



Bunge Mashinani Initiative v County Governor of Kiambu & 2 others (Constitutional Petition E004 of 2023) [2023] KEHC 18671 (KLR) (19 June 2023) (Judgment)

Neutral citation: [2023] KEHC 18671 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CONSTITUTIONAL PETITION E004 OF 2023**

PM MULWA, J

JUNE 19, 2023

IN THE MATTER OF ARTICLES 1(1), 3(B), 1 (4) 2, 3, 10, 19, 20, 21, 22, 23, 27, 28, 40, 47, 50, 73, 174, 176, 178, 185, AND 258 OF THE CONSTITUTION OF KENYA AND FUNCTIONS OF THE COUNTY GOVERNMENT IN THE FOURTH SCHEDULE OF THE CONSTITUTION AND SECTION 10 OF THE PUBLIC APPOINTMENTS (COUNTY ASSEMBLIES APPROVAL) ACT, SECTIONS 8, 9, 14, 19 AND 31 OF THE COUNTY GOVERNMENT ACT

BETWEEN

BUNGE MASHINANI INITIATIVE PETITIONER

AND

COUNTY GOVERNOR OF KIAMBU 1ST RESPONDENT

SPEAKER, KIAMBU COUNTY ASSEMBLY 2ND RESPONDENT

COUNTY ASSEMBLY OF KIAMBU 3RD RESPONDENT

JUDGMENT

1. By a petition and notice of motion application dated January 25, 2023, the petitioner herein Bunge Mashinani Initiative approached the court seeking conservatory order restraining the respondent's acting either in person or through their servants or agents from taking up office.
2. The gist of the petition is that on November 8, 2022, the Governor of Kiambu County proposed a list of 10 County Executive Committee Members (CECM) to the County Assembly for approval and appointment. The County Assembly approved 5 names and rejected the other 5 giving reasons for the rejection. The rejected names are as follows:
 1. Nancy Kirumba Finance, ICT and Economic Planning
 2. Margaret Ruinge Administrative and Public Services



3. Salome Muthoni Wainaina Housing, Physical Planning, Municipal
 4. Administration and Urban Development Wilfred Mwenda Kiara Agriculture, Livestock and Cooperatives
 5. Development Dr Elias Mbuthia Health Services
3. In a special sitting on January 20, 2023 the 2nd and 3rd respondents confirmed the irregular appointment of the 5 rejected names. It was averred that the 1st respondent breached the law by swearing them into office. The swearing-in was done in contravention of the law. The names were not gazetted.
 4. In the petition, the petitioner sought the following prayers:
 - a. A declaration that the respondents acted in contravention of the constitutional provisions and other laws in the irregular appointments of the 5 initially rejected nominees.
 - b. A declaration that the persons that were rejected as nominees to the office of the County Executive Committee Members of Kiambu County are not duly appointed as such.
 - c. Pending the hearing and subsequent determination of this application and petition, a conservatory order be issued restraining the respondents acting either in person or through servants, agents, police officers, employees or anyone else from recognizing the five rejected nominees as County Executive Committee Members for Kiambu County Government.
 - d. An order that the County Government makes all County Assembly proceedings available for the public through all the established platforms.
 - e. An order that each party should bear their costs because this petition is in the public interest.
 - f. Any other such further orders as it may deem fit.
 5. In response the 1st respondent filed grounds of opposition dated February 22, 2023, and raised 11 grounds. The 1st respondent submits the petitioner's application as filed is incurably defective, as it fails to give names of people seeking to be restrained from taking office, that the power to consider the suitability question is not a judicial power but a legislative power and that the court should restrain exercising its jurisdiction due to separation of powers. The cases relied on were the Supreme Court decisions in *Justus Kairuki Mate v Martin Nyaga Wambora & Anor* (2017) eKLR, and *Mumo Matemu v Trusted Society Human Rights Alliance & 2 others* (2013) eKLR. It was submitted that the County Assembly may reject, approve and make a decision before communicating the decision to the executive arm of government. And that no evidence has been attached showing an invalid decision. There is no provision for the gazetting of names of County Executive Members in the Kenya Gazette, and therefore the petition and the application failed to meet the threshold for granting conservatory orders.
 6. Charles Thiongo filed a replying affidavit on behalf of the 2nd and 3rd respondents in which he deposes that he is the speaker of the 3rd respondent. He states that the petition is fatally defective, incompetent and bad in law and premised on misrepresentation of facts. He denies the 2nd and 3rd respondents were in contravention of the law. The 2nd and 3rd respondents strictly adhered to the 3rd respondent's standing orders amended on September 27, 2017 in the approval of the nominees. The special meeting



of January 20, 2023, was called after a special request by the Members of the County Assembly *vide* a letter dated January 13, 2023, with the sole reason of rescinding their previous decision. The decision to rescind its decision was based on standing order No 69 of the Kiambu County Assembly standing orders.

7. The 2nd respondent submits the rationale for considering the assembly's decision was based on the fact that the previous decision was erroneous, having been based on inaccurate information and the report contained errors and omissions on the nominees' academic qualifications, professional competencies and work experience. There were valid, legitimate and genuine circumstances which warranted the reconsideration of the decision of the Assembly regarding the CECM nominees.
8. At the application hearing, Mr Makori for the petitioner urged the court to find that the 1st and 2nd respondents are in contravention of the *Constitution*. He submits that if one's nominees are rejected there should be fresh nominees. He further submits that there was a challenge in obtaining the information on the standing orders when preparing the petition. The first 5 names to be approved by the County Assembly were gazetted while the subsequent nominees approved during the special meeting were not gazetted. He urged the court to allow the prayers sought.
9. Mr Wanyama for the 1st respondent, while submitting relied on the grounds of opposition filed on February 22, 2023. That the petition fails to meet the threshold of commencing a constitutional petition as no clear provision of the *Constitution* has been cited to have been infringed as cited in the Annarita Karimi Njeru Case. The breach must be clearly stated and there is no declaratory order in the petition regarding any breach, especially on the County Assembly Appointment Act.
10. Further counsel submits the County Governor does not influence proceedings in the County Assembly and the County Assembly was guided by the standing orders in rescinding their decision. That the decision to adopt the standing orders is lawful and the court is estopped from interfering with the internal decision of the County Assembly and should uphold the doctrine of separation of powers. He urged the court to dismiss the petition.
11. Mr Burugu for the 2nd and 3rd respondents in his submissions relied on the supplementary affidavit of Charles Thiongo. He submits that the prayers sought in the petition are not clear, the petition is premised on assumptions. That the errors made by the County Assembly having been realised were rescinded before communicating the decision to the Governor of Kiambu County.
12. Counsel submits standing order 69 (2) (a) allows members of the County Assembly to move a motion to rescind their earlier decision. He urged the court to dismiss the petition for want of merit.
13. In rebuttal Mr Makori counsel for the petitioner submits this court has jurisdiction to regulate public bodies including the County Assembly. The relevant provisions of the *constitution* violated have been cited. He submits that the respondents have admitted to mistakes made in approving the 5 members of the County Executive Committee. The court should thus intervene and grant the orders sought.

Analysis and determination

14. I have considered the petition, the affidavit in response and the arguments by counsel and the following are the issues for determination:
 - i. Whether the court is vested with the jurisdiction to hear the petition?
 - ii. Whether the petition is proper?



- iii. Whether the approval of the 5 rejected nominees was contrary to the provisions of the constitution?
 - iv. Whether the orders restraining their assumption of office should issue.
15. Jurisdiction is everything and without jurisdiction, a court ought to down its tools (See *Benson Makori Makworo v Nairobi Metropolitan Services & 2 others* [2022] eKLR). I will therefore determine whether this court is vested with the jurisdiction to hear the petition filed.
 16. Counsel for the respondent urged the court not to not interfere with the powers of the County Assembly and adhere to the doctrine of separation of powers. That the court lacked the jurisdiction to interfere with the decision of the respondents. On the other hand, counsel for the petitioner argued the court is vested with the jurisdiction to hear and determine the petition on merit.
 17. While this court appreciates the doctrine of separation of powers, it is important to elaborate that the said doctrine gives each arm of government the space to carry out its constitutional mandate and functions while bearing in mind the fact that there are checks and balances from the other arms. The court is one such arm of government and therefore must ensure it keeps in check the other arms.
 18. The Supreme Court in *Re: Matter of the Interim Independent Electoral Commission* Advisory Opinion No 2 of 2011 expressed itself as follows:

“The effect of the constitution's detailed provision for the rule of law in the process of governance, is that the legality of executive or administrative actions is to be determined by the courts, which are independent of the executive branch. The essence of separation of powers, in this context, is that in the totality of governance, power is shared out among different organs of government and that these organs play mutually-countervailing roles. In this set-up, it is to be recognized that none of the several government organs functions in splendid isolation.”
 19. Further article 165 (d) of the Constitution, vests the High Court with the jurisdiction to hear and determine issues of interpretation of the Constitution, or determination of issues raised in contravention with the Constitution. It can also be moved to determine issues raised where organizations act in procedural or impropriety behaviour and breach the provisions of the Constitution.
 20. This court is of the considered view that the Constitution vests the judiciary with the responsibility of checking the constitutionality of acts carried out by the other arms of government while upholding the doctrine of separation of powers.
 21. Consequently, I find this court is vested with the jurisdiction to determine the issue raised in the petition. Having so found, I now proceed to determine whether the petition filed is proper.
 22. The respondents submit that the petition, as filed, is defective and incompetent as it fails to clearly state the provisions of the constitution that have been violated or breached by the respondents. Counsel submit it is trite law that when a person is challenging the breach of the provisions of the constitution the breached provisions should be set out as stated in the Annarita Karimi Njeru Case.
 23. The petitioner avers that the contravened provisions of the law have been specifically pleaded. The petitioner states the 5 nominees initially rejected, were approved and appointed in contravention of the constitution and other relevant laws and it has moved the court to issue a declaratory order to the effect that the 5 members were unlawfully appointed into office.



24. In the celebrated case of *Annarita Karimi Njeru v Republic* (1979) 1 KLR 154 the threshold for filing petitions was set out thus;

“We would however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the *constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and how they are alleged to be infringed.”

25. I have perused the petition and I do note that it fails to detail and particularize the provisions of the *constitution* that have been infringed. The petition only lists the provisions of the *constitution* in which it is anchored but the same are not particularized. I thus find the petition fails to meet the threshold set in the *Annarita Karimi case* (supra). From the foregoing I find the petition herein must fail.

26. On whether the approval of the 5 rejected nominees was contrary to the provisions of the *constitution*, the petitioner argues the move by the 1st respondent in swearing in the 5 initially rejected employees is in contravention of the *constitution* and has urged the court to issue a declaratory order restraining the 5 nominees from assuming office.

27. On the other hand, the 2nd and 3rd respondents contend that the appointing committee interviewed the candidates and that the errors initially made in rejecting the 5 nominees were on academic qualifications. And in an attempt to correct the errors, the committee, before submitting the report to the 1st respondent sought the permission of the speaker to call for a special meeting to rescind the decision as per the standing order 69 of the Kiambu County Assembly which provides:

“(1) No motion may be moved which is the same in substance as any question which has been resolved (either in the affirmative or in the negative) during the preceding six months in the same session.

(2) despite paragraph 1

(a) a motion to rescind the decision on such a question may be moved with the permission of the speaker.”

28. The 2nd and 3rd respondents submit the decision of the hiring committee was not influenced in any way by the 1st respondent. That the committee decided to amend its decision before the report was tabled to the 1st respondent. I have perused the attached list of committee members in attendance who requested the calling of a special meeting.

29. This court finds the appointing committee is mandated by the standing order to rescind its previous decisions. It is my considered view that the respondents did not act in contravention of the *Constitution*.

Final Orders

i). The petition herein is bereft of merit and is hereby dismissed.

ii). This being a matter of public interest matter each party to bear their own costs.

30. Orders accordingly.

JUDGMENT delivered virtually, dated and signed at **Kiambu**



This 19th day of June, 2023.

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P.M. MULWA

JUDGE

In the Presence of:

Kinyua – Court Assistant

Mr. Makori for the Petitioner

Mr. Kurgat b/b for Mr. Peter Wanyama for the 1st Respondent

Mr. Burugu for the 2nd & 3rd Respondents

Page 4 of 4

