



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU

PETITION NO. 23 OF 2013

JOHN KIPNG'ENO

KOECH.....PETITIONER

VERSUS

**THE NAKURU COUNTY ASSEMBLY COMMITTEE ON APPOINTMENTS.....1ST
RESPONDENT**

**THE SPEAKER OF THE NAKURU COUNTY ASSEMBLY.....2ND
RESPONDENT**

**NAKURU COUNTY ASSEMBLY.....3RD
RESPONDENT**

**THE HONOURABLE ATTORNEY GENERAL.....4TH
RESPONDENT**

RULING

John Kipngeno Koech, (*the Applicant*) a resident of Nakuru Town, in Nakuru County is a registered voter in Katembwa Ward and Nakuru West Constituency Card No. 0034271211221907-9, GPK No. 0016280010 and holder of National Identity Card No. 5952991. He came to this court in a Petition No. 23 of 2013, and seeks extensive but specific orders against the Respondents named above. Simultaneously with the Petition, the Applicant also filed under a Certificate of Urgency, a Chamber Summons (*the Application*) under Articles 3(1), 22(1) and 23(f) of the Constitution of Kenya, Rules 11, 12, 13, 20 and 21 of the Constitution of Kenya (*Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual*) High Court Practice and Procedure Rules, 2006 Section 3A of the Civil Procedure Act, and all enabling provisions. In the application, the Applicant seeks the issue of certain conservatory orders, pending the hearing and determination of the Petition itself. The orders sought are -

- (a) That this Application be certified extremely urgent and be heard ex parte at the first instance.**
- (b) That pending the hearing and determination of this Application inter partes, conservatory orders do issue staying the decision of the Respondents to reject the nomination of: Prof. Mary Kariuki; Dr. Julius Ogeto; Pollyne Anyango Owoko; Dr. Stanley K. Chepkwony; Joseph Kosgei Tonui; and Mary Wanjiru Waiganjo as members of the Nakuru County Executive Committee as contained First Report of the Assembly Committee on Appointments on the Vetting of Nakuru Executive Committee Nominees; County Public Service Board Members and the County Secretary dated 28th May, 2013.**

(c) That pending the hearing and determination of this Application, conservatory orders do issue staying the decision of the Respondents to reject the nomination of: Prof. Mary Kariuki; Dr. Julius Ogeto; Pollyne Anyango Owoko; Dr. Stanley K. Chepkwony; Joseph Kosgei Tonui; and Mary Wanjiru Waiganjo as members of the Nakuru County Executive Committee as contained First Report of the Assembly Committee on Appointments on the Vetting of Nakuru Executive Committee Nominees; County Public Service Board Members and the County Secretary dated 28th May, 2013.

(d) That pending the hearing and determination of this Application, conservatory orders do issue staying the decision of the Respondents to reject the nomination of: James Kiongi Mwaura; Peter Muriithi Mwarania; and J. M. Mogosi as members of the Nakuru County Public Service Board as contained First Report of the Assembly Committee on Appointments on the Vetting of Nakuru Executive Committee Nominees; County Public Service Board Members and the County Secretary dated 28th May, 2013.

(e) That pending the hearing and determination of this Application, conservatory orders do issue staying the decision of the Respondents to reject the nomination of: James Kiongi Mwaura; Peter Muriithi Mwarania; and J. M. Mogosi as members of the Nakuru County Public Service Board as contained First Report of the Assembly Committee on Appointments on the Vetting of Nakuru Executive Committee Nominees; County Public Service Board Members and the County Secretary dated 28th May, 2013.

(f) That pending the hearing and determination of this Application inter partes, the 2nd Respondent be compelled to supply the Petitioner herein with copies of the Nakuru County Assembly Hansard containing proceedings of the County Assembly where it debated the approval and/or rejection of Nakuru County Executive Committee and County Public Service Board nominees.

(g) Costs of and incidental to this Petition; and

(h) Any other order that this Honourable court deems fit and just to grant in the circumstances.

2. The application is supported by the affidavit of the Applicant sworn on 6th June 2013, and the grounds on the face of the application. I have considered both the Applicant's Affidavit the grounds and the submissions of his counsel Prof. Tom Ojienda, SC made to the court on 11.06.2013 upon the *ex parte* hearing of the Application. It is therefore necessary to recap these arguments.

3. In April 2013, the Governor of Nakuru County (*the Governor*) in exercise of the powers conferred upon him by Sections 30 and 31 of the County Government Act 2012, nominated ten people to serve in the County Executive of Nakuru County. The names of the persons nominated were published and eventually forwarded to the Speaker of the County Assembly for Vetting. The Speaker of the County Assembly in turn constituted a committee of six members of the County Assembly comprising -

1. the Speaker,
2. the Leader of the Majority Party in the Assembly,
3. the Leader of the Minority Party in the Assembly and
4. Three (3) other members of the Assembly.

4. To vet the nominees of the Governor before appointment to the County Executive. Section 35(2) of the County Governments Act (No. 17 of 2012) lays down the statutory criteria for appointment of members of the County Executive. The County Assembly shall not approve nominations for appointment to the Executive Committee that do not take into account -

(a) not more than two thirds of either gender,

(b) representation of minorities, marginalized groups and communities, and

(c) community and cultural diversity within the county.

5. Section 35(2) of the County Governments Act sets out qualifications of candidates to be appointed to the Executive Committee. A candidate must be -

(a) a citizen of Kenya,

(b) a holder of at least a first degree from a university recognized in Kenya,

(c) satisfies the requirements of Chapter Six of the Constitution (the integrity provisions), and

(d) has knowledge, experience and a distinguished career of not less than five years in the field relevant to the portfolio of the Department to which the person is being appointed.

6. It is the Executive Committee of a County which drives the activities, programmes and devolved services in a County pursuant to Section 36 of the County Governments Act. To conduct its activities, the Committee must have at least fifty per cent of its members appointed. *(The quorum of a meeting of a county executive committee shall be more than one half of its membership – S. 41(2) of the Act).* The Governor proposed committee of ten members.

7. In its deliberations held on 28.05.2013, the Nakuru County Assembly Committee on Appointments met and came up with a Report *(First Report of the Assembly Committee on Vetting of Nakuru County Executive Committee Nominees County Public Service Board Members and the County Secretary (the Report))* in which it rejected six (6) of the Governor's nominees on grounds which the Applicant contends, are not in consonance with the criteria set out under Section 35 (above) of the County Governments Act.

8. The Applicant contends further that the County Assembly Committee on Vetting on Nakuru Executive Nominees erred and breached Order 14 of its Standing Orders which incorporates the provisions of Sections 6, 7 & 8 of the Public Appointments (Parliamentary Approval Act, 2011 (No. 33 of 2011), in that it failed to present its Report to the floor of the County Assembly for debate and approval and/or rejection of all nominees or those approved by the Committee.

9. In their Report the County Assembly's Committee rejected the nomination of among others, Dr. Julius Ogeto to serve on the Health docket on the grounds that he was unsuitable because he "lacked vision and passion", Prof. Mary Kariuki and Dr. Stanley Kimaiwa Chepkwony *(nominees respectively for Lands, Physical Planning and Housing and Agriculture, Livestock and Fisheries)* on the grounds that they had not been interviewed for positions they applied for).

10. I note from the preface forwarding the Report, reference among others to Public Appointments *(Parliamentary Approval) Act 2011 (No. 33 of 2011)*. Section 8 of that Act requires the tabling of the Report of a Committee on Appointment to the relevant County Assembly. This was not done. There thus appears a serious breach of the law and procedure.

11. In accordance with the traditions of this Court, it is not mandatory for the court to delve into the merits of the application. At this stage, **"a party seeking a Conservatory Order only requires to demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the conservatory order, there is a real danger that the Applicant will suffer prejudice as a result of the violation or threatened violation of the constitution."** MUSLIMS FOR HUMAN RIGHTS (MUHURI) & 2 OTHERS VS. A.G. & 2 OTHERS [2011] eKLR.

12. In ATTORNEY GENERAL VS. SUMAIR BANSRAJ (1985) 38 WIR 286 cited in THE CENTRE FOR HUMAN RIGHTS & DEMOCRACY & 2 OTHERS VS. THE JUDGES AND

MAGISTRATES VETTING BOARD & 2 OTHERS [2012] eKLR, the West Indies court defined a conservatory order as follows -

“A conservatory order” in the strictest sense of the term is an order directing both parties to undertake that no action of any to enforce their respective right will be taken until the substantive Originating Motion has been determined, that the status quo of the subject matter will remain intact.”

13. For those reasons, there shall issue conservatory orders in terms of paragraphs (b) – (f) of the Chamber Summons dated 6th June 2013.

14. It is so ordered.

Dated, signed and delivered at Nakuru this 13th day of June, 2013

M. J. ANYARA EMUKULE

JUDGE