



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

PETITION NO.8 OF 2013

**IN THE MATTER OF ALLEGED VIOLATION OF FUNDAMENTAL RIGHTS AND
FREEDOMS UNDER ARTICLES 27 OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF ENFORCEMENT OF BILL OF RIGHTS UNDER ARTICLE 22, 23 AND
165 OF THE CONSTITUTION OF KENYA**

BETWEEN

TACHE BOSSA)

JARSO MOKU)

JARSO HALKANO)

ABDI JILLO DADACHA)

MWILARIA BENARD KAINDO).....PETITIONERS

VERSUS

THE INTERIM CLERK ISIOLO GOVERNMENT)

SPEAKER OF ISIOLO COUNTY ASSEMBLY)

GOVERNOR ISIOLO COUNTY)

HON. ATTORNEY GENERAL).....RESPONDENTS

RULING

The petitioners filed this petition on 5th June, 2013 pursuant to Articles 22,23 and 165 of the Constitution of Kenya against the respondents herein being the interim clerk Isiolo County Assembly, Speaker of Isiolo County Assembly, Governor of Isiolo County and the Attorney General seeking a declaration that the 1st, 2nd and 3rd respondents acted in violation of the provisions of the Constitution and the County Government Act by failing to include all the people especially the Meru, Turkana, and the disabled in their list of nominees for appointment to the County Executive Committee. An injunction restraining the

1st, 2nd and 3rd respondents, their agents and persons acting at their behest from vetting/approving and/or swearing in nominees for both the County Executive Committee and County Public Service Board as published on 1/6/2013, Daily Nation Newspaper. That the list of nominees as published be discarded and an order do issue directing that the process of recruitment for appointment to the County Executive Committee and the County Public Service Board be done afresh to meet the tenets of the Constitution of Kenya and the relevant law. That costs of the petition be borne by the 1st, 2nd and 3rd respondents.

The 1st, 2nd and 3rd respondents filed their response on 22nd July, 2013 through the firm of M/S Arthur Ingutya & Co. Advocates. The respondent contended that the provision of the relevant law including the Constitution were followed to the letter and that the Meru and Turkana communities benefitted from the appointment, that reflected a thorough process that was undertaken pursuant to the law and in consideration only of the applications that were made. The respondents further contended that the entire petition was defective and was an abuse of the court process. It was further contended that the court lacked jurisdiction to hear and determine this petition and that there was a similar petition pending before this court being Meru H.C. Petition No. 7 of 2013 filed by a group of citizens against the respondents herein seeking the same orders as those sought in this petition and the 1st, 2nd and 3rd respondents maintained this petition is sub-judice.

On 7th June, 2013 the court directed that the petition be served and that direction be given on 1st July, 2013 on the hearing and determination of the petition. On 1st July, 2013 by consent of parties the petitioners were to file and serve written submissions within 14 days and the respondents to respond within 7 days from the date of service and highlighting was set for 23rd July, 2013. By 23rd July, 2013 the petitioners had not filed their written submissions consequently the court granted them 5 more days to file and serve their written submissions and highlighting was once again set for 5th August, 2013. That on 5th August, 2013 the petitioners sought time to reconsider the way forward in respect of their petition and the matter was set for mention on 7th August, 2013. On 7th August, 2013 the petitioners and their counsel did not attend court hence the court stood over the petition and condemned the petitioners to pay costs of Kshs.3500/- together with court adjournment fees before next hearing or mention date. The matter was subsequently set down for mention on 2nd September, 2013 by the Deputy Registrar and all parties served. Mr. E. Kimathi, Advocate held brief for Mr. Mokuia for the petitioners and sought 14 days to file submissions. The application was granted and matter set down for highlighting on 25th September, 2013. On 25th September, the Counsel for the petitioner did not attend nor did he file any submissions for consideration by the court.

Mr. A. Ingutya who appeared for the respondents relied on the respondents' response dated 2nd July, 2013 and submissions dated 19th July, 2013 and list of authorities. Mr. Ingutya Advocate submitted that the petition is sub judice as the petition is ostensibly in the interest of the public and the issues put forth are the exact issues put forth in High Court Petition NO. 7 of 2013 filed by JOSEPH KALAPATA & 2 Others against the same respondents. That the rights sought to be enforced are exactly the same and the groups alleged to be aggrieved are the same. That is Meru and Turkana communities. He submitted that to allow this petition would be scandalous of this Honourable Court because the court will end up with two decisions on the same issues.

He also averred that the possibility of conflicting decisions on same issues cannot be ruled out. This court has not been supplied with copies of the pleadings in petition No.7 of 2013 and the petitioners' counsel did not attend court to respond on the issue of sub judice. This court do not have pleadings and submissions from the petitioners to make an informed decision on this issue. Consequently this court would not be in a position to say whether the petition is sub judice or not for want of sufficient particulars and petitioners response. I therefore decline to make a finding on the issue of sub judice.

The respondents' counsel further submitted the petition falls short of the required standards of proof. That the cause should have been specifically pleaded and proved. He submitted that there is no evidence on record to prove the allegations against the respondents.

The court has noted that apart from the filing of the petition no submissions were tendered by the petitioners and no evidence was adduced before this court to prove the allegations set out in the petition. The petition is general in its nature and has no specific particulars attributed to the respondents.

The petitioners in spite of having been given sufficient time to file their written submissions have failed to do so. There has been no attempts whatsoever to prosecute the petition. The petitioners have not even complied with the court's order in paying costs ordered against them. This is a clear indication that the petitioners are not serious with this petition and is intended to abuse the court process.

The burden of proof lies always with he who asserts. The petitioners made serious assertions against the respondents but did not prove or attempt to do so. I find the petition has not been prosecuted and ought to be dismissed.

In view of the fact that the petition was not prosecuted, the same is dismissed with costs of the petition to the respondent.

DATED, SIGNED AND DELIVERED AT MERU THIS 24TH DAY OF OCTOBER, 2013.

J. A. MAKAU

JUDGE

Delivered in open court in the presence of:

1. Mr. Mokuu for the petitioners
2. Mr. Kiambi h/b for Mr. A. Ingutya for the respondent

J. A. MAKAU

JUDGE