



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

PETITION NUMBER 7 OF 2013.

IN THE MATTER OF ARTICLES 1,2,3(1),6,10,19,20,21,223(1) & (3), 27(4), 27(5), 28,39(3), 41(1), 48, 160(1), 165(3)(b), 174, 183,191, 258(1) OF THE CONSTITUTION OF KENYA.

AND

IN THE MATTER OF RULES 4, 10, 11, 13, AND 20 OF THE CONSTITUTION OF KENYA (SUPERVISORY JURISDICTION AND PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOM OF THE INDIVIDUAL, HIGH COURT PRACTICE AND PROCEDURAL RULES, 28TH JUNE, 2013.

AND

IN THE MATTER OF SECTION 8, 31, 35, 36, 41 44, 56, 57, 58 OF THE COUNTY GOVERNMENT ACT, ACT NO. 17 OF 2012 LAWS OF KENYA

AND

IN THE MATTER OF SECTION 3, 4, 7, 8, 9, AND 10 OF THE PUBLIC APPOINTMENTS (PARLIAMENTARY APPROVAL) ACT, ACT NO. 33 OF 2011 LAWS OF KENYA.

AND

IN THE MATTER OF STANDING ORDER NO. 58 OF THE INTERIM COUNTY GOVERNMENT STANDING ORDERS AND IN THE MATTER OF THE COUNTY ASSEMBLY COMMITTEE OF APPOINTMENTS ON THE VETTING OF COUNTY EXECUTIVE COMMITTEE MEMBERS OF NYERI COUNTY GOVERNMENT DATED 15TH JUNE 2013

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLE 27(4), 27(5), 28, 39(3), 41(1), 43, 47(1), 48, 56A and 56C OF THE CONSTITUTION OF KENYA 2010

BETWEEN

SIMON WACHIRA KAGIRI..... PETITIONER

VS

THE COUNTY ASSEMBLY OF NYERI..... 1ST RESPONDENT

THE GOVERNOR NYERI COUNTY..... 2ND RESPONDENT

THE HON. THE ATTORNEY GENERAL..... 3RD RESPONDENT

JUDGMENT

a) The petition and response to it

1. By a petition dated 26th July, 2013 and filed before this Court on 29th July under certificate of urgency, the petitioner, allegedly anchored by several provisions of the Constitution and relevant legislation governing appointment of chief officers of County Governments, sought to move the Court for the grant of orders:
 - a. A declaration that the proceedings of the Nyeri County Assembly to reject the petitioner for appointment to Nyeri County Executive Committee breached the petitioner's constitutional rights under articles 27(4), 27(5), 28, 39(3), 41(1), 43, 47(1), 48 and 56(c) of the Constitution of Kenya, and were null and void for all intents and purposes;
 - b. A declaration that the proceedings of the Nyeri County Assembly to reject the petitioner for appointment to Nyeri County Executive Committee breached the constitutional rights of the residents of Nyeri under article 43 of the Constitution of Kenya, and were null and void for all intents and purposes;
 - c. A declaration that the proceedings of the Nyeri County Assembly to reject the petitioner for appointment to Nyeri County Executive Committee patently violated the provisions of section 35 of the County Government Act No. 17 of 2012 and were null and void for all intents and purposes;
 - d. A declaration that the proceedings of the Nyeri County Assembly to reject the petitioner for appointment to the Nyeri County Executive Committee patently violated the provisions of section 7 of the Public Appointments (Parliamentary Approval) Act No. 33 of 2011 and were null and void for all intents and purposes;
 - e. That pending the hearing and determination of the application inter partes, conservatory orders of stay do issue to stay the decision of the respondents to reject the nomination of the petitioner;
 - f. An order of Judicial Review Orders of Mandamus to remove into this honourable Court and compel the Nyeri County Assembly to approve the nomination of the petitioner as a member of the Nyeri County Executive Committee there being no statutory and constitutional principle to reject the petitioner from being appointed to the Nyeri County Executive Committee;
 - g. An order of Judicial Review Orders of Prohibition to remove into this honourable Court and prohibit the Governor of Nyeri County from presenting to the Speaker of Nyeri Assembly or any person whatsoever, any fresh names of nominees for approval by Nyeri County Assembly for appointment as members of Nyeri County Executive Committee;
 - h. An order of Judicial Review Orders of Mandamus to remove into this honourable Court and compel the Governor of Nyeri County to appoint the petitioner as a member of the Nyeri County Executive Committee;
 - i. An order expunging the allegations contained in page 25 of the Committee of Appointment's report as unconstitutional and thus unlawful;
2. In support of the petition, the petitioner contended that:
 - a. The Petitioner being a person and citizen within the meaning of both Articles 12(1) and 20(2) of the Constitution of Kenya, 2010, was entitled to each and all the fundamental rights and freedoms expressed and or implied in the Constitution.

- b. Article 3 of the Constitution of Kenya, 2010 obliged the Petitioner (and indeed all other persons) to uphold and defend the Constitution and in particular to insist that all organs and or bodies of the Government of Kenya equally respect, uphold and defend the Constitution.
- c. Article 22(1) of the Constitution of Kenya, 2010 entitled the petitioner (and indeed all persons) to move the Honourable Court whenever a right or fundamental freedom in the Bill of rights was denied, violated, infringed or threatened.
- d. Article 10 of the Constitution of Kenya, 2010 obliged the respondents to observe human rights, non-discrimination, equity, social justice, rule of law, good governance, and integrity in exercise of their functions.
- e. Article 47(1) of the Constitution of Kenya, 2010 entitled the Petitioner (in common with other persons) to a fundamental and inalienable right to a lawful and procedurally fair administrative action.
- f. The 1st and 2nd respondents had in blatant violation of various provisions of the Constitution of Kenya, various statutory provisions and Interim County Assembly Standing Orders, purported to refuse to approve the Petitioner for appointment to the Nyeri County Executive Committee, in the following respective sectors:

SIMON WACHIRA KAGIRI.....TOURISM, CULTURE, GENDER YOUTH AND SPORTS.

- g. The guiding principles when the 1st respondent considers whether to approve or reject nominees for appointment to the County Executive Committee were set out in the following Constitutional and Statutory provisions:

(i) National values and Principles of governance set out in Article of the Constitution of Kenya, including observance of human rights, non-discrimination, equity, social justice, rule of law, good governance, and integrity.

(ii) Section 35(2) of the County Governments Act No. 17 of 2012 enjoining the 1st Respondent to take into account:

(iii) Section 7 of the Public Appointments (Parliamentary Approval) Act No.33 of 2010 that sets out the relevant factors to be taken into account in vetting a nominee for public appointment, to wit:

a) Procedure used to arrive at the nominee;

b) Constitutional or statutory requirements relating to the office in question; and

c) Suitability of the nominee for appointment proposed, having regard to the nominee's abilities, experience and qualities.

- h. In blatant violation of the listed provisions of the Constitution of Kenya, County Governments Act and Public Appointments (Parliamentary Approval) Act, the respondents purported to reject the petitioners for appointment to Nyeri County Executive Committee on the following illegal, unreasonable, irrelevant and unconstitutional grounds:

(i) That having been charged and acquitted in a Criminal Case he did not satisfactorily answer integrity issues.

(ii) That the petitioner did not demonstrate appropriate knowledge and

understanding of relevant docket.

(iii) That though well versed in tourism matters he failed to address satisfactorily in matters relating to culture, gender, youth and sports.

- i. In exercising its constitutional mandate under Article 179(2) (b) of the constitution of Kenya, the 1st Respondent, as evident, out rightly violated the constitutional and statutory considerations to be taken into account in approving or rejecting nominees for appointment to County Executive Committee on illegal, unreasonable, irrelevant and unconstitutional grounds, the respondents, jointly and severally violated the rights and freedoms of the petitioner as follows:
 - j. By expressly admitting that the petitioner had the right qualifications and good academic credentials, but declining to approve the petitioner for appointment unreasonably and violated the petitioner's right to fair labour practices contrary to the provisions of Article 41(1) of the Constitution of Kenya;
 - k. By refusing to approve the petitioner for appointment to the Nyeri County Executive Committee without giving cogent reasons for rejection of petitioner as nominees for appointment into the Executive Committee, the respondents acted illegally, unreasonably and violated the petitioner's right to administrative action that is lawful, reasonable and procedurally fair, contrary to the provisions of Article 47(1) and presumption of innocence contrary to Article 50(2) (a) of the Constitution of Kenya.
 - By expressly admitting that the petitioner had the right qualifications and good academic credentials and commending the 1st Respondent's Committee on Appointments for recommending the 2nd Respondent's approval of the appointment of the petitioner to the Nyeri County Executive Committee, but declining to approve the petitioner for appointment to the County Executive Committee, the Respondents violated the Petitioner's right to administrative action that is lawful, reasonable and procedurally fair, contrary to the provisions of Article 47(1) of the Constitution of Kenya.
 - m. By refusing to approve the petitioners for appointment to the Nyeri County Executive Committee on illegal, unreasonable, unconscionable, irrelevant and unconstitutional grounds, the respondent paralysed the Nyeri County Executive Committee from executing its mandate in Article 183 of the Constitution of Kenya as read together with part 2 to the Fourth Schedule thereof, thereby disentitling the residents of Nyeri County of their fundamental economic and social rights which include the right to accessible and adequate quantities, social security, and education, contrary to the provisions of Article 43 of the Constitution of Kenya.
 - The petitioner was reasonably apprehensive that, in seeking to rely on the provisions of section 10 of the Public Appointments (Parliamentary Approval) Act No. 33 of 2011, the Governor of Nyeri County would submit to the 1st respondent, fresh names for approval by the 1st Respondent and subsequent appointment by the Governor, thereby rendering the petition otiose;
 - The provisions of section 10 of the Public Appointments (Parliamentary Approval) Act No. 33 of 2011 applied to the Governor in the circumstances of this petition by dint of the provisions of section 8(7) of the County Governments Act, which authorizes application of corresponding national legislation to counties on an issue that the County Governments Act was silent;
3. In opposition to the petition, the 1st respondent filed grounds of opposition contending on the main:
 - a. **THAT** the Petition, its grounds and the Supporting Affidavit had not raised any, or any sufficient grounds, on the basis of which the court would exercise its discretion to grant the orders prayed for, or at all.
 - b. **THAT** the Petitioner's plea for a Conservatory Order in prayer (e) of the Petition did not lie in the

matter, as the decision of the 1st Respondent in declining to approve the Petitioner had already taken place, and as such the Petitioner had not met the legal threshold for grant of temporary orders at that stage of the proceedings.

- c. **THAT** the Petition against the 1st Respondent was misconceived, frivolous and bad in law as the 1st Respondent was not *sui juris*, since the County Assembly, as constituted under the Constitution of Kenya and its establishing Statute was not an entity with capacity to sue, or to be sued, in its own name.
 - d. **THAT** the Petition as framed was misconceived and bad in law as the Honorable Court did not have the jurisdiction to grant the Orders sought in prayers (f), (g) and (h) of the petition since the discretion to approve nominees for appointment to the County Executive was vested in the 1st Respondent.
 - e. **THAT** the application and indeed the Petition itself, sought to defeat the doctrine of separation of powers, which demanded that there should be a distinction between the legislative organ(s) of the government and other organs and as such, the Court in exercise of judicial power ought not to arrogate itself the powers of County Assembly and/or subjugate the powers exercisable by any other arm or organ of the government.
 - f. **THAT** indeed the material presented before the Court by the Petitioner was sufficient to demonstrate at the preliminary stage, that the 1st Respondent fulfilled and/or complied with all the provisions of the law in regard to the procedure followed by the County Assembly in the vetting process and arrived at its decision(s) fairly and in a manner that was sound, reasonable and within the law.
 - g. **THAT** the application lacked merit as the Court lacked jurisdiction to entertain the Petition and any application for temporary or conservatory Orders in the circumstances attending the Petition before the Court.
4. When Mr. Ng'ang'a for the petitioner appeared before me on the 29th July, 2013, I was not persuaded that he had sufficiently demonstrated in his application that the 1st and 2nd respondents were about to fill the post in respect of which his client had been rejected. I therefore granted him leave to file supplementary documents, which he said he had, to that effect and directed that he serves the application on the respondents and return before me on 30th July, 2013 for directions.
 5. On 30th July, 2013, my brother Justice Ombwayo, sitting for me on this petition, heard the interlocutory application herein and issued conservatory orders pending the hearing of the main petition.
 6. When the parties appeared before me on 13th August, 2013 for directions, it was agreed that in the interest of time and speedy disposal of the dispute, the petition together with the preliminary issues raised in the interlocutory application be argued together on the 27th August, 2013 and that the Court renders one ruling in respect of the interlocutory application and the petition. The parties agreed to frame issues along which they would format their submissions before the Court.
 7. It was further agreed by the consent of the parties that since issues in this petition and petition number 10 are similar, petition number 7 (this petition) be tried as a test case and the determination thereof and orders made, will apply to petition number 10 with equal force. So that the determination of this petition will render petition number 10 spent in terms of issues for adjudication by the Court.

b) Issues for determination.

8. When the matter came up for hearing on 27th August, 2013, Mr. Ng'ang'a and Mr. Mugambi who

as it were, were the main protagonists in this matter framed seven issues, to wit:

- a. Whether the 1st respondent is a legal person in the eyes of the law and as such sui juris, with corporate personality and capacity to sue and be sued in its own name.
- b. Whether the 1st respondent violated the constitutional and statutory considerations in the procedure prescribed for the vetting process under the Constitution, the County Government Act, and the Public Appointments (Parliamentary Approval) Act.
- c. Whether the petition as framed is supported by sufficient evidence to discharge the petitioner of the burden of proving and establishing his allegations that his rights were violated.
- d. Whether the nature and character of the petition by the petitioner, amounts to a violation of the doctrine of separation of powers by requiring the court to interfere with the powers, functions and discretion vested in the 1st respondent.
- e. Whether the honourable court has powers and/or jurisdiction to grant the orders sought in prayers (f), (g), and (h) of the petition.
- f. Whether by rejecting to approve the petitioner's candidature, the 1st respondent has disentitled the residents of Nyeri County their fundamental economic and social rights.
- g. Who is entitled to the costs of the petition.

9. At the hearing of the petition it was agreed that Counsel structure their submissions in the order in which the issues were framed. For simplicity in the determination of the petition, the Court will adopt the same format in addressing the issues raised in the petition merging them where they are cross-cutting and or overlapping.

c) Submissions by Counsel

10. On issue number 1 regarding the proper party to sue, Mr. Ng'ang'a for the petitioner submitted that all bodies that perform public duties are subject to judicial review. He gave examples such as: administrative system of central Governments, local governments or county governments, quasi-governmental bodies which exercise disciplinary function in respect of certain professions. To this list Mr. Ng'ang'a added that all bodies that perform public functions or that are engaged in actions which although private are of public nature are subject to the interference by the court. To support this submission Mr. Ng'ang'a relied on the case of **Republic vs. Registrar of Societies & 5 others ex-parte Kenyatta & 6 Others Misc. Civil Application No. 747 of 2006** to which he urged the court to consider the cases cited therein. Mr. Ng'ang'a urged me to take into account the dictum of Lord Bridge in the case of **Tower Hawlets of London Vs. Chetnik Development Ltd [1988] 1 ALL ER 956** where he stated:

“...a truly unfettered discretion will at once put the decision maker outside or as I would prefer to say, above the law. Public bodies and private persons are both subject to the rule of law, nothing can be more elementary...it is that any action to be taken must be justified by positive law. A public body has no heritage of legal rights which it enjoys for its own sake; at every turn, all dealings constitute fulfillment of duties which it owes to others; indeed it exists for no other purpose...”

11. According to Mr Ng'ang'a, the Committee on Appointments which consisted of the speaker, his deputy, leader of majority, leader of minority and two committee members presented its report to the County Assembly which was adopted by the latter hence it was the right party to sue. In any event, Mr. Ng'ang'a submitted, article 159(2) (d) and (e) of the Constitution is clear that justice shall be administered without undue regard to procedural technicalities and that the purpose and principles of the Constitution shall be protected and promoted.

12. Mr. Mugambi on his part submitted that the County Assembly, the 1st Respondent herein, is not a legal person who can sue or be sued in its own name. According to Counsel, the law (the **Constitution** and the **County Government Act**) recognises the corporate status of the County government. He cites section 6 of the **County Government Act (CGA)** which provides:

“...as an entity exercising constitutional authority, a county government shall be a body corporate with perpetual succession and shall have all the powers necessary for the discharge of its functions”

13. According to counsel, the appointment process is carried out by the County Government whereby the 2nd respondent nominates a candidate and the 1st respondent approves. Any violation in the process of appointment is therefore attributable to the County Government and not the County Assembly.

14. Mr. Mugambi further submitted that in essence, the County Assembly is a collection of elected and nominated persons who perform the functions set out under the law. According to Mr. Mugambi, the Speaker though an ex-officio member of the County Assembly, plays a key part in the exercise of the roles and functions of the County Assembly. It is therefore his submission that the appropriate way to bring legal action against the County Assembly is through the speaker. In support of this submission Mr. Mugambi relied on the decision of Ojwang J in the case of **Ng'ok vs. The AG & Another [2005] eKLR** where the court rejected the argument that the AG had locus standi to file pleadings for a statutory corporation whose corporate status was set out under the provisions of a statute.

15. Mr. Ng'ang'a in response to Mr. Mugambi's submissions on this issue argued that section 6 of the County Government Act provides for the duties of the County Government. These duties, according to counsel are exclusive to the County Government. He submitted that the legislature thought it wise not to include the power to sue so that this could be left to other bodies. Further, the County Assembly Appointments Committee had the speaker as one of its members and the decision being impugned was made by this body hence it was the correct body to sue. Mr Ng'ang'a further submitted that the matter before the Court was a constitutional matter hence procedure was to be kept minimal and further that the fact that certain aspects of the County Government had not been constituted made it unclear on the proper body to sue.

16. According to Mr. Ng'ang'a the County Assembly was making a decision regarding constitutional rights of a person hence the right body to sue. According to counsel, Arap Ng'oks case sought to be relied on by the 1st respondent was in respect of a civil procedure matter hence did not apply to a constitutional petition as was the case here.

17. On issue number 2 concerning the whether the 1st respondent violated the petitioner's constitutional rights, Mr. Ng'ang'a submitted that the report of the Appointments Committee at page 25 thereof stated that:

“... the Committee found out that he had been charged with a court case but had eventually been acquitted under section 210 of the Criminal Procedure Code and though he had been acquitted under section 210 of the Criminal Procedure Code, the Committee observed that the case was dismissed on a technicality... the committee was of the view that he did not satisfactorily answer the integrity issues...”

18. To this Mr. Ng'ang'a submitted that it was a blatant contravention of article 50(1) and (2) of the Constitution. According to Counsel, presumption of innocence is a cornerstone of international law on human rights and is clearly entrenched in the constitution. The fact that the petitioner's arraignment in court and his subsequent acquittal was used as a reason to deny him a chance to fair labour treatment and equality in the eyes of the law was unfair, unreasonable and arbitrary. Mr. Ng'ang'a therefore submitted that his client was entitled under article 258 of the Constitution to institute court proceedings claiming the Constitution has been contravened or is threatened with contravention.

19. Mr. Mugambi on his part submitted that the petitioner in the supporting affidavit to the petition did not disclose evidence and facts in proof of the alleged violation. The supporting affidavit, counsel submitted, contained no averment of fact to establish that there were defects in the procedure, fundamental omissions or a consideration of an extraneous matter. According to counsel therefore, the evidence provided fell critically short in discharging the burden of proof imposed on the petitioner by law. On this score, Mr. Mugambi relied on the Court of Appeals decision in **Mumo Matemu vs. Trusted Society of Human Rights Alliance [2013] eKLR** where it was observed by that court thus:

“... the general evidentiary standard applicable in judicial review of the procedural propriety of appointments process is that there must be a showing by the claimant that there were substantive defects in that procedure, fundamental omissions, or a consideration of extraneous considerations as to render the cumulative process unconstitutional...”

20. Further it was Mr. Mugambi's contention that “the criteria for vetting/approval of nominees for appointment to public office by parliament questionnaire” which was structured pursuant to section 6 of the Public Appointments (Parliamentary Approval) Act (PA Act) required the Committee to consider whether any nominee has ever been charged in Court. In this respect Mr. Mugambi submitted that it was outrageous for the petitioner to argue that merely because the Committee on Appointments considered his having faced a criminal charge, his constitutional rights under article 50(1) and 50(2) were violated. It was Counsel's submission that making a blanket assumption that the petitioner was thus presumed guilty, was stretching the argument beyond the legislative intention in requiring the vetting body to take into account matters concerning criminal proceedings. According to counsel, the court has no basis looking into the subjective mind of the decision makers in arriving at the conclusion that the petitioner did not meet the integrity test. In this regard Mr. Mugambi further relied on the Court of Appeal's decision in **Mumo Matemu's case** where that court further observed thus:

“... under this test, the court will not be sitting in appeal over the opinion of the organ of appointment, but only 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 clear nexus with a determination that the candidates meet the objective established in law rather than a judgment over the subjective state of mind of the decision makers. This in our view provides a fact-dependent objective test that is judicially administrable in such cases...”

21. In this regard, Mr. Mugambi submitted that the petitioner did not establish any impropriety in the approval process. That is to say the burden was on the petitioner to adduce evidence that the approval process as established by article 179(2)(b) of the Constitution and relevant provisions of the PA Act were violated in rejecting his candidature.

22. In response to Mr. Mugambi's submission on this point, Mr. Ng'ang'a argued that it was not true that there was no impropriety on the part of the 1st respondent. He urged the court to look at the vetting report which took into account the criminal charges the accused once faced. It was Mr. Ng'ang'a's contention that once a constitutional issue was taken into account the other matters became irrelevant. According to him, the fact that the petitioner was acquitted made the issue a non-issue. Besides no member of the public gave any evidence with regard to unsuitability of the petitioner for appointment. The issue therefore was not a matter of procedure but of fundamental rights of the petitioner. Further, counsel submitted that the petitioner's arraignment if at all was relevant, took place outside of 3 years hence was not within the contemplation of 6(8) PA Act which takes into account criminal charges within three years of the date of the intended appointment.

23. Concerning issue number 3, Mr. Ng'ang'a submitted that this had been adequately dealt with in response to issue number 2 and added that the petitioner's disqualification was unconstitutional and referred the court to the decision in **Ex Chief Peter Odoyo Oganda & Others vs. IEBC & Others Civil Appeal No. 307 of 2012** affirmed in **Mumo Matemu's case** to the effect that

decisions must be rational that limits arbitrariness and not discretion itself.

24. Mr. Mugambi for his part submitted that the petitioner has cited a flurry of constitutional provisions which he alleged had been violated without demonstrating in which way or manner they had been violated. It was counsel's submission that it was not enough for the petitioner to cite articles of the constitution pleading they have been violated without furnishing evidence as to how violation has occurred.
25. On issue number 4, Mr. Ng'ang'a argued that the County Assembly was not shielded by the Constitution in the manner that parliament was by virtue article 117 of the Constitution and National Assembly (Powers & Privileges) Act. According to him the Assembly ought to be regarded at the level of a tribunal hence amenable to the jurisdiction of the court through judicial review of its actions.
26. According to Mr. Mugambi, without factual evidence that there was procedural impropriety by the 1st respondent in exercising its legal mandate, the court had no jurisdiction to overturn the decision arrived at by the 1st respondent. To do so, would be to do an exercise similar to vetting process which is the constitutional mandate and statutory role of the 1st respondent. Counsel submitted further that from the first report of the Committee on Appointments annexed to the petitioner's supporting affidavit and the second report of the said committee read together with the explanation of the process contained in the 1st respondent's replying affidavit, its duty was fully discharged. According to counsel therefore, what the petitioner sought from the court was for it to substitute its own evaluation of the material on the basis of which the petitioner proposed his suitability. This Mr. Mugambi submitted would be a trap that if the court were to fall into, it would be exercising an appellate jurisdiction over the 1st respondent. A power the court did not have. On this point he referred the Court to Mumo Matemu's case in which the Court of Appeal stated:
- “...for avoidance of doubt, we also reiterate that a court reviewing the procedure of legislature is not a super-legislature sitting on appeal on the wisdom, correctness or desirability of the opinion of the impugned decision-making organ. It has neither the mandate nor the institutional equipment for that purpose in our constitutional design. Moreover, the process cannot be wrong simply because another institution, for example the courts, would have conducted it differently.”**
27. In concluding this segment of his submission, Mr. Mugambi argued that even if the Court were to uphold the petition, the most it would do would be to refer the petitioner back to the appointing and approving body with directions on which procedural lapses occurred and require their correction by the 1st and 2nd respondent.
28. Regarding issue number 5 on whether by rejecting the petitioner's candidature, the 1st respondent has disentitled the residents of Nyeri County their fundamental economic and social rights, Mr. Ng'ang'a argued that the petitioner had impeccable credentials hence the act by the 1st respondent of taking into account irrelevant criminal prosecution to refuse the petitioner's appointment deprived the people of Nyeri County of a person who could have advanced their fundamental economic and social rights. According to Mr. Ng'ang'a therefore the court had power to issue the orders sought. It was his position that the 1st respondent was subordinate to the court and hence the court had supervisory power over it and the orders sought were thus within the powers of the court.
29. Mr. Mugambi for his part submitted on this issue that there was no evidence presented that the residents of Nyeri County had been disentitled their fundamental economic and social rights. Other than the supporting affidavit by the petitioner, there was no material placed before the court on the basis of which any findings on this issue could be made.
30. Concerning issue number 6 on whether the court could grant the orders sought, Mr Ng'ang'a reiterated his submissions on issue numbers 1 and 2 while Mr Mugambi for his part submitted that the effect of the orders sought in the petition had the sum effect of compelling the 1st respondent to approve the appointment of the petitioner, prohibiting the 2nd respondent from undertaking his

statutory duty under section 35 of the County Government Act and section 10 of PA Act and compelling the 2nd respondent to appoint the petitioner to Nyeri County Executive in spite of the nomination and vetting process. According to Counsel, under the Constitution, the petitioner's appointment involved two stages:

- a) nomination of the 2nd respondent's
- b) approval (by way of vetting) by the 1st respondent

31. According to Counsel, both these stages required the exercise of discretionary powers by the 1st and 2nd respondent as donated by the relevant statutory provisions. According to counsel therefore, these powers being discretionary, the order of mandamus could not lie. In support of this argument, he cited the case of **John Peter Mureithi et al vs. AG [2006] eKLR** where the High Court stated:

“... a mandamus issues to enforce a duty performance of which is imperative and not optional or discretionary...”

Counsel further cited paragraphs of Halsburys Laws of England 4th Edition Vol 1 at 111 from paragraphs 89 as follows:

“The order of mandamus is of most extensive remedial nature, and is in form of justice directed to any person, corporation or inferior tribunal requiring him or them to do some particular thing thereon specified which appertains to his or their office and is in nature of a public duty.

At paragraph 90 it is stated as follows:

“... the order must command no more than the party against whom the application is made is legally bound to perform. Where a general statute which imposes a duty leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way”

From the foregoing therefore Mr. Mugambi concluded his submissions that it would be inopportune for the court to grant the orders sought in prayers (f), (g) and (h) of the petition.

32. Regarding the issue number 7 on costs, Mr. Ng'ang'a submitted that this was a matter for the discretion of the Court however being a public interest litigation, each party ought to bear their own costs. Mr. Mugambi for his part submitted that once the election process was concluded in March, 2013, the County Government was expected to proceed and constitute the County Executive as well as County Service Board. This process was stopped by the petitioner and had occasioned costs including costs for the defence of the petition. In the circumstances costs ought to follow the event.

The decision.

33. The Court will determine the first, fourth and fifth issues as framed by the parties together and at this stage since they revolve around the same legal questions and principles.

34. According to Mr. Ng'ang'a for the petitioner, the 1st Respondent, the County Assembly, in conducting the vetting process, was carrying out a public function hence the proper party to bring to Court. Mr. Mugambi for the respondent on his part however submitted that the County Assembly was not a legal person capable of suing or being sued. According to Mr. Mugambi, The County Government Act No. 17 of 2012 (**CGA**) recognises the corporate status of the County

Government only.

33. Whereas both Counsel submitted on the question of legal capacity or otherwise of the 1st respondent to sue or be sued, neither addressed me on the issue whether any suit can lie against the County Assembly as such, in the exercise of its constitutional and statutory mandate.

34. On the issue of whether the County Assembly may be sued in its own name the court takes the view that the County Assembly as a distinct institution in the County Government carrying out public duties as mandated by the Constitution and the County Government Act, is capable of suing or being sued in the absence of an express statutory provision. However such suit ought to be brought through its titular head - the Speaker. The omission to cite the Speaker as such party is a technical omission that does not occasion the Assembly any prejudice. It is however a practice that must not be encouraged. The Court is aware of the argument gaining momentum of late that the court ought to focus on substance than technicalities while adjudicating disputes. To support this argument over-reliance has been placed on article 159(2)(d) of the Constitution which provides:

“In exercising judicial authority, the courts and tribunals shall be guided by the following principles—

(d) justice shall be administered without undue regard to procedural technicalities...”

The operative words here are **“undue regard”**, which means technicality still has a place in the administration of justice by the courts. Litigation must be structured and orderly for the court to effectively adjudicate the dispute before it. Rules of procedure therefore define the manner and extent to which parties to litigation should engage. The Court of Appeal in **Mumo Matemu's** case cited earlier in this judgment has stated:

“...the principle in Anarita Karimi Njeru case underscores the importance of defining the dispute to be decided by the court. In our view, it is a misconception to claim as it has been in recent times with increased frequency that compliance with rules of procedure is antithetical to article 159 of the Constitution and the overriding objective principle under sections 1A and 1B of the Civil Procedure Act (cap 21 and section 3A and 3B of the Appellate Jurisdiction Act (cap 9). Procedure is also the handmaiden of just determination of cases...”

35. I now turn to the issue whether the County Assembly may be sued for actions it undertakes pursuant to the Constitution and enabling legislation. Section 16 of the **CGA** provides that no civil or criminal proceedings may be instituted in any court or tribunal against a member of a county assembly by reason of any matter said in any debate, petition, motion or other proceedings of the county assembly. Further section 7 of the same Act provides that the national law regulating the powers and privileges of parliament shall with the necessary modification, apply to County Assembly. The national legislation alluded to in this section is the National Assembly (Powers and Privileges) Act which provides at section 12 that the decisions of parliament shall not be questioned in any court. The question therefore is: which and to what extent are the modifications envisaged by section 17 of the **CGA**? As a corollary, does the phrase “necessary modification” admit of the interpretation that the Court has jurisdiction to question anything done by the County Assembly in the exercise of its constitutional and statutory mandate?

36. County governments are miniature national governments structured and ordered in line with traditions and principles that govern the national government. To this extent the doctrine of separation of powers apply with equal measure.

37. The county governments were embraced in the new Constitution as vehicles for devolution through which government services could be brought closer to the people and also to provide them with opportunity to participate on how they would like to be governed. One of the mediums through which this participation is exercised is through the County Assembly. It is at the

Assembly floor that matters concerning and affecting the County Government are debated and resolutions or legislation passed for the betterment of the residents of the County concerned. Depending on the issue and the way a particular debator may have been acculturated, contributions on the Assembly floor may at times be abrasive and out of decorum under ordinary circumstances but that should be no reason for the Judiciary through the courts, as another arm of government, to interfere unless in exceptional circumstances. It is expected that these Assemblies as institutions of democracy and governance ought to engender a culture of decorum and decency expected in a civilised and democratic society and therefor reign in on debators who hide behind the privileges of the Assembly to conduct debates in a manner that lacks decorum.

38. The only possible scenario in which the Court may be prepared to interfere with the proceedings and decisions of the County Assembly and indeed Parliament is in extreme situations when these bodies act or conduct their proceedings in a manner that amounts to abrogation of the Constitution. I say so because article 1 of the Constitution vests the sovereign power on the people of Kenya which they can either exercise directly or through their democratically elected representatives. This sovereign power is delegated to parliament, legislative assemblies of the county governments, the judiciary and independent tribunals. So if in the purported exercise of this delegated sovereignty, an organ of the state acts in excess of such power, the High Court exercising its authority under article 165(3)(d) of the Constitution has power on being moved to issue appropriate orders in the circumstances. In recent case of Mumo **Matemu vs. Trusted Society of Human Rights Alliance & 5 Others Civil Appeal No. 290 of 2012** the Court of Appeal in interpreting the breadth and scope of article 165(3)(d) took a similar view and held as follows:

“...It is clear that on its face, the jurisdiction of the High Court is broad enough to cover review of the constitutionality or legality of appointments by other organs of government...”

A similar position was taken by the High Court in the case of **Federation of Women Lawyers Kenya (FIDA-K) & 5 Others vs. The Attorney General & Another [2011] eKLR** when the Court held:

“...If the process of appointment is unconstitutional, wrong, unprocedural or illegal, it cannot lie for the respondents to say that the process is complete and and this court has no jurisdiction to address the grievances raised by the petitioners...the jurisdiction of this court is dependent on the process and constitutionality of the appointment..”

39. In essence therefore, the intervention by the High Court in such cases is underpinned on the constitutional supremacy which requires that any violation of the constitution by parliament and indeed any organ of the state in the performance of its functions is amenable to judicial review.

40. For the Court to interfere however, the applicant or petitioner ought to demonstrate that the action or inaction by parliament or county assembly or any state organ for that matter, attacks the very fabric of the constitution which if left unchecked would destroy the foundation of our sovereignty and nationhood. The issue so to speak must traverse beyond just personal rights and liberties of the petitioner.

41. The petitioner's complaint is that he was refused recommendation for appointment to the Nyeri County Executive Committee on the allegations that he had once in his life faced a criminal charge in respect of which he was acquitted without prosecution. In as much as the court may hold the view that once acquitted, a person has the right to be presumed innocent, the consideration of the issue of the petitioner's prosecution by the county assembly if at all was the sole reason for disqualifying the petitioner did not amount to an extreme violation of the constitution to warrant intervention by this court. That is to say, the petitioner has not sufficiently demonstrated that he is not prompted by personal agenda and that he is acting bona fide with a view to vindicating the cause of justice beyond missed opportunity for employment. In this context, the court comes to the inevitable conclusion that whilst there exist situations when action may be commenced against a

county assembly, his complaints did not meet the threshold to warrant such action against the 1st respondent.

42. Before I leave the issue of the proper parties to this petition, it is important to state that the only party who was properly brought before this court was the 2nd respondent. The Attorney General had nothing to do with the petition and was wrongly joined to it. I say so because article 156(4)(b) of the Constitution provides that the Attorney General shall represent the national government in court or any other proceedings to which the national government is a party...". These proceedings were against the County Government. There is nowhere in the petition where any allegation was made or any remedy was sought against the national government to warrant representation by the Attorney General.
43. The second set of issues for determination are (b), (c) and (f). To these, Mr. Ng'ang'a submitted that reference to criminal proceedings in respect of which the petitioner had been acquitted violated his constitutional rights more particularly article 50(1) and (2). That is to say the fact that the petitioner's arraignment in court and his subsequent acquittal was used as a reason to deny him the appointment amounted to unfair labour practice and denied the petitioner the benefit of equality in the eyes of the law. According to Mr. Ng'ang'a, the fact that the petitioner had been acquitted made this a non-issue and the panel was thus guilty of impropriety by taking it into account. According to Mr. Mugambi however, the petitioner failed to show by way of affidavit, facts to establish that there were defects in procedure, fundamental omissions or consideration of an extraneous matter.
44. From the report of the Committee on Appointments, the petitioner was among sixteen people whose names were submitted by the 2nd respondent for approval for appointment by the Assembly. The Assembly on 4th June, 2013 directed that the names and accompanying information be referred to the Committee on Appointments for vetting and a report be submitted to the Assembly within 14 days in accordance with standing order number 42. According to the report, the Committee held 13 sittings during which it came up with the modalities of the vetting exercise and the said 16 nominees appeared before the Committee and were vetted in accordance with the Public Appointments (Parliamentary Approval) Act No. 33 of 2011. To this point the petitioner has not raised any complaint that the procedure adopted by the 1st and the 2nd respondent violated any laid down rule or procedure. That is to say nothing is contained in the petition or the supporting affidavit that attacks the integrity of the process up to this stage. The Court therefore reasonably assumes that the 1st and 2nd respondent to this extent, adhered to the law.
45. The petitioner therefore appears not to attack the procedure adopted by the 1st and 2nd respondent, but the substance of the vetting process itself. Pausing here, does the Court have jurisdiction to do so? In the case of **Trusted Society of Human Rights Alliance vs. The AG & 2 others Petition Number 229 of 2012** the High Court stated:
- "...the court is entitled to review the process of appointment to state or public offices for procedural infirmities as well as for legality. A proper review to ensure the procedural soundness of the appointment process includes an examination of the process to determine if the appointing authority conducted proper inquiry to ensure that the person appointed meets constitutional requirement."**
46. The Court is therefore clothed with jurisdiction to question the substance of decisions made by other organs of government such as the 1st and 2nd respondent but only to the extent of their constitutionality or otherwise. The Court must guard against the temptation to substitute its own opinion and judgment with that of other state organs properly mandated to make such decisions.
47. At page 25 of the report the Committee made the following observations:
- a) He has a Diploma in Philosophy, Diploma in theology, Bachelor in Religious Studies and a post graduate Diploma in Development studies.

- b) He is a part time lecture at Kimathi University and also Chairman of the local Council of St. Veronicah Catholic Church.
- c) He is the Chairman and founder of Mt. Kenya Tourism Circuit Association. He has been a member of the Nyeri Central Business District Association, Pembe Tatu neighborhood Association, Biashara Sacco Society Ltd amongst others.
- d) He has previously worked with Caritas – Nyeri for 16 years as Director promoting community based development projects.
- e) The Committee found out that he had been charged with a court case but had eventually been acquitted under Section 210, of the Criminal Procedure code and though he had been acquitted under section 210 of the Criminal Procedure code, the Committee observed that the case was merely dismissed on a technicality.
- f) The Committee was of the view that he did not satisfactorily answer the integrity issues.
- g) Further the committee found that he did not demonstrate appropriate knowledge and understanding of the dockets under the department of Tourism, Culture, Gender, Youth and Sports.
- h) Though well versed in tourism matters, he failed to address in any or any satisfactory way, matters relating to culture, Gender, Youth and Sports.
- i) The Committee was not satisfied with the capacity of the nominee to handle the functions under the department of Tourism, Culture, Gender, Youth and Sports.
- j) The Committee found the nominee **unsuitable for the appointment** as the Executive nominee for Tourism, Culture, Gender, Youth and Sports.
48. The petitioner was found unsuitable for appointment for two main reasons namely lack of integrity and failure to demonstrate appropriate knowledge and understanding of culture, gender youth and sports. Regarding the criminal case the Committee observed that the case was merely dismissed on a technicality. The relevant proceedings were attached to the petition and they clearly stated that the criminal case against the petitioner had been pending in court for close to four years during which time the trial did not start because of the constant absence of the appointed prosecutor and absence of the complainants.
49. The dismissal of the criminal case was indeed on a technicality as the veracity of the allegations against the petitioner which culminated in his arraignment in court were never tested. However as stated earlier, technicalities are also essential to the administration of justice. To arraign a person in court and keep him attending court for that long without the prosecution commencing amounts to injustice. Justice delayed is justice denied. It may well be that the allegations against him were unfounded hence no one was prepared to come forward to testify.
50. It is curious that neither the petitioner nor the 1st respondent, disclosed the nature of the charges the petitioner faced. The Committee too in its report did not make any such disclosure. All it said in conclusion was that the petitioner did not satisfactorily answer the integrity issues.
51. Not every criminal charge attacks the integrity of the person affected. Some offences such as certain categories of traffic or licensing offences are not considered as going to the integrity of the person affected. It was therefore necessary that the Committee discloses to the court, the charge and the extent to which it touched on the petitioners integrity in order for the court to be able to see whether they were issues that touched on the integrity of the petitioner to warrant his disqualification for appointment. In the absence of these the 1st respondent cannot justify its conclusion that the petitioner did not satisfactorily answer the integrity issues.

52. But this was not the only reason for which the petitioner was not recommended for appointment by the 1st respondent. According to the Committee's report, the petitioner also failed to demonstrate appropriate knowledge and understanding of the dockets under the department of Tourism, Culture, Gender, Youth and Sports to which he sought to be appointed. It was the Committee's view that although the petitioner was well versed in tourism matters, he failed to address in a satisfactory way, matters relating to culture, gender youth and sports. The petitioner did not attack the Committee's assessment on this issue. His major focus was on the fact that the committee made reference and presumably relied on his arraignment in court on charges that were ultimately dismissed for want of prosecution. However as stated before the criminal charge was not the sole reason for which his appointment was declined.

53. The Committee had the opportunity to interview the petitioner and in the absence of any material to show they acted in excess of their jurisdiction or took into account issues that they ought not to have taken into account, cannot be faulted. In conducting the process, the Committee and the 1st respondent were agents of the County Government hence had the duty and responsibility to recommend for appointment not only the best person for the job but also comply with the constitution and enabling statutes with regard to national values, gender balance and equity in public appointments. Nothing has been shown by way of evidence or affidavit that they acted contrary to the constitution or any law. The petitioner has merely made broad allegations of violations by the 1st and 2nd respondent without getting to the specifics of how and in what way the Committee violated those rights or failed to comply with the law. In the case of **Anarita Karimi Njeru vs. The Republic (1976-1980) 1KLR 1272** the court held as follows with respect to constitutional applications:

“... if a person is seeking redress from the High Court on a matter which involves a reference to the constitution, it is important that he should set out with reasonable degree of precision that of which he complains, the provisions said to be infringed and the manner in which they are alleged to be infringed.”

54. Concerning the claim that by rejecting to approve the petitioner's appointment the residents of Nyeri have been denied their fundamental economic and social rights, the court while reiterating the observations in **Anarita Karimi's case** observes that no credible connection has been established between the claimant's appointment and economic and social rights of the residents of Nyeri. Such rights have not only been unspecified but also their connection with the disapproval for appointment of the petitioner, too remote. For the court to so hold would be tantamount to saying that without the petitioner's skills the residents of Nyeri County's economic and social rights are in jeopardy. The petitioner has not and indeed cannot possibly demonstrate that he must be the one to be offered the job and if not the residents of Nyeri County are in jeopardy in so far as their socio-economic rights are concerned.

55. Regarding who should bear the costs of the petition, the Court takes the view that litigation around the new constitution is one of the ways of its implementation. It has been lauded as one of the most progressive constitutions in modern times. In order to develop jurisprudence on its various provisions, the court ought to display more latitude to people who have the courage to seek interpretation of the various values and principles contained in it. An order for costs should therefore be made only in those cases where it can be sufficiently demonstrated that the petitioner was not furthering the development of constitutionalism.

56. It cannot be said that the petition raised issues that were so insubstantial and so attenuated that this Court could not render an interpretation or a decision. The vetting process is a new phenomenon in our public appointment's hence litigation arising out of the process cannot by any manner of interpretation be considered insubstantial. The Court would in the circumstance order that each party bears his or her own costs.

57. To sum it all, for reasons given above, this petition while presented an opportunity for the

Court to interpret various issues arising out of the Constitution and more particularly the devolved government, fails on its own merit and is hereby dismissed with no order as to costs. This order as stated earlier will apply with the same effect to Petition number 10 of 2013.

58. It is so ordered.

Dated and delivered at Nyeri this 10th day of September, 2013.

NELSON ABUODHA J.

JUDGE

Delivered in open Court in the presence of Mr. Nga'ang'a for the Petitioner and Mr. Mugambi for the 1st Respondent, Mr. Wahome for the Second respondent and no appearance for the Attorney General.

NELSON ABUODHA J.

JUDGE