



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. 279 OF 2013

BETWEEN

MATHEW

LEMPURKEL.....PETITIONER

AND

HON JOSHUA WAKAHORA IRUNGU COUNTY GOVERNOR, LAIKIPIA COUNTY ...1ST
RESPONDENT

HON. PATRICK MARIRU, SPEAKER LAIKIPIA COUNTY ASSEMBLY.....2ND
RESPONDENT

THE ATTORNEY GENERAL3RD
RESPONDENT

JUDGMENT

1. On 31st May 2013, I gave conservatory orders whose effect was to stop the County Executive from taking office or performing the function of office. The order was to remain in force for 30 days to facilitate the hearing of the matter expeditiously as it is necessary that the issue at hand be settled so as not to undermine the functioning of the County Government.
2. In the petition dated 30th May 2013 coming up for hearing today, the petitioner has moved the court to complain that the County Executive for Laikipia County does not have a member of the Samburu Community yet the Samburu Community constitutes a substantial minority community that ought to be included in the Executive. He complains that Governor did not take into account the principle of fair representation of all Laikipia County minorities marginalised groups and communities.
3. The petitioner contends that in particular, the list does not consider regional balance and ethnicity and is in flagrant breach of **section 35(1)** of the **County Government Act (Act No. 17 of 2012)** which provides that when nominating members of the executive committee, the county governor shall ensure that to the fullest extent possible, the composition of the county Executive reflects the

community and cultural diversity of the county. The petitioner also relies on the provisions of **Article 10** and **232** of the Constitution which emphasise the national values and principles of governance and in particular inclusiveness and protection of the marginalised.

4. The petitioner's grievance arises from the fact that the County Assembly rejected a member of the Samburu community, Patrick Lekimain, and replaced him with Ms Jane Putunoi who is a Massai thereby leaving the Samburu Community unrepresented.
5. The petition is opposed by the 1st and 2nd respondents ("the respondents"). According to the replying affidavit of Joshua Irungu, the County Governor, sworn on 18th June 2013, one of the members of the County Executive is a member of the Samburu Community and therefore the County Executive meets the statutory threshold of inclusiveness and diversity set out in the **County Government Act** and the Constitution.
6. As regards the representation of Samburu, it is the respondents' position that Ms Putunoi is a member of the Samburu Community and it is not correct to state that the Community is not represented.
7. In considering a matter such as this it is not for the court to substitute its own views of the suitable candidate, this is discretion conferred on the appointing or nominating bodies. The duty of the court is to interrogate the process to see if it implemented in a manner that meets and results in an outcome that is intended to meet constitutional objectives; that is for purposes of this appointment, inclusion or diversity. In the case of **FIDA-K & Others v Attorney General and Others Nairobi Petition No. 102 of 2011 (Unreported)**, the court observed, in respect of the decision by the Judicial Service Commission to appoint judges, that, ***"It is not our mandate to consider the merits of their decision but only whether the choice JSC made was extraneous to the purpose for which the discretion was granted and whether due process in that regard was followed in the execution of their mandate."***
8. A process adopted to call for applicants and put them through a process of vetting must include or involve the interrogation of Constitutional and statutory criteria, interrogation of integrity and technical competence of the individual is just but a facet on the duty of the Governor and the County Assembly. They must direct their minds to inclusiveness and diversity and the process must lend itself to meeting this outcome.
9. The Governor is given ultimate responsibility to make appointments through a transparent process. The task of balancing all the ethnic and community interests in the County are no mean feat. The Governor deposes that, ***"Laikipia County being a heavily cosmopolitan county with over twenty ethnic communities, majority of who are rightfully minorities balancing such interests is a hard task and the nomination of representative from each community to the County Executive Committee is untenable as the Committee has only eight slots to be filled and so many considerations have to be taken into account apart from ethnic and community balancing."***
10. I agree with the respondent's view, but however hard the task the Constitution obligations remains that is to adopt a process that is rationally connected to meet the outcome of the diversity. Such a process does not demand a seat for each community nor does it require the use of mathematical precision to allocate seats. What is required is a process that shows that all these factors were taken into account and that the end product was rational in light of the Constitutional objectives.
11. It is also important to recognise that the process of nomination, appointment and vetting is intended to ensure that Constitutional objectives are met. Each body along the process is supposed to consider the factors necessary to meet the Constitutional threshold for appointment. All these bodies have a margin of discretion in exercising their authority (see **Community Advocacy Awareness Trust and Others v Attorney General Nairobi Petition No. 243 of 2011 [2012]eKLR** at para 94).

12. I have considered the depositions and I have noted that the position of County Executive was duly advertised in the newspapers and went through a selection process. According to the vetting report presented to the County Assembly, it was noted that Ms Putunoi appeared before the Committee on 23rd May 2013 and it was stated that, ***“despite inviting memoranda from the public, on her suitability or otherwise for appointment to public office, none was received.”*** It appears that the issue of Ms Putunoi not being a member of the Samburu Community was not an issue at that point.
13. It is now an issue and the decision whether the County Executive is representative means that I have to decide whether or not Ms Putunoi is a member of the Samburu Community. In other words, the issue of diversity of County Executive is directly linked to the identity of one person. A person’s ethnicity is a fundamental issue of identity and in making a decision about one’s identity the person ought to be given an opportunity to be heard and to assert her own identity. Ms Putunoi was not joined as a party and to proceed to inquire into her ethnic identity without her participation in the proceedings would constitute a fundamental breach of her right to be heard (See ***Pashito Holdings and Another v Ndung’u and 2 others KLR [E &L] 1, 295***).
14. The petitioner’s case, at paragraphs 14 and 15 of the petition, was premised on the contention Ms Jane Putunoi is a Maasai. The respondents assert that she is Samburu. Having been appointed to the Executive Committee, she would be directly affected by any adverse order. Although this matter has been adjourned several times, the petitioner has not deemed it fit to join Ms Putunoi to the suit. In her absence from these proceedings, I decline to find in the petitioner’s favour.
15. The petition is hereby dismissed with no order as to costs. Conservatory orders in force are hereby discharged.

DATED and DELIVERED at NAIROBI this 15th July 2013.

D.S. MAJANJA

JUDGE

Ms Kilonzo instructed by Kilonzo and Company Advocates for the petitioners.

Ms Orengo instructed by Sichangi Partners Advocates for the 1st and 2nd respondents.