



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU

PETITION NO. 23 OF 2013

AS CONSOLIDATED WITH

PETITION NO. 25 OF 2013

JOHN KIPNG'ENO KOECH.....PETITIONER

VERSUS

NAKURU COUNTY ASSEMBLY

COMMITTEE ON APPOINTMENTS.....1ST RESPONDENT

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

NAKURU COUNTY ASSEMBLY.....3RD RESPONDENT

ATTORNEY-GENERAL.....4TH RESPONDENT

AND

CHRISTOPHER S. ONDIEKI.....1ST PETITIONER

JOSEPH CHESARO KIMOSOI.....2ND PETITIONER

VERSUS

COUNTY GOVERNMENT OF NAKURU.....1ST RESPONDENT

GOVERNOR NAKURU COUNTY GOVERNMENT.....2ND RESPONDENT

JUDGMENT

1. This Judgment relates to two Petitions, namely -

1. High Court of Kenya at Nakuru Petition No. 23 of 2013 (John Kipngeno Koech vs. (1) Nakuru County Assembly Committee on Appointments, (2) the Speaker of the Nakuru County Assembly (3) The Nakuru County Assembly and (4) the Attorney-General).

High Court of Kenya at Nakuru Petition No. 25 of 2013 between – (1) Christopher S. Ondieki – First

Petitioner, (2) Joseph Chesano Kimosoi (Second Petitioner),

-versus- (1) County Government of Nakuru - First Respondent, and (2) Governor, Nakuru County Government –Second Respondent

2 In Petition No. 23 of 2013 the Petitioner seeks the following prayers -

(1) *A Declaration that the Report by the Nakuru County Assembly Committee on Appointments rejecting the nominees for the County Executive and the County Public Service Board breached the Petitioner's constitutional rights under Articles 3(1), 6, 10(2)(c), 22(1), 43, 47(1), 174, 175 and 176 of the Constitution of Kenya 2010, and is null and void for all intents and purposes.*

(2) *A declaration that the Report was a clear violation of Sections 35 and 38 of the County Governments Act 2012, (No. 17 of 2012) and Section 7 of the Public Appointment (Parliamentary Approval) Act, 2013 (No. 33 of 2013) and was null and void.*

(3) *Pending the hearing and determination of the application inter partes conservatory orders of stay do issue staying the decision of the Respondents rejecting the nomination of the members of the County Executive Committee and the Public Service Board as contained in the Report dated 28th May, 2013.*

(4) *An order of certiorari to remove into this Court and quash the decision of the First and Second Respondents dated 28th May 2013 purporting to reject the nominations of the nominees to the County Executive Committee and Public Service Board.*

(5) *An order of mandamus to compel the Second Respondent to approve the rejected list of nominees.*

(6) *Costs of the Petition.*

(7) *Any other orders that the court may deem fit and just to grant.*

3. In Petition No. 25 of 2013, the Petitioner sought -

1. *an order and declaration that once the County Assembly has resolved to reject the nominees to the County Executive Committee and given reason for the said refusal, it is not open for the County Government (of Nakuru), to submit the same names again for approval by the same County Assembly which rejected them.*

2. *An order and a declaration that it is against the principles of separation of powers and against the principles of checks and balances for the executive arm of the County Government and the County Assembly (the Legislative arm of the County), to strike a deal to approve names of candidates which had earlier been rejected.*

3. *An order and a declaration that it is against national values and principles of County Government for the County Executive to strike a deal with the County Assembly Secretary to the exclusion of the public, without vetting or after they have been vetted and rejected to overturn their own decision and purport to approve the same nominees.*

4. *That pending the hearing and determination of the Petition, the Court do issue a conservatory order directing and restraining the County Government from submitting or resubmitting to the Nakuru County Assembly names of candidates who had earlier been submitted to the County Assembly for Appointment but were rejected; the said nominees being -*

(A) (xiii) Prof. Mary Kariuki,

(xiv) Prof. Stanley K. Chepkwony,

(xv) Mr. Joseph K. Tunoi,

(xvi) Ms. Pollyne Anyango Awoko,

(xvii) Dr. Julius Ogeto,

(xviii) Ms. Mary Wanjiru Waiganjo.

(B) County Secretary

ii. J. M. Magosi

(C) County Public Service Board

(i) Chairman James Kiongi Mwaura

(ii) Member – Peter Muriithi Mwarania

(5) The court do give directions and order as to costs.

4. These Petitions (23 and 25 of 2013), were with Consent (of Counsel for the Petitioners and the Respondents), consolidated by orders made on 28/08/2013, as they raised substantially the same issues.

5. ARGUMENTS FOR AND AGAINST PETITION NO. 23 OF 2013

5.01 The Petitioner's case

The Petitioner pleaded that he is a resident of the County of Nakuru and being a person in terms of Articles 12(1) and 20(2) of the Constitution of Kenya 2010, is entitled to each and all fundamental rights and freedoms expressed or implied in the Constitution. Under Article 3, thereof, he is obliged to uphold and defend the Constitution, and in particular to insist that all organs and bodies of the Government be established in strict compliance with the provisions of the Constitution.

5.02 In the Petition therefore, the Petitioner is challenging the decisions made by the First Respondent and adopted by the Third Respondent as contained in the First Report of Vetting Committee of the County Assembly of Nakuru on appointments of nominees for the County of Nakuru Executive Committee, County Public Service Board members and County Secretary dated 28th May 2013 purporting to reject the nominations of the candidates to the said Committee and Board on grounds of not meeting the required constitutional and statutory threshold was unconstitutional.

5.03 The Petition was opposed by the First, Second and Third Respondents through the firm of Gitobu Imanyara & Co. Advocates who filed a Notice of Appointment of Advocates on 19th June 2013, as well as **Grounds of Opposition** in answer to the Petition.

5.04 It was the Respondents' case that the Petitioner herein had not shown a violation of any right or fundamental freedom or manner of alleged breaches to enable it exercise the rights under Article 22(1) of the Constitution of Kenya, 2010, to have access to this court whenever a right or fundamental freedom is denied, violated, infringed or threatened with such denial, violation or infringement or threat. The Respondent also argued that the Petitioner had not shown that the Respondents had violated any access to information under Article 35, the economic and social rights under Article 43, or the right to administrative action, that is, to expeditious, efficient, lawful, reasonable and procedurally fair action under Article 47(1) of the Constitution. The Respondents urged in the grounds of opposition, that the Petitioner had not shown that the Respondents had undermined the values and principles of governance under Article 10(2) of the Constitution. The Respondents denied the Petitioner's assertion that they had failed to uphold or defend the Constitution. It was these Respondents case that all the decisions relevant to the Petition were arrived at in accordance with the provisions of the Constitution, the County

Governments Act, 2012, the Standing Orders of the National Assembly of Kenya, and County Assembly of Nakuru.

5.05. These Respondents also contended that none of the provisions of the Constitution cited in paragraphs 3, 4, 5, 6 & 7 of the Petition were breached or shown to have been breached in relation to the Petitioner. It was their assertion in particular that the Report by the First Respondent on Appointments on the vetting of the nominees or candidates to the County Executive and County Public Service Board, and County Secretary dated 28th May 2013, met all the constitutional and statutory requirements and were subsequently referred to the County Assembly which adopted them.

5.06 In the alternative, it was these Respondents' averment that even if there were shortfalls to the required constitutional and statutory threshold, the Petitioner had not established any constitutional or statutory right to enable him institute these proceedings (Petition). Though these Respondents admitted that the Petitioner is a person defined under Articles 12(1) and 20(2) of the Constitution, they denied that he is entitled to institute the proceedings herein, or to the grant of the orders sought for lack of specificity in line with the decision of **ANNARITA KARIMI NJERU [1979] KLR 154**, and **[1979] KLR 162**.

5.07 The Respondents also relied on the Replying Affidavit of Joseph Mutua Malinda, the Clerk of the Second Respondent sworn on 19th August 2013, where it was alleged that the Petitioner had in paragraph 2 of the Petition said that he was a registered voter, he did not disclose whether or not he had exercised the right to vote in the Elections, for the elected members of the County Assembly, so as to show that he had any bona fide interest in the functions of the three arms of the County Government of Nakuru – [the Governor, and Executive Committee, the Public Service Board and the County Assembly]. The absence of such averment was clear evidence of lack of good faith in instituting these proceedings and accordingly though the Petitioner invokes his rights under the Constitution, he should not be made a beneficiary of the court's discretion.

5.08 In any event in so far as the First Respondent was concerned, as a Committee, on Appointments, it only made recommendations to the County Assembly whose function was either to adopt or reject them, in accordance with the Assembly's standing orders. As a Committee, it did not make a decision. It is the County Assembly which received and debated the Committee's recommendations, and thereafter voted, and made its decision accordingly. These Respondents contended that as the Petitioner failed to make any representations to either the Committee or the Assembly, the Petitioner was estopped in law from raising any issues in this court.

5.09 One Joseph Motari Mogosi, the Interim County Secretary for Nakuru County, who is serving in this position as a Nominee of the Transitional Authority swore and had filed a Relying Affidavit on 2nd August 2013. He averred that he was in charge of the process of nomination of the candidates, and presentation of the names to the Nakuru County Assembly. He stated that the process of nomination was competitive and that the Applicants were interviewed by a Selection Panel and by a letter dated 13th May 2013, the Governor of the County of Nakuru forwarded the list of nominees proposed for appointments. He deponed that the nominees were qualified, based on experience, were of high integrity and met the threshold of Chapter Six of the Constitution of Kenya, 2010. He also averred that those who were nominated for appointment had applied for the various positions and were nominated procedurally.

5.10 The Hon. the Attorney-General, the Fourth Respondent did not file any document or make any submissions in relation to these proceedings.

6.0 PETITION NO. 25 OF 2013

6.01 As already noted this Petition was consolidated with Petition No. 23 of 2013 (*supra*). These Petitioners in this Petition were - **Christopher S. Ondieki and Joseph Chesaro Kimosoi**. It was filed on 15th June 2013 against the County Government Nakuru and the Governor of the County of Nakuru. In this Petition, the Petitioners alleged that the Governor had resubmitted the list of rejected nominees to the County Assembly for appointment subsequent to holding meetings with members of the County Assembly where a deal was struck to appoint rejected members. The Petitioners contend that the

resubmission of rejected names in this manner was both against the national values and the principles of governance, transparency, integrity, accountability, rule of law and sovereignty of the people.

6.02 Against this Petition, the Respondents raised a Preliminary Objection by a Notice dated and filed on 21st June 2013, and contended that the court lacks jurisdiction to entertain the matter, that the members of the Committee had already been sworn in, and that the matter had therefore been overtaken by events. In addition the Respondents contended that these Petitioners lacked *locus standi* to present this Petition.

6.03 Against these broad prayers and objections, counsel for the respective Petitioners and Respondents filed and exchanged written submissions. These were highlighted to the court at length on 3.09.2013. After perusing these submissions and the authorities cited and relied upon by counsel, I found these to be the issues for determination -

1. *whether the Petitioner's have the locus standi to prosecute the petitions,*
2. *whether the court has jurisdiction to hear and determine the Petition herein,*
3. *whether the rejection of the nominees as per the Report dated 28th May 2013 was made in contravention of the Constitution and the County Governments Act, 2013, and*
4. *whether it is legal for the Governor of the County of Nakuru to resubmit the names of rejected nominees to the National Assembly for appointment.*

7.0 WHETHER THE PETITIONERS HAVE LOCUS STANDI TO PROSECUTE THE PETITION(S)

7.01 The Respondents in the consolidated Petitions argued that the Petitioners herein lacked *locus standi* to institute the Petition. **Firstly** because they failed to categorize the particulars of breach to entitle them to the orders or declarations sought, that the Petitioner (in Petition No. 23 of 2013) was acting in bad faith, as he had neither presented himself during the public hearing nor did he offer any reason for such failure, that he was acting out of a political motive, and oblique considerations and as such the Petition must fail.

7.02 The case of **ANARITA KARIMI NJERU** (*supra*) settled the proposition that where a person is alleging a contravention or threat of contravention of a constitutional right, he must set out the right infringed and the particulars of such infringement or threat.

7.03 However as recent decisions have shown, that the case of **Anarita Karimi Njeru** though laying an important principle must be seen in the context of Section 84(1) of the Constitution of Kenya (1969 – *Consolidated*) and now repealed). That section provided -

“84(1) Subject to subsection (6), if a person alleges that any of the provisions of Section 70 to 83 (inclusive) has been, is being or is likely to be contravened in relation to him (or) in the case of a person who is detained, if another person alleges a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may apply to the High Court for redress.”

7.04 *Locus standi* under Section 84(1) was established in two respects. **Firstly**, if the contravention related to the Petitioner personally, and **Secondly** if the contravention related to a detained person. Those were the only instances where *locus standi* was conferred upon an individual, under the said Section 84(1) of the repealed Constitution. That is the extent in my humble view of the authority of **ANARITA KARIMI NJERU**.

7.05 In contrast, the Constitution of Kenya, 2010 confers upon every person in Kenya, the obligation to respect, uphold, protect and defend the Constitution of Kenya, and any attempt to establish a government

otherwise than in compliance with this Constitution is unlawful (*Article 3*), and 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, (*Articles 22(1) and 258 (1) & 2*). In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by persons, acting in the public interest (*Articles 22(2)(c) and 258(2)(c)*).

7.06 Articles 22(1) & (2) and 258(1) & (2) of the Constitution 2010, thus confer upon any person the right to bring action in more than two instances **firstly** in the public interest, and **secondly** (where a breach of the Constitution is threatened in relation to a right or fundamental freedom).

7.07 The national values and principles of governance which bind all state organs, state officers, public officers and all persons whenever any of them makes or implements public policy decisions, and these national values and principles of governance include patriotism, national unity sharing and devolution of power, the rule of law, democracy and participation of the people, good governance integrity transparency and accountability (*Article 10, (1)(2)*).

7.08 Consequently the Constitution of Kenya 2010, grants the individual much wide scope in terms of *locus standi* than Section 84(1) of the repealed Constitution. The comment in **TRUSTED SOCIETY OF HUMAN RIGHTS ALLIANCE VS. AG. & 2 OTHERS** [2012] eKLR regarding the decision in **Anarita Karimi Njeru** is very apt. The Judges said -

“We do not purport to overrule Anarita Karimi Njeru as we think it lays down an important rule of constitutional adjudication; a person claiming constitutional infringement must give sufficient notice of the violations to allow her adversary to adequately prepare her case and to save the court from embarrassment on issues that are not appropriately phrased as justiciable controversies. However we are of the opinion that the proper test under the new Constitution is whether a Petition as stated raises issues which are too insubstantial and so attenuated that a court of law properly directing itself to the issue cannot fashion an appropriate remedy due to the inability to concretely fathom the constitutional violation alleged.

The test does not demand mathematical precision in drawing constitutional Petitions. Neither does it require talismanic formalism in identifying the specific constitutional provisions which are alleged to have been violated. The test is a substantive one and inquires whether the complaints against the Respondents in a constitutional petition are fashioned in a way that gives proper notice to the Respondents about the nature of the claims being made so that they can adequately prepare their case.”

7.09 In other words under the new Constitution, the Court is bound to inquire and determine matters on their merit, and where the matter in issue could be deciphered from the pleadings, then the court was bound to determine such matter even when the particulars of breach had not been specifically pleaded.

7.10 Emphasizing the point, the Court of Appeal in **MUMO VS. TRUSTED SOCIETY OF HUMAN RIGHTS ALLIANCE & 5 OTHERS** (*supra*), said -

“Our commitment to the values of substantive justice, public participation, inclusiveness, transparency and accountability under Article 10 of the Constitution by necessity and logic broadens access to the courts. In this broader context, this court cannot fashion nor sanction an invitation to a judicial standard of locus standi that places hurdles on access to the courts, except only when such litigations is hypothetical abstract or is an abuse of the judicial process.”

However, we must hasten to make it clear that the person who moves the court for judicial redress in cases of this kind must be acting bona fide with a view to vindicating the cause of justice. Where a person is acting for personal gain or private profit or out of political motivation or other oblique consideration, the court should not allow itself to be seized at the instance of such person and must reject the application at the threshold.”

7.11 In addition, Article 258(1) grants every person the right to institute court proceedings claiming that this constitution has been contravened, or is threatened with contravention. Court proceedings may also be instituted by any person acting in the public interest (Article 258(2)).

7.12 In the present case, the Petitioners filed their Petitions on their own behalf as residents of County of Nakuru, and also in the public interest. They have a genuine interest in the functioning of the County Assembly and in particular over the appointments of members of the County Executive Committee, whose functions not only impact upon them, but also the other ordinary residents of the County of Nakuru.

7.13 There was no evidence of any bad faith or political motivation, in filing the Petitions as alleged by the Respondents. The fact that neither of the Petitioners demonstrated that they voted is, in my view, with respect, not relevant to the Petitions, and does not show any bad faith on the part of the Petitioners. In addition, failure to present their grievances during the deliberations by the First and Second Respondent (*in Petition 23 of 2013*) over the appointments does not in any way bar the Petitioners from presenting the Petitions herein. The court should and will determine the question of the constitutionality of the appointments by the Respondents on its merit.

The Petitioners have the necessary *locus standi*.

8.0 OF WHETHER THE COURT HAS JURISDICTION TO DETERMINE THE ISSUES RAISED

8.01 It was the submission of the Respondents that the exercise of legislative function of the County Assembly are not justiciable and the process commenced by the Petitioners was inherently an abuse of the doctrine of separation of powers and undermines constitutionalism; that these proceedings amount to a back-door and unconstitutional interference with the legislative powers conferred upon the County Assembly of Nakuru, and that since the Respondent were exercising a legislative mandate, then the actions of the Petitioners amount to an encroachment of the doctrine of the separation of powers.

8.02 The Respondents averred that the court is bound by the principle of separation of powers and is not entitled to replace the decision of the legislative branch of the government lawfully arrived at with its own decision on the merits of the County Assembly decision. Though Mr. Lawrence M. Karanja, one of the Counsel for the Respondent, conceded that the court has jurisdiction to determine the issues raised in the Petition, that jurisdiction was however limited to matters of procedure and not the merits of the decisions of the Respondents. Counsel submitted that the test was legality or unconstitutionality of the decision.

8.03 By definition, “*jurisdiction is the practical authority granted to a formally constituted legal body to deal with and make pronouncements on legal matters and by implication to administer justice within a defined area of responsibility. It is the scope, validity, legitimacy or authority to preside or adjudicate upon a matter.*” In the case of OWNERS OF MOTOR VESSEL “Lillian S” vs CALTEX OIL (K) LTD [1989] KLR 1 the Court defined jurisdiction thus -

“By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or take cognizance of matters presented in a formal way for its decision.”

8.04 It therefore follows that jurisdiction of a court is fundamental and goes to the root of the matter, and without it the court cannot take any step, make any determination or issue any orders thereon, and the entire proceedings would be null and void *ab initio*. In the case of SAMUEL KAMAU MACHARIA VS. KENYA COMMERCIAL BANK LTD & 2 OTHERS [2012] eKLR the Supreme Court of Kenya held -

“A court's jurisdiction flows from either the constitution or legislation or both. Thus a court of law can only exercise jurisdiction as conferred (to it) by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by the law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a court

of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter for without jurisdiction, the court cannot entertain any proceedings.

This court dealt with the question of jurisdiction extensively in, “In the Matter of Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. Where the Constitution exhaustively provides for the jurisdiction of a court of law, the court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a court of law beyond the scope defined by the Constitution. Where the constitution confers power upon Parliament to set the jurisdiction of a court of law or tribunal the legislature would be within its authority to prescribe the jurisdiction of such court or tribunal by statute law.”

8.05 In the Owners of the Motor Vessel “Lillian S” vs. Caltex Oil Kenya Oil (*supra*), the court said -

“where a court has no jurisdiction there would be no basis for a continuation of the proceedings – a court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

8.06 It was the Respondents' contention that the appointment of members of the Executive Committee of a County was a matter solely vested on the County Assembly, and that if the court granted the orders sought, it would be acting in contravention of the doctrine of separation of powers.

8.07 The doctrine of the separation of powers postulates that each organ of government is independent and none should interfere with the functions of the other. This doctrine also holds that each organ (*of government*) is to act as a check and balance of the other to ensure that each organ functions within the provisions of the Constitution or Statute. The High Court which is a creature of the Constitution is the only body that is empowered to determine the constitutionality or otherwise of the functions of the other state organs. Under Article 165(d) of the Constitution of Kenya 2010, the High Court is vested with the jurisdiction to hear and determine any question respecting the interpretation of the Constitution including the determination of inter alia -

- i. *the question whether any law is consistent with or in contravention of the Constitution,*
- ii. *the question whether anything said to be done under the authority of the Constitution or of any law is inconsistent with, or in contravention of, the constitution, or*
- iii. *any matter relating to the constitutional powers of state organs in respect of county governments and any matter relating to the constitutional relationship between levels of government.”*

8.08 In addition thereto, the High Court is also vested with jurisdiction under Article 23 to hear and determine applications for redress of a denial, violation, or infringement of, threat to, a right or fundamental freedom in the Bill of Rights. Therefore, all persons and institutions are subject to review by the High Court in exercise of its jurisdiction to safeguard the principles and values of the constitution and to uphold its supremacy. In the case of **MUMO MATEMU VS. TRUSTED SOCIETY OF THE HUMAN RIGHTS ALLIANCE & 5 OTHERS** [2013] eKLR the Court of Appeal held -

“It is not in doubt that the doctrine of separation of powers is a feature of our constitutional design and a pre-commitment in our constitutional edifice. However separation of powers does not only prescribe organs of government from interfering with other functions. It also entails empowering each organ of government with counter veiling powers which provide checks and balances on actions taken by the other organs of government. Such powers are, however, not a licence to take over functions vested elsewhere. There must be judicial legislative and executive deference to repository of the function. We therefore cannot agree with the High Court's dicta in the Petition, subject of this Petition that -

["Separation of powers must mean that the courts must show deference to the Independence of the legislature as an important institution in the maintenance of our constitutional democracy as well as accord the executive sufficient latitude to implement legislative intent. Yet as the Respondents concede, the courts have an interpretive role including the last word in determining the constitutionality of all government actions"].

8.09 In its decision the subject of appeal in the above, the three judge bench in Trusted Society of Human Rights Alliance vs. Attorney-General & 2 others [2012] eKLR the Court said -

"The doctrine of separation of powers did not disentitle the court from entertaining the controversy surrounding the appointment of the Interested Party. A constructive reading of the Constitution, case law on the question, and comparative jurisprudence from other jurisdictions on the question have led us to the conclusion that the High Court of Kenya would properly review both the procedure of appointment of the Interested party as well as the legality of the appointment of itself – including determining whether the Interested Party met the constitutional threshold, for appointment to the position.

The constitution consciously delegates the sovereign power under it to the three branches of government and expects each will carry out those functions assigned to it without interference from the other two ... this must mean that the courts must show deference to the independence of the legislature as an important institution in the maintenance of our constitutional democracy as well as accord the Executive sufficient latitude to implement legislative intent. Yet ...the courts have an interpretive role, including the last word in determining the constitutionality of all governmental action. That too is an incidence of the doctrine of separation of powers."

8.10 In SPEAKER OF THE NATIONAL ASSEMBLY & OTHERS VS. DE LILLE, M.P. & ANOTHER [297/298] [1999] ZASCA, the Supreme Court, Court of Appeal of South Africa held -

"This inquiry must crucially rest with the Constitution of South Africa. It is supreme not Parliament. It is the ultimate source of all lawful authority in the country. No Parliament, however bonafide, or eminent, its membership, no President, however formidable be his reputation or scholarship and no official however efficient or well meaning can make law or perform any act which is not sanctioned by the constitution. Section 2 of the Constitution expressly provides that law or conduct inconsistent with the constitution is invalid and the obligations imposed by it must be fulfilled. It follows that any citizen adversely affected by any decree, order or action of any official or body, which is not properly authorized by the Constitution is entitled to the protection of the courts. No Parliament, no official and no institution is immune from judicial scrutiny."

8.11 In conclusion, the comparative analysis of case law, I go back to the High Court's decision in MUMO MATEMU's case where it is said -

"In our view, the test is whether the means applied by the organs of appointment to meet their legal duty has been performed in compliance with the objective and purpose of the Ethics and Anti-Corruption Act as construed in light of Article 79 of the Constitution of Kenya. Under this Act, the courts will not be sitting in appeal over the opinion of the organ of appointment, but will only be examining whether the relevant material and vital aspects having a nexus to the constitutional and legislative purpose of integrity were taken into account in the actual process. Stated otherwise, the analysis turns on whether the process had a clear nexus to the constitutional nexus with a determination that the candidates meet the objective criteria established in law rather than a judgment over the subjective state of the mind of the decision maker. This in our view, provides a fact dependent objective test that is judicially administrable in such cases."

8.12 The Court is thus vested with the jurisdiction to determine the constitutionality of the process of appointments by the County Assembly of the nominees by the Governor, as well as the constitutionality of making such appointments by the Governor. The scope of the court's jurisdiction extends to the procedural improprieties, as well as the legality of the appointment decision to determine whether it

accords with the constitutional threshold. The court applies an objective test where each case is determined on its own merit.

8.13 Having determined that the Petitioners have the necessary locus standi, and this court is invested with the necessary jurisdiction to determine the matters in question, I now turn to the three vital issues in the determination of the consolidated Petitions herein -

- i. *whether the rejection of the nominees of the Governor, to the positions of County Executive Committee, and Public Service Board was contrary to the provisions of the Constitution, and*
- ii. *whether the orders of certiorari and mandamus ought to be granted,*
- iii. *whether the names of the rejected nominees can be resubmitted to the County Assembly.*

9.00 OF WHETHER THE REJECTION OF THE NOMINEES WAS CONTRARY TO THE PROVISIONS OF THE CONSTITUTION

9.01 Chapter Eleven of the Constitution of Kenya 2010, (Articles 174 to 187), establishes Devolved Government. Those Articles provide for objects of devolution, (Article 174), principles of devolved government (Article 175), County Governments (Article 176), County Executive Committees (Article 179), and legislative authority of county assemblies (Article 185).

9.02 Article 176(1) provides that there shall be a county government for each County, consisting of a **County Assembly and a County Executive**. Article 179(1) provides that the executive authority of the county is vested in, and exercised by a county executive committee comprising of -

(a) the County Governor and Deputy Governor, and

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

9.03 Article 186(1) provides for the functions and powers of the national and county governments and Article 186(4) provides that “*for greater certainty (of the functions and powers of the county governments), Parliament may legislate for the Republic on any matter.*”

9.04 The County Governments Act, 2012 (*No. 17 of 2012*) is, I think, the legislation contemplated by or under Article 186(4) of the Constitution. Sections 8 & (44) thereof define the role and procedure, and committees of the County Assembly. Section 8(2) in particular provides -

“8(1)

(2) If a County Assembly fails to enact any particular legislation required to give further effect to any provision of this Act, a corresponding national legislation, if any, shall with necessary modifications apply to the matter in question until the County Assembly enacts the required legislation.”

9.05 Section 30 and 31 in turn define the functions and responsibilities and powers of the Governor. Sections 35 and 36 provide for the manner (procedure), for appointment and functions of the County Executive members and functions of the Executive Committee. Section 44 provides for the appointment of the County Secretary and Sections 57 and 58 provide for the establishment and composition of the County Public Service Board.

9.06 Pursuant to the powers vested in the County Governor under Articles 179(2)(b) of the Constitution and Section 30(2)(b) of the County Governments Act, the Governor of Nakuru County nominated eighteen (18) candidates for appointment to the County Executive Committee, Public Service Board and

County Secretary. There is no dispute that the names of the candidates were forwarded to the Speaker of the County Assembly. There was however doubt raised by Counsel for the Petitioner that since fourteen (14) days had expired following the receipt of the List of Nominees, then the County Assembly is deemed to have approved the List, in terms of Section 9 of the **Public Appointments (Parliamentary Approval) Act 2012 (No. 33 of 2012)**. Section 9 provides that nominees are deemed approved after the expiration of fourteen (14) days period as prescribed in Section 8 of the said Act.

9.07 There was however no evidence provided by the Petitioner that fourteen days had expired before the County Assembly considered the List of Nominations for the Executive Committee and Public Service Board. The record shows that the List of Nominees was forwarded on 13th May 2013, and the County Assembly submitted its Report on 28th May 2013, that is within the prescribed period of fourteen (14) days. The nominees cannot therefore take benefit of the said provision. I therefore find and hold that the nominees were interviewed within the period prescribed by the Public Appointments (*Approvals*) Act, 2012.

9.08 Though reference was made to Standing Order No. 185(4) (*of the Nakuru County Assembly*), neither counsel for the Respondents (*in Petition No. 23 of 2013*) nor the Interim Secretary for the County of Nakuru, availed a copy to the court. Both counsel however made reference to the provisions of the Public Appointments (Approval) Act 2012 and to which provisions, the court shall also as necessary, defer.

9.09 Though it may be considered a technicality, a Committee on approval of appointment is not a body corporate, and has no separate legal status to be a separate party in any action, including a Petition under the Constitution. It is an ad hoc body constituted by the Speaker for good reason from time to time. Though they have their sanction under Statute, I have grave doubts that they are liable to sue or be sued. Their inclusion in an action is in my view incompetent.

9.10 However the names having been forwarded by the Governor pursuant to Article 179(2)(b), (3) and (6) and Article 183 of the Constitution as read with Section 30 and Section 58(d) of the County Governments Act, the Speaker of the County Assembly (who should be the 1st Respondent) duly constituted the Committee on Appointments, which proceeded to hold sessions between 23rd, 26th, May 2013.

9.11 On 18th May 2013, the Clerk of the County Assembly, placed an advertisement in the print media inviting the public to submit memoranda on the suitability of the nominees. The Appointments Committee held sessions between the 23rd and 26th May 2013 when the nominees appeared before the committee and were subjected to vetting. Out of the ten (10) nominees presented by the Governor for appointment to various positions in the County's Executive Committee, only four (4) were found suitable and six (6) were rejected by the County Assembly. The names of those rejected and the reasons for their rejection are as follows -

(a) Prof. Mary Kariuki (nominee for Lands, Physical Planning and Housing)

- She failed to convince the committee that she had experience and knowledge as stipulated in Section 35 (3) (d) of the County Governments Act.
- She had not applied for the position.

(b) Dr. Stanley K. Chepkwony,

- He lacked experience and knowledge as stipulated in the law.
- he had not applied for this position.

(c) Joseph K. Tonui

- he had failed the test as set out in Section 35 (3) (d) of the County Governments Act.
- He was not articulate and had not applied for the position.

(d) Pollyne Anyango Awoko

- she lacked the knowledge and experience required for running ICT and E-Government.
- she had not applied for the docket of Public Service for which she had been nominated.

(e) Dr. Julius Ogeto

- he lacked appreciation of important health policies and had a casual approach to cancer management and maternal health care.

(f) Ms. Wanjiru Waiganjo

- she lacked knowledge on the docket, did not meet the provisions of Section 35 (3) (d) of the County Governments Act and had not been interviewed for

For the position of County Secretary J. M. Moguso was rejected as he had not been competitively recruited as required by Section 44 of the County Governments Act.

The Nominees of the Public Service Board -

(g) James K. Mwaura

- he exceeded the age limit for serving in the public service and did not appreciate the role of the youth in the country.

(h) Peter Murithi Mwarania

- He did not demonstrate any understanding of the board and more so the policy issues
- he failed to produce a mandatory clearance of good conduct from the Police.

9.12 The First Respondent then prepared a the First Report on the vetting of the nominees dated 28th May 2013 which was tabled before the County Assembly on 28th May 2013 when it was adopted after deliberations. The Petitioner's case was that the First Respondent failed to appreciate the existing constitutional principles and statutory provisions when conducting the vetting process, that it took into account irrelevant considerations which essentially casts doubt on the entire decision-making process.

9.13 As a result therefore the First Respondent breached the nominee's right to administrative action that is lawful, reasonable and procedurally fair under Article 47 (1) of the Constitution. This right envisages that an administrative action must not only accord with the provisions of the empowering statute, but also the rules and principles of common law. It was also contended that by refusing to approve the nominees for appointment to the Nakuru County Executive Committee and the County Public Service Board on illegal, unreasonable grounds, the First, Second and Third Respondents paralyzed the Nakuru County Executive Committee and the County Public Service Board from executing constitutional and statutory functions, thereby denying the residents of Nakuru County their economic and social rights which include the right to accessible and adequate housing, highest attainable standards of health, freedom from hunger, clean and safe water in adequate quantities, social security and education contrary to Article 43 of the Constitution.

9.14 The main question for determination by this court is whether the First and Third Respondents under the Chairmanship of the Second Respondent took into account irrelevant factors during the vetting process thus breaching the Constitution. The qualifications of candidates for appointment as County Executive Members and Public Service Board are well provided for in Section 35 of the County Governments Act. Appointment of county executive members -

(1) *The governor shall, when nominating members of the executive committee—*

(a) *ensure that to the fullest extent possible, the composition of the executive committee reflects the community and cultural diversity of the county; and*

(b) *take into account the principles of affirmative action as provided for in the Constitution.*

(2) *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 the minorities, marginalized groups and communities; and*

(c) *community and cultural diversity within the county.*

(3) *A person is qualified for appointment for the position of the County Public Service Board under Section 58 (3) if he-*

(a) *satisfies the provisions of Chapter Six of the Constitution;*

(b) *is not a state or public officer;*

in the case of chairperson or vice-chairperson, possesses a minimum qualification of a bachelor's degree from a recognised university and working experience of not less than ten years; and

(d) *in the case of any other members-*

(i) *possesses a minimum of a bachelor's degree from a recognised university and working experience of not less than five years; and*

(ii) *is a professional, demonstrates absence of breach of the relevant professional code of conduct.*

9.15 Section 7 of the **Public Appointments (PARLIAMENTARY Approval) Act 2011 (No. 33 of 2011)** provides that the issues for consideration by the First and Third Respondents during the vetting process in relation to any nomination shall be—

(a) *the procedure used to arrive at the nomination,*

(b) *any constitutional or statutory requirements relating to the office in question; and*

(c) *the suitability of the nominee for the appointment proposed having regard to whether the nominee's abilities, experience and qualities meet the needs of the body to which nomination is being made.*

9.16 In their Report, the committee indicated that it interviewed the candidates and examined them the criteria they used in vetting them was based on their academic qualifications, employment record, professional affiliations, potential conflict of interest, knowledge of the relevant field, overall suitability for the position, tax compliance and integrity. The question or issue is whether these were or are the conditions relevant to the vetting of the candidates. They certainly were generally, but are not in accord with the provisions of either **Leadership and Integrity** – Chapter Six of the Constitution or the provisions of Section 35(2) of the County Governments Act 2012 that the County Assembly shall not approve nominations for appointment to the executive committee that do not take into account -

- (a) *not more than one two-thirds of either gender,*
- (b) *representations of minorities, marginalized groups and communities, and*
- (c) *community and cultural diversity within the County.*

9.17 Or that the nominees did not qualify in terms of being either Kenya citizens holders of first degrees from a recognized university, or did not satisfy and in what manner the requirements of Chapter Six of the Constitution, or that they did not have knowledge, experience and distinguished careers of not less than five years in the field relevant to the portfolio of the department to which the person is appointed, or that they held other public office.

9.18 Under the **Public Appointments (Parliamentary Approval) Act**, which the Committee adopted for use in the hearings, Section 7, requires that an approval hearing shall focus on a candidate's academic credentials, professional training and experience, personal integrity and background, and the criteria set out in the Schedule shall be used by a committee during an approval hearing for the purpose of vetting a candidate.

9.19 The issues for consideration by the County Assembly like the relevant house of Parliament, in relation to any nomination shall be -

- (a) *the procedure used to arrive at the nominee,*
- (b) *any constitutional or statutory requirements relating to the office in question,*
- (c) *suitability of the nominee for the appointment proposed having regard to whether the nominees abilities, experience and qualities meet the needs of the body to which nomination is being made.*

9.20 This criteria are cumulative in effect, and none of them should be taken in isolation, or regarded as more important than the other. I did not find any of them cited as grounds for rejection of the nominees for positions of executive committee of County of Nakuru. I therefore find and hold that the Respondents in Petition No. 23 of 2013 acted *ultra vires* the Constitution and the County Governments Act.

9.21 However for the position of appointment of County Secretary, Section 44(2)(a) of the County Governments Act requires that the County Secretary ***“shall be competitively sourced amongst persons who are university graduates with at least ten years experience in administration and management.”***

9.22 In his Affidavit sworn on 31st July 2013, the nominee for the position of County Secretary depones that he is the Interim County Secretary for the County of Nakuru and serves in his current position as a nominee of the Transitional Authority and was so appointed by that Authority. Though he may continue serving as Interim County Secretary, pending competitive recruitment of a substantive holder in terms of Section 44(2)(a) of the County Governments Act, I find and hold that he was not competitively sourced, and the County Assembly of Nakuru acted within the law in rejecting his nomination. The question however remains on whether the orders of certiorari and mandamus ought to be granted in respect of other rejected nominees.

10.00 OF WHETHER ORDERS OF CERTIORARI AND MANDAMUS SHOULD ISSUE

10.01 In his paper, **“Review of Administrative Decisions of Government and Administrative Courts and Tribunals”** presented to the 10th Congress of the International Association of Supreme **Administrative Jurisdictions** (Sydney – March 2010), the Hon. Mr. Justice Alnashir Visram, Judge of Appeal referred to a decision of the Court of Appeal (**Republic vs. Attorney-General and Registrar of Societies – Misc. Application No. 769 of 2004**) and Nyongesa & Others vs. Egerton University College [1990] KLR 693 and Onyango vs. AG [1987] KLR 711 and Kenya Hotels and Allied Workers Union vs. Registrar of Trade Unions [2005] eKLR where that Court observed -

“The law relating to Judicial Review had not reached the furthest or the last frontier and the courts must endeavour to expand the grounds of intervention depending on the circumstances before them”.

(Republic vs. A.G. and Registrar of Societies – supra).

And

“Courts are loath to interfere with decisions of domestic bodies and tribunals including college bodies. However courts will interfere and quash decisions of any bodies when moved to do so where it is manifest that the decisions have been made without fairly and justly hearing the person concerned or the other side.”

10.02 Discussing the remedy of Judicial Review in the case of **REPUBLIC VS. KENYA ROADS BOARD, ex parte HARUN MWAU** (*Misc. Application No. 1372 of 2000*), (On the question of Judicial Review and Parliament), the High Court said -

“The remedy of judicial review is available as a procedure through which the applicant can come to court for the determination on any constitutional issue including striking down legislation which may be unconstitutional.In countries with written constitutions, the rule of law implies limitations on legislative power and on all other organs of State. Parliament can only exercise its power within certain parameters for acts of Parliament to be constitutional. The limitations which the law imposes upon the Executive and the legislature can only be meaningful where there is a procedure to interpret the law and examine Executive actions or decisions with finality. This unique power to test the acts of the three arms of State for consistency is vested in the Judiciary. There are what are called Judicial Review Powers. The Judiciary, in such exercise, is also subject to the rule of law.”

10.03 Unlike the pre-2010 Constitution when the power to grant Judicial Review orders of certiorari, mandamus and prohibition were tacked away in Sections 8 and 9 of the **Law Reform Act, (Cap. 26 Laws of Kenya)**, today, Article 23(3)(f) provides that in any proceedings brought for enforcement of fundamental rights and freedoms of the individual under Article 22 of the Constitution, the court's jurisdiction and scope to grant those orders is widened and is constitutionally underpinned.

10.04 The question however remains as to when the order of certiorari may be granted. An order of certiorari will issue on grounds of procedural errors or illegality. In the celebrated English case of **COUNCIL OF CIVIL SERVICE UNIONS VS. THE MINISTER FOR CIVIL SERVICE [1985]** AC 374 HL, Lord Diplock said -

“By illegality as a ground for judicial review, I mean that the decision-maker must understand correctly the law his decision making power and must give effect to it.”

10.05 In the case of **Attorney-General vs. Fulham Corporation [1921] 1 ch. 440**, it was held that ***“illegality might also consist of using powers in a manner totally different from that envisaged.”*** I have already made reference to Section 35(2) and (3) of the County Governments Act. Similar provision appears at Section 58(2) & (3) of the said Act with regard to the appointment of a member of Public Service Board.

10.06 It is thus clear to this Court that a County Assembly exercising its administrative function of approval of nominees, has a statutory duty to exercise that function to the fullest extent with the requirements of the enabling law, and failure to do so, may render its findings, determinations and decisions and recommendations *ultra vires* the Act, and in particular Sections 35(2) & (3) and 58(2) & (3) thereof and I grant prayers 1 and 2 in Petition No. 23 of 2013.

10.07 In the circumstances, there shall issue an order of certiorari, to bring to this Court, and quash the findings and decisions of the County Assembly of Nakuru as set out in the First Report of the Committee on the Vetting of Nakuru County Executive Committee Nominees; County Public Service Board, Members and County Secretary dated 28th May 2013 in relation to -

- (xiii) Prof. Mary Kariuki,
- (xiv) Prof. Stanley K. Chepkwony,
- (xv) Mr. Joseph K. Tonui,
- (xvi) Ms. Pollyne Anyango Owoko,
- (xvii) Dr. Julius Ogeto,
- (xviii) Ms. Mary Wanjiru Waiganjo.

And County Public Service Board

- (i) Chairman - James Kiongi Mwaura
- (ii) Member – Peter Muriithi Mwarania

11.00 OF THE ORDER OF MANDAMUS

11.01 The order of mandamus is an order directing a public body, authority, person or inferior tribunal exercising public duty, to exercise that function or duty if it has not done so. In this case, the County Assembly of Nakuru carried out its mandate and its decision is the subject of an order of certiorari already granted. It must be emphasised that the former prerogative order and now judicial order of *mandamus* is not the equivalent of a mandatory injunction, or specific performance in contract. The order only lies where the statutory or public duty has not been performed or carried out. My favourite example is the liquor licencing bodies – when they fail to meet and consider applications for liquor licences, the courts will direct them to meet and consider the applications, but the court will not direct them to grant licences or make decisions in any one way. There is no legal basis for an order of mandamus. The prayer for the order of mandamus does not lie, and is therefore denied.

12.00 OF WHETHER THE NAMES OF REJECTED NOMINEES CAN BE RESUBMITTED

12.01 Section 10 (*Rejection of Nomination*), of the Public Appointments (Parliamentary approval) Act, says -

“10. Where the nomination of a candidate is rejected by Parliament, the appointing authority may submit to the relevant house the name of another candidate, and the procedure for approval specified in the Act shall apply accordingly.”

12.02 There is no similar provision in the County Governments Act, 2012. The Public Appointments (Parliamentary Approvals) Act 2011 (No. 33 of 2011) is an earlier Act and came into force on 14.11.2011. The County Governments Act is a later Act, and came into effect on 4th or 5th March 2013 depending upon when the final results of the Elections of 4th March 2013 were announced.

12.03 It is thus clear to me that if Parliament had intended the provisions of Section 10 of the Public Appointments (Parliamentary Approval) Act to apply to appointments under the County Governments Act it should have incorporated it expressly. Though Section 14 of the County Governments Act refers to incorporation or adoption of standing orders of the National Assembly, there is no express provision for adoption of the practice under Section 10 of the the Public Appointments (Parliamentary Approval) Act. The provision would in my view only be regarded as directory and not mandatory in relation to rejected nominees. In the circumstances therefore, I decline to grant prayers 1, 2 and 3 of Petition No. 25 of 2013. I hasten add that though *sub-judice* principle has been trivialized in Kenya, it is a great safeguard for both the respect of the adjudication process through courts of law, and indeed the rule of law, that interim orders of court be observed until reversed upon review by the same court, or appeal by a higher court. It was therefore highly improper for the parties to circumvent the process of court by private

political arrangement in the subsistence of the interim orders of court. I note that those arrangements were promptly put aside, and hence this Judgment.

13.00 OF COSTS

13.01 Article 176(1) of the Constitution as already stated, provides that - *“there shall be a county government for each County, consisting of a county assembly and a county executive.”*

13.02 The County Assembly and County Executive are two sides of the same coin. I direct that this being public interest litigation each party shall bear its own costs.

13.03 In summary therefore -

(1) There shall be orders in terms of prayers 1 & 2 of the Petition No. 23 of 2013, prayers 1, 2 and 3 of the Petition No. 25 of 2013 are declined.

2. there shall be an order of certiorari in relation to the six rejected nominees to the executive committee, and to the two to the Public Service Board.

3. the County Assembly's decision on the County Secretary is upheld and shall remain in force.

(4) Each party to bear its own costs.

Dated, signed and delivered at Nakuru this 25th day of September, 2013

M. J. ANYARA EMUKULE

JUDGE