



REPUBLIC OF KENYA

High Court at Garissa

Petition 2 of 2013

ABDI SALAT AGALAB.....PETITIONER/APPLICANT

AND

GOVERNOR GARISSA COUNTY.....1ST RESPONDENT

ATTORNEY GENERAL.....2ND RESPONDENT

RULING

Introduction and background

[1] The Governor of Garissa County who is the 1st respondent in this matter nominated, on 29th April 2013, ten persons to form the Garissa County Executive Committee. The law requires that such nominated persons be submitted to the County Assembly for approval before they are appointed. It is the list of the nominees that is being challenged by the petitioner who has come to court under certificate of urgency. The application is dated 3rd May 2013 and was filed on 6th May 2013 contemporaneously with the Petition challenging the constitutionality of such nomination. The application is the subject matter of this ruling.

[2] The Notice of Motion which is anchored under various provisions of the Constitution and the County Governments Act seeks the following prayers:

i. That the hearing of the application be certified urgent and the motion be heard ex parte in the first instance.

ii. That a temporary order do issue staying the forwarding of the list of nominees of the County Executive Committee to the County Assembly of Garissa for vetting pending the hearing and determination of this application.

iii. That a temporary order do issue staying the vetting, gazettelement and or formal appointment by the 1st respondent of the nominees of the County Executive Committee pending the hearing and determination of this application.

iv. That an order do issue declaring the list of nominees of the County Executive Committee as established by the 1st respondent unconstitutional and an order do issue compelling the 1st respondent to properly constitute/nominate to the County Executive Committee in accordance with the law.

v. Costs of this Motion

[3] The application was certified urgent and the court directed that service to the respondents be effected to pave way for inter partes hearing. The court granted prayer two in the interim to stay the forwarding of the list of nominees of the County Executive Committee to the County Assembly for vetting.

The Applicant's Case

[4] The grounds in support of the application are found on the face of the application and the supporting affidavit sworn by the petitioner. The grounds can be summarised that the list of nominees is unconstitutional and illegal; that it is composed of persons from three major clans, namely the Abduak, Abdalla and Awlilahan clans of Garissa County leaving out the Rer Mohamed, a marginalized and minority clan and other minority clans and groups; that the list is prejudicial to the petitioner and that the petitioner and his clan, Rer Mohamed, will suffer irreparable violation of their fundamental rights; that their right to effective participation in public and political life has been defeated; that the selection of the nominees was not free and fair; that the selection was influenced by nepotism, favouritism and improper motives; that the list does not reflect the cultural diversity of the Garissa County; that among the native ethnic communities of Garissa County, Rer Mohamed clan was not considered for the nominations and that Rer Mohamed's identity and characteristics as a native Somali ethnic group risks being destroyed.

[5] In addition to the grounds found on the face of the application and in the supporting affidavit sworn by the applicant, there is a further affidavit sworn by the applicant and filed on 17th May 2013 to which he attached a bundle of documents marked "ASA 2" in support of his claim that there are four native clans of Garissa County. In the further affidavit the applicant deposes that the orders granted by the court (referring to the interim orders of this court granted on 7th May 2013) stayed the forwarding of the names as well as the vetting of the nominees and that these orders were not issued in vain. He further deposed that the Rer Mohamed clan is not part of the Abdalla clan and this is the confusion they seek to address.

[6] Learned counsel for the applicant, Mr. Biketi, made detailed oral submissions. He relied on the principles laid down in the case of **Giella v Cassman Brown [1973] EA 358** namely:

- i. The applicant must show a prima facie case with a probability of success;**
- ii. That an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages;**
- iii. That if the court is in doubt it will decide the case on the balance of convenience.**

[7] He submitted that the Rer Mohamed clan is a native of Garissa County and that the cultural richness of Garissa County cannot be mentioned without mentioning the Rer Mohamed clan; that the nominees to the County Executive Committee comprise of persons from the three major clans, with the Abduak clan having three nominees out of the ten, the Abdalla clan having three nominees including the Deputy Governor and the Awlilahan clan having four nominees including the Governor. He further submitted that the Rer Mohamed clan and other smaller and marginalised groups are being discriminated against and they ought to be considered for nomination in the County Executive Committee; that the Rer Mohamed are not part of the Abdalla clan and ought to be considered as of right.

[8] Counsel cited the Preamble to the Constitution which recognizes the cultural diversity of Kenya and Article 10 of the Constitution on national values and principles of governance which bind all state organs, state officers, public officers and all persons whenever they apply or interpret the Constitution; enact, apply or interpret any law or make or implement public policy decisions. He submitted that the 1st respondent was under obligation to follow the law in nominating persons to the County Executive committee as provided under section 30 of the County Governments Act.

[9] Other provisions of the Constitution relied on are Article 20 which provides that the Bill of Rights applies to all law and binds all State organs and all persons and that every person shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom. Counsel relied on Article 27 of the Constitution which guarantees

equality of every person before the law and right to equal protection and equal benefit of the law. Counsel relied on Article 56 of the Constitution which states, inter alia, that the State shall put in place affirmative action programmes designed to ensure that minorities and marginalized group are represented in governance and other spheres of life and submitted that the Rer Mohamed clan is a marginalized group as shown in the bundle of documents marked “ASA 2” and as defined under Article 260 of the Constitution.

[10] It was further submitted that the 1st respondent failed to abide by the objects and principles of devolved government as provided for under Article 174 of the Constitutions which include promotion of democratic and accountable exercise of power; fostering of national unity by recognizing diversity; protection and promotion of the interests and rights of minorities and the marginalized communities. It is contented that having 8 out of 10 nominees to the County Executive Committee from three clans is not the fullest extent inclusion of cultural and community diversity. It was argued that the applicant has demonstrated a prima facie case with a probability of success.

[11] In respect to the second principle (threat of irreparable harm) it was submitted that the application seeks an injunction against the whole process from nomination, vetting and appointment of the Executive Committee. The nomination is unconstitutional and if allowed to proceed it will perpetuate the unconstitutionality of the entire process; that since the nomination was unconstitutional the County Assembly will act in vain it were to proceed with vetting of the nominees and if the appointment is allowed to go on, it will violate the provisions of the Constitution.

[12] On the third principle (balance of convenience) it was submitted that this is discretionary and the court resorts to it where there are doubts in regard to the first and second principle. It was submitted that the balance of convenience lies in favour of the applicant.

[13] Counsel for the applicant further submitted on the issue of the jurisdiction of this court to hear and grant any appropriate relief as provided under Article 23 (3) of the Constitution. It was submitted that the County Assembly is a State organ and this court can issue injunctions against it if its actions contravene the law. Counsel relied on **Constitutional Petition No 47 of 2011, Twinobusingye Severino v. Attorney General**, a Ugandan case and **De Lille v. Speaker of the National Assembly**, a South African case to drive home the point of the supremacy of the constitution.

The 1st Respondent’s case

[14] Mr. Mureithi for the 1st Respondent opposed the application. He relied on grounds of opposition dated 10th May 2013; the replying affidavits of the 1st Respondent sworn on 10th May 2013 and that by the Speaker to the County Assembly sworn on the same date. It is contented in the grounds of opposition that the application is misconceived, bad in law and defective and it does not disclose any grounds that merit a grant of the orders sought; that the application is legally untenable and is grounded on simple misunderstanding of basic principles of law and is a complete abuse of the process; that the list of nominees reflect the constitutional values of equality, non discrimination, inclusiveness, diversity, fair distribution and public participation; that the application is overtaken by events as the list of nominees was forwarded to the Speaker County Assembly by the 1st respondent on 29th April 2013; that prayer number 3 is misconceived and does not lie in law since the 1st respondent does not vet nominees to the County Executive Committee under the law (Article 179 (2) (b)); is premature as the nominees have not been approved by the Assembly; the order affects other parties who are not party to this case including the County Assembly; that the orders seeks to cripple the entire executive and legislative authority of Garissa County.

[15] It was further submitted that prayer number 4 is premature because it is a final prayer that can only be granted after the hearing of the Petition; that marginalized groups are represented in the County Assembly pursuant to Article 177 (c) of the Constitution; that the petitioner is propagating discrimination in violation of Article 27 of the Constitution as there are other bona fide residents of Garissa County who do not identify with any of the alleged clans and that the interim orders granted by this court were made through misrepresentation that the 1st respondent had been served with the application as ordered by the court.

[16] The Clerk to the Assembly has through his affidavit deposed that he received the list of nominees for

vetting from the 1st respondent on 29th April 2013. The 1st respondent has through his affidavit deposed that he was never served with the application before interim orders were granted; that he nominated 10 persons purely on merit and the number is pre-determined by the law (Article 179 (2) (b)) and that in nominating the 10 persons he took into account the peculiar requirements of Garissa County; that the list reflects constitutional principles of equality, inclusiveness, non discrimination and such nomination was not influenced by tribalism, clanism, nepotism or discrimination; that the names were forwarded before the orders of court were made; that it is practically impossible to include all the residents of Garissa in the Executive Committee given the cosmopolitan nature of the County.

[17] Mr. Mureithi made oral submissions in which he stated that the Constitution ought to be read as a whole when interpreting the same and that Articles 27 and 56 ought to be read together with Article 179 of the Constitution; that the historical injustices like the ones alleged by the applicant ought to have been presented to the Truth, Justice and Reconciliation Commission; that there is no evidence to persuade the court to stop the vetting exercise since the only complaint is discrimination based on numbers and in any case the vetting is undertaken by the Assembly which organ is not a party to these proceedings; that the orders sought would cripple the functions of the legislature and the executive and deny the residents of Garissa much needed services.

[18] Counsel further submitted that the rights of marginalized are catered for under Article 56 and this can only be realized progressively; that the 1st respondent has the discretion to nominate members of the County Executive Committee with approval of the Assembly and this discretion is exercised under the provisions of the law; that he is not required to reward anyone; that the interests of the marginalized are catered for under Article 177 (1) (c) of the Constitution which allows political parties to nominate members of the marginalized groups.

[19] It was further submitted that the petitioner has misunderstood the principles in **Giella case** above which principles are not applicable in this case and that the applicant ought to have sought a conservatory order instead of an injunction which cannot issue at this stage; that there is no evidence to support the allegation that Rer Mohamed is a minority clan and is marginalized; that the petitioner ought to have sought judicial review orders instead of a constitutional petition. Counsel further submitted that right of a marginalized person/community is not an absolute right, it is limited by law to the extent that the limitation is reasonable and justifiable as provided under Article 24; that there is no evidence to show that the 1st respondent has failed in leadership and integrity. Counsel relied on the cases of **John Waweru Wanjohi & 27 Others v Attorney General & Others in Petition No 373 & 426 of 2012 [2012] eKLR**; **John Kabui Mwai & 3 Others v Kenya National Examination Council & 2 Others in Petition No 15 of 2011 [2011] eKLR** and **Tabro Transporters Ltd v Absalom Dova Lumbasi in Civil Appeal No 31 of 2012 [2012] eKLR**.

[20] Counsel further submitted that the Ugandan and the South African cases cited by the applicant are not relevant to his case. It was submitted that the Ugandan case was questioning the constitutionality of a resolution passed by National Assembly and was not concerned with nominations and the South African case deals with unconstitutionality of a law and right to be heard and did not deal with the question of discrimination. It was submitted that the petitioner in the case before this court does not raise the issue of discrimination and no harm will be occasioned to the petitioner since the Assembly is yet to vet, approve or decline to approve. Counsel asked the court to dismiss the application because the balance of convenience is in favour of declining to grant the prayers sought.

Issues and determination

[21] No matter how one looks at the application and the Petition before this court, it is clear that the applicant is raising one major issue for determination; **namely the constitutionality of the nomination of the 10 persons to the Garissa County Executive Committee** (emphasis added). It is the contention by the applicant that the nomination was against the provisions of the Constitution and the County Governments Act that is before me for determination. All the provisions of the law the applicant is relying on to show that the 1st respondent did not follow the law, to wit; the Preamble to the Constitution, the values and principles of governance under Article 10, the application and enforcement of Human Rights under Articles 20, 22 and 23, equality before the law and non discrimination of marginalized groups under Article 56, leadership and integrity under Article 73, objects of devolution under Article 174 as well as Section 30 of the County governments Act have been invoked to support this one allegation.

[22] It has been submitted that the applicant meets the criteria for granting temporary injunctions set out

in the **Giella case**. The 1st respondent through his counsel is arguing that the applicant ought to have sought conservatory orders instead of injunctive orders. The applicant however is of the view that he is properly before this court. Under the **Giella principles** an applicant must show firstly that there exists a prima facie case with a probability of success. A prima facie case has been defined in **Mrao Limited v. First American Bank of Kenya Ltd & 2 other (2003) eKLR** thus: **“A prima facie case in a civil application includes but is not confined to a ‘genuine and arguable case’. It is a case which on the material presented to court; a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the other party as to call for an explanation or rebuttal from the latter.”**

[23] As far as this application is concerned, this court seeks to be satisfied that there exist reasonable grounds for doubting the legality (constitutionality) of the nomination of the 10 persons to the County Executive Committee and that the nomination constitute a violation of the applicant’s legal and equitable rights. In other words, is the application vexatious or frivolous?

[24] I want to understand the applicant as coming from the perspective that with the dawn of the new dispensation heralded by the coming into force of the Constitution 2010, the applicant and the Rer Mohamed clan, and perhaps the other smaller clans and groups which the applicant claims to represent, genuinely believe that the 1st respondent was under a legal obligations to consider them in the nominations. The hope the citizens of this country place on the Constitution and the new legal regime unfolding under it is so great that this court believes that it is their right to have their day in court. The applicant is raising fundamental and constitutional issues that require interrogation.

[25] In respect to the second principle, it is my view that the nature of the claim raised by the applicant is not one that damages can adequately compensate if the court were to find against the applicant. As regards the last principle, the balance of convenience, my view is that this court will not go as far as considering this principle given my reasoning as regards the 1st and 2nd Giella principles.

[26] The authorities cited by counsel for the 1st respondent are very relevant to this case. In the case of **John Waweru Wanjohi & 27 others** the issues in that case included the constitutionality of the appointment of the National Land Commission. The other cases dealt at length with issues of discrimination and the interpretation of Article 27 of the constitutions and I am convinced that this court and the parties will benefit immensely from these resources during the determination of the Petition.

[27] I now wish to turn to the issues raised by the 1st respondent in opposing this application. But before I do so, I wish to correct a misunderstanding that this court’s orders issued on 7th May 2013 staying the forwarding of the list of names of County Executive Committee nominees to the County Assembly for vetting also stayed the vetting. This misapprehension of the orders of this court is found in the further replying affidavit of the applicant in paragraphs 6 and 7. The court order is specific and was given as sought under prayer number 2 of the Notice of Motion dated 3rd May 2013.

[28] This court was informed that the list of nominees was submitted to the County Assembly for vetting on 29th April 2013. The 1st respondent deposes to this fact in his replying affidavit. The same facts are contained in the affidavit of Mohamed Abbey Mohamed, the Speaker to the County Assembly. Further, exhibits “NJA 1 & 2” attests to this. There has been no evidence adduced to counter this fact. The import of this is that the prayer to stay the submission of names for vetting by the County Assembly, which is prayer number 2 in the Notice of Motion has been overtaken by events. The record shows the applicant came to court on 6th May 2013 a week or so after the names had been presented to the Assembly. With no evidence to the contrary, this court’s orders dated 7th May 2013 were granted in vain! Whether the applicant was aware of this and failed to inform the court is not disclosed.

[29] The other issue that requires resolution surrounds prayers 3 and 4. Prayer 3 raises concern that the orders sought affect parties who have not been enjoined in the application and Petition. It also raises issues that touch on the core of the Petition, the constitutionality or otherwise of the nomination of the 10 persons to the County Executive Committee. Prayer 4 seeks orders that are final in nature and granting it would settle the case at the interlocutory stage. This would be prejudicial to the 1st respondent.

[30] My view in this matter is that it raises pertinent constitutional issues that require interrogation by this court. While I agree with the counsel for the 1st respondent that this court cannot grant orders against a party who is not a party to this suit, and that granting prayer 4 would amount to giving final orders at the interlocutory stage, I believe that justice will not be seen to have been done, if this court were to settle this

case in one way or another at his stage without fully interrogating all the issues raised by the parties. I have restrained myself from making orders and findings that may embarrass this court and the parties and that may be prejudicial to any party before hearing the main Petition. Because of this restraint, it may seem that the court has not analysed all the issues raised and/or has not made findings on them. To my mind, suffice it to state here that the constitutionality or otherwise of the nomination and appointing processes, which are the functions of the 1st respondent can only be fully addressed after the full trial of the Petition. Let the applicant table evidence in support of his allegations and let the respondents respond thereto. This will result in an informed decision of this court. By tendering the evidence in the applicant's possession in support of his case this court will be able to determine if what he alleges is true and if so whether there are legal remedies available to him. At the end of it all, the question will be; what are the consequences of an illegal act under our law if it were to be found that the 1st respondent acted outside the law? I therefore decline to grant the prayers sought by the applicant in the Notice of Motion dated 3rd May 2013 for the reasons I have explained and direct that each party bears its own costs. I also direct parties to agree on the issues to pave way for the hearing of the main petition. I make orders accordingly.

S.N MUTUKU

JUDGE

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Signed, dated and delivered this 22nd May 2013.

Mr. Biketi for the applicant

Mr. Mureithi for the 1st Respondent