval of the fourth respondent appointed them, to the said office. The Bukusu clan of the Luhya Community was given 71.4% of the slots while the Kalenjin Community was given 28.6% of the slots. The minority Kisii Community and other cosmopolitan diverse ethnic committees residing in Trans-Nzoia County were conspicuously left out.
7. On **17th August 2013**, the first respondent appointed a member of his clan from the Luhya

Community to the office of the County secretary Trans-Nzoia County and also nominated eleven (11) County chief Officers but after deliberating on the list of the nominees, the County Assembly of Trans-Nzoia committee on appointments gave its report on **29th April 2014**, rejecting the list of nominees and recommending that the nominating authority abide by the Constitution, Statutory Law and Established Practices.

8. However, on the same **29th April 2014**, the third respondent in collusion with the first respondent and in contravention of the recommendations aforementioned wrote to the county Secretary and misrepresented the fourth respondent on its report and included hitherto secretly the name of Dr. Wycliffe Wabwire Kiiya and on the **30th April 2014**, the first respondent organized for a swearing in ceremony in which twelve (12) persons were sworn in and took office illegally.
9. The foregoing facts form the basis for the petitioner's case against the five (5) respondents and all the County chief Officers / Interested Parties.

It is the petitioner's contention that the nominations, vetting and appointments by the respondents was a gross violation of **Articles 10, 27 (4) and 232(1) and a breach of Articles 2(1) and 3(1) of the Constitution**. That, in nominating and appointing the interested parties, the first respondent went against the recommendations of the fourth respondent thereby breaching the principles of good governance, integrity and transparency as entrenched in **Article 10 of the Constitution**.

10. The petitioner also contends that the action by the first respondents to recommend for appointment of person who had not been interviewed contravened the values and principles referred to in **Article 232 of the Constitution, Section 59 and 65 of the County Governments Act and the Provisions of the Public Appointment Act, 2011**. That, the action by the first respondent of nominating and appointing the persons herein-mentioned offended **Articles 27 and 232 of the Constitution and s. 45(1) (a-b) of the County Governments Act** and the action by the third respondent of misrepresenting the report of the fourth respondent was in itself a **violation of Chapter six (6) of the Constitution**.
11. It was further contended by the petitioner that the actions of the respondent jointly amounts to a violation of the petitioner's right to a fair administrative action in that the first respondent's County Government has discriminated the Kisii community against all nominations, appointments and other economic employments and that the first respondent has compromised all public and official interests in favour of personal interest of rewarding his clan with public appointments discriminatively.

It is for all the foregoing reasons that the petitioner prays for the orders sought herein.

12. In the response to the petition, the first respondent vide a replying affidavit dated 15th July 2014, prays for the dismissal of the petition with costs and avers that if the petition was made in good faith, then the petitioner would have disclosed his real names being **Joel Onsare Gesuka** and would also have disclosed that he was among the five candidates who vied for the seat of Governor, Trans-Nzoia County in the General Election of March 2013. That, having been overwhelmingly rejected by voters, the petitioner has now embarked on a scheme to frustrate and discredit the County government so as to derail its development agenda for the people of Trans-Nzoia.
13. The first respondent in essence avers that the allegations and contentions by the petitioner are legally and Constitutionally unfounded if not based on utter falsehood and tribal Chauvinism. He (first respondent) and his Government comprising of the second and fifth respondent as well as the interested parties / chief Officers contend that the petitioner rushed to file this petition without exhausting the existing avenues for redress through the County Assembly of Trans-Nzoia.

That, the decision of a committee of the County Assembly was not binding on the plenary of the assembly and therefore the approval of the names of the appointees by the assembly prevailed over the deliberations of its committee. That, the appointments of the County Secretary, members of the County Executive Committee, members of the County Public Service Board and the Chief Officers was open, transparent, just meritorious and compliant with the Constitution, the County

Governments Act and the Public Officers Ethnic Act.

14. It is also the contention of the first respondent that all positions were advertised and appointments were only from candidates who attended the interview. That, the aforementioned Dr. Wycliffe Wabwire Kiiya was not appointed as a Chief Officer but as member of the County Executive Committee which appointment was properly made by the first respondent and not the County Public Service Board and was approved by the County Assembly.
15. The first respondent further contended that the Kisii Community in Trans-Nzoia are not a special or minority community having acquired land in the area by purchase as opposed to being indigenous to the area.

As for the third and fourth respondents, they also deny the allegations made against themselves by the petitioner and aver in their affidavit dated **16th February 2015**, that they have all along acted within the **provisions of the Constitution and the County Governments Act and all other Laws, Regulations and Guidelines** relating to the running the affairs and conduct of the County Assembly.

16. They (third and fourth respondents) also aver that they did not breach the Constitution as alleged by the petitioner and that the third respondent only played his role of advertising the position of County Secretary in two national newspapers on **12th July 2013** pursuant to section 44 of the County Government Act and the fourth respondent played its role of vetting and approving the nominees as provided by Sec.8(1) of the County Governments Act. That, the various positions of Chief Executive Officers of the County were advertised on the **20th November 2013 and 24th December 2013**.
17. It was further averred by the third respondent that in the discharge of his duties, he informed the first respondent vide a letter dated **29th April 2014**, of the approval of the nominees as provided for under S.11 of the Public Appointment Act, 2011 and after the positions were advertised, interviews carried out and the appointments approved on the floor of the County Assembly on the same **29th April 2014**. That, the nomination and appointment of the County Executives and the Public Service Board followed the due process of the law and that of the County Secretary was conducted in accordance with the prescribed procedures.
18. The third and fourth respondents contended that this petition is unmerited as the first respondent acted in compliance with their recommendations in so far as they were mandated to vet and recommend appointments. That, the nominees appeared before a vetting board appointed and supervised by the fourth respondent and that the vetting process was transparent and open to every member of the county including the Petitioner who did not even apply for any position.

That, the first and fourth respondents made the appointments after the names of the interested parties were presented in the county Assembly for voting whereby members of the assembly voted and approved the names.

19. The third and fourth respondents also contended that the rejection of names by the committee of the assembly would not be a basis for the petition since the committee's duty was to check the nominations and forward its recommendations to the plenary of the house and once the report was real to the house, the house was put to vote on the same, its decision being final. That, the full house voted on the committee's report and overruled the recommendations therein thereby proceeding to pass the nominees.
20. It was further contended by the third and fourth respondents that they could not purport to change the list of the members appointed as executives through a democratic process and that the order sought herein to prevent the Chief Officers from taking office was not available to the petitioner as it was overtaken by events.

That, the issuance of orders of certiorari would grind to a halt the County Government of Trans-Nzoia. The third and fourth respondents also pray for dismissal of the petition as being an abuse of the court process.

21. The arguments for and against the petition were made by way of written submissions. In that regard, the petitioner filed his written submissions on **20th April 2015**, through **S. Nyakundi & Co. Advocates**.

The first, second and fifth respondents together with the interested parties filed their submissions on **8th June 2015**, through **Sifuna & Sifuna Advocates**, while the third and fourth respondents did like wise on 28th April 2015, through **Kithi & Co. Advocates**.

22. From the facts of the case and the submissions by all parties, it is apparent that the issues for determination are **firstly**, whether the respondents or any one of them violated and / or breached the provisions of the Constitution and / or Statutory Law as alleged by the petitioner, **secondly** whether the Kisii community in Trans-Nzoia County to which the petitioner presumably belongs is a minority group and has been discriminated against within the county.

23. It may in passing be mentioned that in the present Constitutional dispensation there is always an assumption that any person who moves the court for judicial redress of a Constitutional nature does act in good faith with a view to promote, respect, uphold and defend constitutional principles hence vindicating the cause of justice. Where a person acts for personal gain or out of political and / or tribal motivation, no court of justice would allow itself to be seized or captured at the instance of such person and would strike out an application at the very beginning (*see, Mumo Matemo vs Trusted Society of Human Rights Alliance & Others (2013) eKLR.*)

24. However, whenever there is a suspected public wrong or public injury allegedly caused by an act or omission of the state or a public authority and which is contrary to the Constitution or the Law, any member of the public acting in good faith and having sufficient interest can maintain an action for redress of such public wrong or public injury (*See, S.P Gupta vs President of India & Others AIR (1982) SC 149.*)

25. Contrary to what has been implied herein by the respondents, this petition cannot be said to have been motivated by political or tribal considerations on the part of the petitioner simply because he deems the Kisii Community in Trans – Nzoia County to be a minority group or because he lost overwhelmingly in his quest to become the Governor of the County in the 2013 General Election or because he thinks that the respondents have violated the Constitution by discriminating against the Kisii community or any other ethnic group in the County. In sum, it cannot be said that this petition is brought in bad faith. It is thus proper before the court.

26. However, any petitioner seeking redress or on a matter involving an alleged breach or violation of the Constitution is required to set out within a reasonable degree of precision, that of which he complains, the provisions said to be infringed and the manner in which they were allegedly infringed (*see, Anarita Karimi Njeru vs Republic [1976-80] 1 KLR 272*). There must be proof of the allegations if the applicant is to be granted the orders sought.

27. With regard to the first issue for determination, the declaratory orders sought herein by the petitioner and in particular, prayers (a), (b), (c) and (d) relate to the nomination and appointment of the County Executive Committee members, the County Public Service Board members, the County Secretary and the Chief Officers.

It is the petitioner's belief that the action of nominating and appointing such persons to the respective offices was unconstitutional, illegal, null and void such that there should be a declaration that the first respondent kept his Bukusu clan of the Luhya community ahead of all other diverse ethnic communities in Trans – Nzoia thereby acting unconstitutionally (see prayer (e)) and a declaration that he (first respondent) and third respondent are unfit and incompetent to hold public office and should therefore be subjected to applicable disciplinary procedures (see, prayer (k)).

28. As may be deciphered from the record herein, the belief is founded on the fact that the County of Trans – Nzoia is cosmopolitan with diverse ethnic communities being residents and whose rights under **Article 22, 27 and 47** of the Constitution are guaranteed and the respondents, under

Articles 3, 10, 21 and 56 have the constitutional obligations to uphold the said rights in favour of the petitioner. Further that, the action by the first respondent in nominating the interested parties was thus in violation of the Constitution for failure to reflect the entire balance of the cosmopolitan and diverse ethnic communities residing in the county and more specifically discriminated against the Kisii Community among others who are minorities in the county.

29. The petitioner emphasizes that the appointment of the chief Officers after the rejection of the first respondent's nomination list by the County Assembly on the **29th April 2014** was a violation of the Constitution, the rule of law and the administration of justice.

Apparently, the petitioner felt more aggrieved by the nomination and appointment of the Chief Officers (Interested parties) than other officials in the Executive Committee and the Public Service Board as well as the County Secretary. He listed the names of the members of the Executive Committee and said that 55.55% are from the Bukusu clan, 33.33% from the Kalenjin community and 11% from other diverse communities in the County.

30. The petitioner also listed the names of the public service board members and said 71.4% were from the Bukusu clan and 28.6 % from the Kalenjin community. He noted that other diverse ethnic communities and in particular the Kisii were left out and hence discriminated by the respondents in the appointments. He submitted that the appointments were based on nepotism / ethnic discrimination on the part of the first and fourth respondents and that the first respondent and his deputy outrightly abused office and acted unconstitutionally by sharing all job opportunities between themselves. The two violated Articles 27(4) and 232(1) (g)(h) and (i)

31. **Article 27(4) of the Constitution** provides for non-discrimination of persons on grounds of ethnic or social origin "inter-alia" by the state and **Article 232** provides for the values and principles of public service, including fair competition and merit on the basis or appointments and provisions (**Article 232(1) (h)**) and affording adequate and equal opportunities for appointment, training and advancement at all levels of the public service of men and women, members of all ethnic groups and persons with disabilities (**Article 238 (1) (I)**).

32. **S. 65 of the county government Act, 2012**, was the Statutory law cited herein by the petitioner to show that the respondents acted unlawfully in making the material appointments.

The provision provides for matters to be taken into account during appointments. These include the standards, values and principles set out in Articles **10, 27 (4), 56(c) and 232(1)** of the **Constitution (S.65 (1) (a))** and the need to ensure that at least 30% of the vacant posts at entry level are filled by candidates who are not from the dominant ethnic community in the county among other factors (**S.65(1)(c)**).

33. The respondents did not dispute that the County of Trans – Nzoia is Multi-ethnic and cosmopolitan consisting of forty three (43) ethnic communities reflecting the face of Kenya. However, it was vehemently disputed by the first respondent that the questioned nominations and appointments were carried out unconstitutionally and unlawfully. He submitted that the appointments were proper and were not motivated by nepotism or ethnicity. That, the petitioner never applied for any position in the County despite the same being advertised in public media and has not shown that any member of the Kisii community was excluded on tribal consideration.

34. The third and fourth respondents indicated that as far as they were concerned they followed due process in undertaking the action being questioned by the petitioner. In that regard, positions were advertised in the national newspapers, applications for the positions were received, reviewed and interviews carried out before the nominees were vetted. Thereafter, a report of the appointments committee was prepared and tabled before the plenary of the County Assembly whose members debated it and voted over the same overruling the recommendations of the committee on some nominees and approving all the nominees. The approval was then communicated to the governor who appointed the said nominees to the various positions as had been applied for.

35. As for the nominations and / or appointment of the members of the Executive Committee and the Public Service Board, other than listing the names of the officials and giving a percentage in terms of the community they represented, the petitioner has not provided sufficient and credible material

to firstly prove that the officials are from this or that ethnic communities. Identifying them by name and giving them a tribal tag on that basis was not enough to show that they are all from the Bukusu clan of the Luhya community. It is also doubtful whether there exists a Bukusu clan of the Luhya community as opposed to the Bukusu sub-Tribe of the Luhya community.

36. Besides, it is not known whether the tribal or ethnic percentage placed by the petitioner with regard to the appointment of the members of the executive committee or the public service board is a true reflection of the situation on the ground consideration being given that the Luhya community is composed of distinct sub-tribes which may share names. The names of an individual is not absolute proof that he / she belongs to this or that tribe. It is common knowledge that some tribes from all regions in this country share names.

Suffice to hold that there is no proof by the petitioner that the first respondent and indeed all the respondents violated Articles 27(4) and 232 of the Constitution or S.65 of the County Government Act, in appointing the members of the Executive Committee and the Public Service Board.

37. There is nothing to show that other ethnic communities in Trans-Nzoia County and in particular the Kisii community, were discriminated in the aforementioned appointments or that they were not accorded equal opportunity in applying for the positions which were open to all and sundry. There is nothing to show that applications for the positions were received from ethnic communities other than the Bukusu and the Kalenjin and were rejected on tribal grounds.

The petitioner did not apply in his own right for the position and cannot now be heard to say that his constitutional rights were breached and / or violated by the respondents. Neither can he be heard to speak on behalf of a whole community without showing or identifying the members of that community who were discriminated or excluded from applying for the given position solely on ethnic considerations.

38. As for the appointment of the County Secretary, not even a scintilla of evidence was availed to prove that the appointment was contrary to the law. Here again, the appointee i.e Fredrick Wafula Sifuna or Fredrick Wakofula Sifuna is identified as a member of the Bukusu "Clan" by name and there is nothing to show that members of other diverse ethnic communities in Trans – Nzoia applied for the job and were rejected on tribal basis. In any event, there was nothing to show that the first respondent and the appointee belong to the same tribal clan as alleged by the petitioner.

39. As noted herein-above, the petitioner was or appeared most aggrieved by the appointment of the County Chief Officers who are the interested parties herein. He was thus required to satisfy this court that the said appointments were carried out in breach or in total disregard to the laid down statutory procedures or in gross violation of the provisions of the Constitution particularly Articles 27 and 232. He was required to establish the manner in which these provisions were breached and the manner in which the appointing authority failed to adhere to the requirements set out in S.65 of County Government Act or any other statute. He was also required to establish the manner in which members of the Kisii community were discriminated by the respondents while carrying out the recruitment exercise.

40. The petitioner was essentially supposed to show that there was substantive defects in the procedure of nominating and appointing the chief offices or there was fundamental omission or consideration of extraneous matter so as to render the cumulative process unconstitutional

It is a fundamental tenet of the rule of law that evidence, whether real, documentary, circumstantial or presumptive is the basis of any judicial decision and that is why judicial decisions are not founded on a toss of the coin (*see Mumo Matemu vs Trusted Society of Human rights alliance & Others (Supra)*).

41. The function and responsibilities of a County Governor such as the first respondent are spelt out in S.30 of this County Government Act, while S. 31 of the Act spells out the powers of a governor.

County Executive members and the County Secretary are appointed in accordance with the provisions of s.35 and S.44 respectively of the County Government Act and the County Chief Officers are appointed in accordance with **S. 45 of the Act**.

S. 45 (1) of the Act provides that:-

“ The governor shall:-

- a) Nominate qualified and experienced County Chief Officers from among persons competitively sourced and recommended by the County Public Services Board and
- b) with the approval of the county Assembly, appoint County chief Officers.”

42.The County Public service Board is established under **S.57** of the County Government Act and the appointment of its members is through a competitive process. It is the board which is empowered under s. 45(1) of the Act, to make recommendations to the the county Governor with reference to appointment of the County Chief Officers. The names of the nominees are thereafter forwarded by the governor to the County Assembly for approval.

43. It was not disputed herein that the positions for County chief Officers were advertised and application received from all interested parties before interviews were carried out. Thereafter, the nominees were vetted by a committee of the county assembly which thereafter tabled its report before the plenary of the house for debating and voting and when this was done, the assembly overruled some of the recommendations of its committee and approved all the nominees thereby paving way for the governor to appoint them in the respective positions.

The assembly had the power to reject or approve the names of the nominees. It was therefore within its powers to approve the names of the nominees even though the vetting committee had reservations about some nominees.

44.A party aggrieved by the approval of the nominees by the County Assembly was at liberty to petition the assembly with a view to reconsidering its decision. Under Article **37** of the Constitution, every person has a right, peacefully and unarmed to assemble, to demonstrate and to present petitions to public authorities and under **S.15(1)** of the County Government Act, a person has a right to petition a County Assembly to consider any matter within its authority. Further, under **S. 88(1)** of the same Act, citizens have a right to petition the County Government on any matter under the responsibility of the county government.

45.Herein, the petitioner did not take the option aforementioned and instead moved this court with the present petition which having been carefully considered by the court on the basis of the supporting grounds, the averments in the supporting affidavit and the supporting submissions is found to be devoid of adequate particulars of the claims relating to the alleged violation of the Constitution and the County Government Act or any other statute by the respondent. The petition contains no cogent material to sustain a conclusion that the procedural aspects of the appointments of the various officers by the first respondent and indeed all the respondent failed to pass the Constitutional Standard. In sum, the petition did not meet the standard enumerated in the case of **Anarita Karimi Njeru (Supra)**.

46.Consequently, it is the holding of this court that the respondents or any one of them did not violate and / or breach the provisions of the Constitution and / or Statutory law in the nominating and appointment processes relating to the members of the County Executive Committee, County Public Service Board, County Secretary and the County Chief Officers / Interested Parties.

The declaration orders sought herein relating to the said officers and the first / third respondents together with orders of certiorari and prohibition against the officers and the first respondent i.e prayers (a-e) (g – l), as well as the orders sought in prayers (m) and (n) cannot in the circumstances

issue.

47. With regard to the second issue for determination relating specifically to prayer (f) of the petition, Article 56 of the Constitution provides for minorities and marginalized groups, in that the state shall put in place affirmative action programmes designed to ensure that minorities and marginalized groups:-

- a) participate and are represented in governance and other spheres of life.
- b) are provided special opportunities in educational and economic fields.
- c) are provided opportunities for access to employment
- d) develop that cultural values, languages and practices .
- e) have reasonable access to water, health services and infrastructure.

48. Blacks Law Dictionary (8th Ed.) at page 1017, defines a minority group as a group that is different in some respect (such as race or religions belief) from the majority and that is sometimes treated differently as a result. That, the term “Minority” is in that sense not limited to a group that is outnumbered. It may also be applied to a group that has been traditionally discriminated against or socially suppressed, even if its members are in the numerical majority in an area.

Such a group may also be defined as “a group numerically inferior to the rest of the population of a state, and in a non-dominant position whose members - being nationals of the state – posses ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religions and language” (*see, Rangal Lemeigurans & Others vs Attorney General & Others [2006] e KLR*).

49. A minority group may also be defined as “a group of citizens of a state, constituting a numerical minority and in a non dominant position in that state, endowed with ethnic, religious or linguistic characteristics which differ from those of the majority of the population having a sense of solidarity with one another, motivated, if only implicitly, by a collective will to survive and whose aim is to achieve equality with the majority in fact and in law” (*see, the Rangal Lemeiguran case (supra)*).

50. The petitioner did not offer any evidence such as demographic data to show that the Kisii community as a whole is numerically a minority group in this country and in this county of Trans- Nzoia. Besides, no evidence was provided to fit the Kisii community into the aforementioned definitions of a minority group. Such a status comes with special considerations in fact and in law and cannot simply be acquired by mere settling of a group of people of one ethnic group in an area other than their established ancestral home e.g. members of the Kisii community or any other ethnic group who have settled and “adopted” the county of Trans-Nzoia as their home.

The Kisii community in Trans-Nzoia is thus not ethnically, religiously or linguistically distinct from the Kisii communities in other parts of this country for it to be regarded as a minority group.

51. For the foregoing reasons, the declaratory order sought in prayer (f) of the petition cannot issue.

All in all, this petition is lacking in merit and is hereby dismissed with costs to the respondents.

J. R. KARANJA

JUDGE

[Delivered & Signed this 25th day of June 2015]