



Moindi v County Governor, Machakos County & 4 others (Constitutional Petition E019 of 2022) [2023] KEHC 20701 (KLR) (13 July 2023) (Judgment)

Neutral citation: [2023] KEHC 20701 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CONSTITUTIONAL PETITION E019 OF 2022**

MW MUIGAI, J

JULY 13, 2023

IN THE MATTER OF ARTICLES 10, 22, 23, 37,56, 73, 75, 174, 175, 176, 179, 197, 232, 258 & 259 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF CONTRAVENTION OF ARTICLES 27 & 56 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF SECTIONS 30(1) & (2) IF THE COUNTY GOVERNMENTS ACT 2012

BETWEEN

THOMAS MOINDI PETITIONER

AND

COUNTY GOVERNOR, MACHAKOS COUNTY 1ST RESPONDENT

COUNTY GOVERNMENT OF MACHAKOS 2ND RESPONDENT

SPEAKER, COUNTY ASSEMBLY OF MACHAKOS 3RD RESPONDENT

COUNTY ASSEMBLY OF MACHAKOS 4TH RESPONDENT

MACHAKOS COUNTY PUBLIC SERVICE BOARD 5TH RESPONDENT

JUDGMENT

1. The Petitioner, Thomas Moindi is an adult citizen, a patriot who is a resident and investor in Machakos County and is of the Kisii community.
2. The 1st Respondent, County Governor, Machakos County is the Governor of Machakos County



3. The 2nd Respondent, County Government Of Machakos, is the County Government provided for under Article 176 of the [Constitution](#) as read together with the [County Governments Act](#).
4. The 3rd Respondent, Speaker, County Assembly Of Machakos is the speaker of a County Assembly elected under Article 178 of the [Constitution](#) as read together with the [County Governments Act](#).
5. The 4th Respondent, County Assembly Of Machakos is the County Assembly established under Article 176 of the [Constitution](#) as read together with the [County Governments Act](#).
6. The 5th Respondent, Machakos County Public Service Board is described as a collectivity of all individuals performing functions within any department of the County Government or its agency but does not include the Governor, Deputy Governor, members of the County Executive Committee and members of the County Assembly.

The Petition

7. Vide a Petition dated 27.10.2022 and filed on 31.10.2022, the Petitioner seeks the following orders;
 - a. A declaration that the list of nominees made by Governor of Machakos County (1st Respondent) is discriminatory against the Petitioner and other minority groups within the County, does not represent the community and cultural diversity of Kenya and there was a clear violation of Article 27 of the [Constitution of Kenya, 2010](#) and section 35 of the [County Governments Act, 2012](#)
 - b. An order of *certiorari* quashing the list of nominees to the County Executive Committee announced by the Governor of Machakos H.E. Wavinya Ndeti on October 19.2022
 - c. An order that the Governor of Machakos County conducts fresh nominations adhering to the relevant provisions of the [Constitution](#), the [County Governments Act](#) and taking into account the ethnic balance among the nominees.
 - d. Costs of the Petition.
 - e. Any other orders that the court may deem fit and just to grant.
8. The Petition is supported by the affidavit of Thomas M. Moindi deponed on 27.10.2022. the Petitioner avers that the 1st Respondent named 10 County Executive Committee members, they were; Consolata Mutisya (devolution), Onesmus Muia (finance), Dr. Daniel Yumbya (health), Nathaniel Nganga (roads/transport), Philip Kilonzo (lands), Bishop Zoel Nzomo (agriculture), Mutanu Raphael (water), Joyce Mwikali (education), Sharon Mutua (trade) And Onesmus Muasya (Sports/Gender).
9. The names were to be forwarded to the County Public Service Board for Vetting/ Approval hearing scheduled to be conducted on Thursday, October 27, 2022 and Friday, October 28, 2022 according to an advertisement in the Daily Nation on Wednesday, October 19, 2022 which the Petitioner avers was postponed and is apprehensive may take place at any time.
10. The Petitioner contends that the nominees do not reflect the community and cultural diversity of Kenya stipulates in Section 35 (1) of the [County Governments Act](#), that 9 of the nominees are from Kamba Community representing 90% and 1 is from Kikuyu Community representing 10%. The nominees do not represent the minority communities living in Machakos County including Kisii, Asian, Kikuyu, Borana, Maasai, Luo and Swahili despite them living there for a long time and investing heavily in the county.



11. The Petitioner avers that the Governor is empowered to nominate executive committee members under section 35 (2) of the [County Governments Act](#) and the list submitted for approval is in compliance with Article 197(1) of the [Constitution](#).

1st, 2nd & 3rd Respondent's Replying Affidavit

12. A Replying Affidavit in opposition of the Petition was deposited by Dr. Victor Muya Ndambuki, the County Secretary of the 1st Respondent who stated that the Petition did not meet the threshold for Constitutional Petitions as specifically enunciated in the Anarita Karimi case to the extent that it does not plead with specificity which Articles of the [Constitution](#) or Fundamental Rights of the Petitioner have been breached to warrant the lodging of a Constitutional Petition. The Petition seeks to question compliance with statute, the [County Governments Act](#) and thus cannot be litigated in a Constitutional Petition.
13. It was contended that the petition was overtaken by events and the Petition in its present form is an academic exercise meant to waste the Honourable Court's time as the County Executive members have since been sworn into office.
14. Further, that the nominees are being condemned unheard as they are not parties to these proceedings and if the Petitioner has complaints against such parties he has an avenue of seeking the removal of each member in the manner provided by law under Section 40 and 78 of the [County Governments Act](#) for incompetence, abuse of office, gross misconduct, gross violation of the [Constitution](#) or other law or conviction of an offence punishable by imprisonment for at least 6months or resignation. It was contended that the nominees have a right to be heard as they have individually acquired rights and responsibilities.
15. It was contended that the Petitioner having voluntarily withdrawn the Notice of Motion Application that had sought conservatory orders then there is nothing that remains since the nominees have now been successfully vetted and appointed into office. In addition, The Petitioner had not provided any factual evidence in support of the ethnic demographic of persons who reside in and have settled in Machakos county in support of the assertion that a particular community has been left out of the appointments nor evidence of the ethnicity of all the nominees and is inviting the court to infer the same from names.
16. It was contended that the members of the County Executive Committee are spread from all the sub counties in the county in order to accord the sub counties representation. Further, the composition is widespread and accommodates a majority of all ethnic groups in Kenya based on their competencies and qualifications. Article 179 (3) of the [Constitution](#) provides no more than 10 positions for County executive members and the forty-seven tribes who cannot all be accommodated at the same time.
17. It was contended that there was public participation and members of the public were invited to share their views and comments on the nominees during the vetting and before they were approved for appointment. Despite the invitation, the Petitioner did not present any views before the Assembly neither did he challenge the process before the assembly.

1st, 2nd & 5th Respondent's Notice Of Preliminary Objection

18. The same is dated 2.12.2022 and filed on the same date. The grounds raised are;
 - a. The Petition herein does not raise an issue on violation of constitutional rights but is anchored on alleged non-compliance with statutory provisions which is not a matter to be litigated as a constitutional petition.



- b. The petition as presented is in contravention of Rule 10 (2) of the *Constitution of Kenya (Protection of Fundamental rights and Freedoms) Practice and Procedure Rules, 2013*. The Petition herein has not set out in precision the specific provisions of the *Constitution* which have allegedly been violated and the manner in which they are violated. The petition fails to meet the precision test as set in the Anarita Karimi Case on enforcement of violation of the *Constitution*.
- c. The Petition is a mere academic exercise since the nominations the Petitioner is challenging have since been acted upon and the nominees substantially appointed to their positions.
- d. The Petition herein offends the provisions of section 40 *County Governments Act* which sets out the manner in which members of county executive committee may be removed from office and on specific grounds.
- e. It is in the interest of justice that the petition and the entire proceedings be dismissed and struck out.

3rd & 4th Respondent's Replying Affidavit

- 19. The same is deposed by Joseph Laban Mutisya, the clerk/Accounting officer of the 4th Respondent who opined that in spite of the opportunity for public participation provided to the Petitioner and the general public through advertisement in the newspaper, no feedback/ memoranda on the issues raised by the Petitioner herein was received for consideration by the County Assembly of Machakos.
- 20. That the arguments assume that the appointees do not reflect the community, cultural diversity and are not based on tangible references that substantiate failure of the 4th Respondent to comply with the law. It was contended that the value of transparency, inclusiveness, gender, social justice, accountability, sustainable development and non-discrimination were upheld in the process of vetting and subsequent appointments into office.
- 21. The 4th Respondent contends that it has complied with the objectives of devolution under Article 174 of the *Constitution* by ensuring continued delivery of service by vetting and approving the nominees for appointment and it is the Petitioner acting against the interest of devolution as the nominees have been appointed and have settled into their offices to be of service to the citizenry of Machakos county. Further, no contention had been raised against their ability to represent the minorities and marginalized communities.
- 22. It was contended that the threshold emphasized by the petitioner should not be looked at in isolation of other requirements and provisions of the *Constitution of Kenya, 2010* which require the best interest of the citizenry to be met. He said they considered the nominees' backgrounds and exposure to different cultural diversities, adversities and unique situations to arrive at the conclusion that they formed a complete face of Machakos County in terms of the threshold emphasized by the Petitioner.
- 23. It was contended that the petitioner filed this petition as an afterthought after failing to participate in the vetting process and his motive is not in the best interest of the county. Lastly, the report of the 4th Respondent's committee on appointments demonstrates that they were well informed of the legal provisions and the same were put into consideration.

Supplementary Affidavit

- 24. The same was deposed by Thomas M. Moindi and filed on 7.5.2023 where he stated that the vetting process that was advertised in the Daily Nation was postponed and it was not clear when it would be



done. It was averred that upon service of the Petition and the Application herein, the 4th Respondent hastily approved the names of the nominees who were hastily sworn in by the 1st Respondent. The Court was urged not to accept the averment that the Petition was overtaken by events as it was filed on time and the Respondents are to blame for deliberately acting in a manner solely to defeat justice.

25. There was no evidence of public participation conducted by the Respondents as they are under an obligation to do so to the level prescribed by the Supreme Court in various decisions including *British American Tobacco vs Cabinet Secretary of Health & others* [2019].
26. Parties filed submissions on the Preliminary objection and the substantive Petition.

Petitioner's Submissions

27. The Petitioner filed submissions on 17.05.2023 and submitted on 4 grounds. As to whether the Preliminary Objection is well founded in law, it was submitted whole relying on the case of *Mukisa Biscuits Manufacturing Limited vs West End Distributors* (1969) EA 696, *Oraro vs Mbaja* (2005) it was submitted that the Petition raises weighty and serious constitutional questions entailing violation of the *Constitution* including Article 10,27,174 and 232. In addition that it is categorically questioning the integrity of the process towards the nomination, vetting and appointment of the County Executive Committee members and that does not deal with the removal from office as set out under Section 40 of the *County Governments Act*.
28. Secondly, as to whether the Petition was a mere academic exercise since the nominations the Petitioner is challenging have since been acted upon and the nominees substantively appointed to their positions, it was submitted that in the negative as there still exists controversy between the parties as the appointments were done in contravention of the *Constitution* and written law. further, that the matter remains practical in human nature and the orders sought are substantial despite the appointment having taken place. It was also submitted that there is no deadline for the court to intervene and make a declaration of unconstitutionality and any act or omission that is in breach of the *Constitution* is null and void ab initio.
29. Reliance was placed on the case of *Republic vs Kenya Maritime Authority & Another, Zam Zam Abipping Limited (interested party)* [2021] KEHC 309 (KLR), *Shadrack Kinyanjui Wambui vs Independent Electoral and Boundaries Commission & 2 others* [2017] eeKLR, *Daniel Kaminja & 3 others (suing as Westland Environmental Caretaker Group) vs County Government of Nairobi* [2019], *Mutua vs the Governor, Kitui County and 4 others, Job Muisyo, Acting municipal Manager, Kitui Municipality & 3 others (interested party)* [2002] KLR, *Katiba Institute vs Attorney General & 9 others* [2018] e KLR and *Independent Electoral Commission vs Langeberg Municipality* (2001).
30. As to whether the Petition raises any constitutional question to warrant intervention by the court, it was submitted that the court does not have a deadline to rule on unconstitutionality of an action. Article 2 (1) of the *Constitution* provides that the *Constitution* is the Supreme law of the land that binds all state organs and persons and there is no exception to the applicability of the *Constitution*. It was submitted that no court could entertain and argument that seeks to limit the applicability of the *Constitution* as the Respondent seeks to do.
31. Further to the contentions in the Petition, it was submitted that Article 174 of the *Constitution* provides for the objects of devolution to include recognition of minorities, protection and promotion of minorities and marginalized communities as well as Article 232 (1) (h) which provides that;
 1. The values and principles of public service include—
 - (a) high standards of professional ethics;



- (b) efficient, effective and economic use of resources;
- (c) responsive, prompt, effective, impartial and equitable provision of services;
- (d) involvement of the people in the process of policy making;
- (e) accountability for administrative acts;
- (f) transparency and provision to the public of timely, accurate information;
- (g) subject to paragraphs (h) and (i), fair competition and merit as the basis of appointments and promotions;
- (h) representation of Kenya’s diverse communities; and
- (i) affording adequate and equal opportunities for appointment, training and advancement, at all levels of the public service, of-
 - (i) men and women;
 - (ii) the members of all ethnic groups; and
 - (iii) persons with disabilities.

32. Article 27(4) provides that;

“The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.”

33. This point was buttressed by the cases of *Benard Ambasa vs Institute of Human Resources Management & 3 others* [2021], *Mutua vs the Governor, Kitui County & 4 others* (*supra*)

34. Thirdly, as to whether the Petition is about removal from office of the County Executive Committee Members, it was submitted in the negative. The Petitioner contended that the Petition is about violation of Article 10,27,174 and 232 of the Constitution and non-compliance with Section 35 (1) of the County Governments Act 2012. He relied on the case of *Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 others* (2013) e KLR.

35. It was submitted that Section 35 of the County Governments Act provides that;

- (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) consider 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 consider—
 - (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.



36. It was submitted that the nominees do not represent the minority communities living in Machakos County including Kisii, Asian, Kikuyu, Borana, Maasai, Luo and Swahili despite them living there for a long time and investing heavily in the County. The Minority communities are listed in “Unmasking Ethnic Minorities and Marginalized Communities in Kenya Report” by National Gender and Equality Commission.
37. The Petition submitted that there was a difference between section 35 and section 40 which deals with removal from office of the County Executive Committee members.

1st, 2nd & 5th Respondents Submissions

38. The submissions were filed on 7.2.2023. First, as to whether the Preliminary Objection should be upheld, it was submitted that the Petition is based on alleged noncompliance with Section 35 of the [County Governments Act](#) and does not set out or allege violation of any provision of the [Constitution](#).
39. The Respondents relied on the case of Godfrey Paul Okutoyi (suing on his own behalf and on behalf of and representing and for the benefit of all past and present customers of banking institutions in Kenya vs Habil Olaka – Executive Director (secretary) of the Kenya Banker’s Association being sued on behalf of Kenya Bankers Association & Another (2018) eKLR.
40. It was submitted that the Petition seeks to have members of the County Executive Committee removed from office and thus the Petitioner has an obligation to comply with the provisions of Section 40 of the [Act](#) if he desires to have members removed from office.
41. That the petition has been overtaken by events as the nominees whose nomination is challenged have since been appointed to office vide Gazette Notice Vol CXXIV No 236. The Petitioner did not seek to amend his petition, include those persons in the petition herein and the form as is, has been overtaken by events. It is a principle of natural justice as captured in Article 10 of the [Constitution](#) that no person can be condemned unheard. Reliance was placed on the case of [Msagha vs Chief Justice & 7 others](#) Nairobi HCMCE [2006] 2 KLRE 553.
42. While making reference to the case of [Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 others](#) (2013) e KLR, it was submitted that Rule 10 of the [Constitution of Kenya \(Protection of Fundamental rights and Freedoms\) Practice and Procedure Rules, 2013](#) requires that the petition should set out in precise detail the rights or freedoms threatened with violation which has not been done in the present petition as the Petitioner has merely recited and stated articles of the [Constitution](#) without setting out the manner in which they were violated or threatened with violation.
43. On the issue of public participation, it was submitted that it is not disputed that the Respondents conducted a public vetting of the nominees, invited members of the public to make representations on the nominees and a public vetting and enquiry on their qualification was done. The petitioner did not raise any objection to their qualification or competence at the public forums and cannot do so at this juncture, it was contended. The petitioner did not exhaust or even attempt to pursue the avenue provided to challenge the said action.
44. Thirdly, as to whether the petitioner has provided any facts in support of the Petition to warrant intervention by the Court, it was submitted that the Petition is based on mere allegations and unproved facts on the purported ethnicity of the nominees. The court was asked to consider the cases of [Stephen Wasike Wakho & another vs Security Express Limited](#) (2006) e KLR, [Isaac Aluoch Aluochier vs National Alliance and 542 others](#) [2016]e KLR, [Christian Juma Wabwire vs Attorney General](#) [2019] eKLR.



3Rd & 4Th Respondent Submissions

45. They were filed on 17.04.2023 and based on four grounds. While making reference to the case of *Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 others* (2013) eKLR, *Alex Arani Kabinga vs Governor, Nyamira County and another* [2021] eKLR and *A.K.M.M vs E.M.K.K & 2 Others* [2014] eKLR, It was submitted that the Petition ought to be struck off as the same lacks clarity as to which human rights have been violated. It was contended that the process of vetting and approval of the County Executive Committee Members (CEMs) and County Secretary was not spelt out. Further, that the Petition is incurably flawed for failure to comply with the Mutunga Rules in form and content and Section 35 of the *County Governments Act, 2012* alleged to be violated is not a constitutional provision.
46. As to whether the process used for the approval of the Appointment of the members of the County Executive Committee achieved the objectives of Section 35 (2) and (3) of the *County Governments Act, 2012*, It was submitted in the affirmative. Reference was made to the Report of the Committee on Appointments November 2022 which it was opined demonstrated that:
- a. The Committee took into consideration Section 35 (2) and (3) as criteria in the vetting exercise and found that they were compliant with the same (page 11 to 12 of the committee’s report);
 - b. The indication that the Committee considered the representation of minorities, marginalized communities and cultural diversity is in the proof that the nominees/appointees were questioned on vast areas (page 15-61 of the committee’s report), where the Committee concluded that the nominees/ appointees could:
 - i. Represent the minority/ marginalized groups by ensuring the preservation of their culture, traditions, religions and language;
 - ii. Ensure effective participation of members of minorities and other tribes within Machakos County in matters to do with public life, especially with regard to decisions that affect them; and
 - iii. Embrace consultation and public participation as fundamental principles which will enable the CECMs to represent all Machakos residents in the formulation, implementation and evaluation of laws and projects.
47. It was submitted that the Committee ensured that the list of nominees complied with the two-thirds gender rule which is a core principle under the principles of devolution under Article 175 (c) of the *Constitution of Kenya, 2010*. Further, that the nomination/appointment of CECMs was done in an open, competitive and merit-based manner which considered ethnic balances.
48. While relying in the definition of culture and cultural diversity in the preamble of the *UNESCO Mexico City Declaration on Cultural Policies* (the 1982 Mexico City Declaration) at the World Conference on Cultural Policies held in Mexico City in 1982 and the Convention on the Protection and Promotion of the Diversity of Cultural Expressions 2005 (the CDC), it was opined that the implementation of the law on cultural diversity goes beyond appointment into office of different people from various tribes. The key enablers to uphold the inclusivity of all tribes and groups are consultation and public participation as guaranteed by the *Constitution of Kenya, 2010*. That the CECMs demonstrated in their interviews that they interacted with other cultures by looking at the history of where they had worked and what they had achieved.
49. It was contended that they had complied with the finding in the case of *John Waweru Wanjohi & 27 others -vs- Attorney General & 6 others* [2012] eKLR and *Magor & St. Mellons Rural District*



- Council –vs- Newport Corporation* [1952] AC 189; [1951] 2 All ER 839. It was further submitted that the nominees/appointees demonstrated that they reflected cultural diversity by displaying: the will to consult with their citizenry and large workforce on matters, creativity, good problem solving skills and the common desire to be of service to all Machakos County stakeholders without discrimination.
50. As to whether the 3rd and 4th Respondents contravened Article 27 and 197 of the *Constitution of Kenya, 2010*, it was submitted that the Committee did not disqualify the nominees/appointees on the basis of which tribe they came from as it would lead to discrimination under Article 27 of the *Constitution of Kenya, 2010*. The tribe factor in Kenya has been the *prima facie* tool used to discriminate/ judge for or against a Kenyan. That the Committee only considered the wealth qualifications of experience that the nominees/appointees possessed to competently and effectively represent all groups of people and cultures. They also regarded the provisions, rights and principles in Articles 1 (2), 10, 27, 56, 159 (2) (e), 197 (1), 232, 235 and 259 of the *Constitution of Kenya, 2010*.
51. It was contended that the Petition should be dismissed as the Petitioner had failed to prove how the 3rd and 4th Respondents violated Article 27 and 197 of the *Constitution of Kenya, 2010*.
52. Lastly as to whether the Petition has merit, it was submitted that the Committee applied their minds to the Constitutional and Statutory requirements hence reaching a rational conclusion that the nominees/appointees met the test set out in the case of *Trusted Society of Human Rights Alliance –vs- Attorney General and 2 others*, Petition 229 of 2012, is a guiding tool thus: -
- “The appointees had to also meet the constitutional threshold; the qualifications for appointment. If the correct procedures were followed, and the test of legality was substantively met, then the two coordinate political branches could appoint whomsoever they wished to the constitutional office. It was within their constitutional discretion to pick from among competing candidates as long as they were all qualified; and as long as the correct procedures were followed. The Court was powerless to determine whom the Legislature or Executive should appoint once the two tests were satisfied because such a determination would present a political question; an inappropriate one for the courts. However, the court had both the power and the duty to determine whether a particular appointee was constitutionally unqualified to fill the vacant office.”
53. It was submitted that the Petitioner’s report advocates that in Machakos County, the minorities and marginalized communities will be catered for by offering equal socio-economic opportunities to them which is a greater call to ensure opportunities are available to all people in Machakos than simply gaining a position in a County office. In addition, that the rights of residents in Machakos County provide for them to have the CECMs of their choice through their delegated leaders. The will of the people would be subverted if fresh nominations would ensue. Article 174 (d) of the *Constitution*, puts it aptly that devolution recognizes the right of communities to manage their own affairs.
54. It was contended that there was no objection from the public including the Petitioner, when invited to submit information on the suitability of the nominees/appointees, the Petitioner is acting in bad faith by attempting to rock the boat with the instant Petition. Further, that the cost and process of recruitment would only frustrate them in the wake of harsh economic times. The court was urged to regard the best interests of Machakos residents who now have services being delivered to them.
55. On the issue, it was submitted that costs follow the event and the case of *Racheal Muthoni Wanyoike & another –vs- Mentor Sacco Society Limited* [2021] eKLR was cited in support of this position.



Determination

56. The Court considered the Petition, the Responses thereto, the Notice of Preliminary Objection and the submissions of the parties. The issues for determination are;
- a. Whether the Petition is properly before the court.
 - b. Whether the Petitioner is entitled to the orders sought or the Petition is a mere academic exercise since the nominations the Petitioner is challenging have since been acted upon and the nominees substantially appointed to their positions.
 - c. Whether the list of nominees made by Governor of Machakos County (1st Respondent) is discriminatory and violates Article 27 of the Constitution and Section 35 of the County Governments Act.
 - d. Whether there was public participation in the appointment of the members of county executive committee.
 - e. The Petition herein offends the provisions of section 40 County Governments Act.
 - f. Whether the members of county executive committee should have been enjoined in the Petition

Whether the Petition is properly before the court.

57. The Respondents contend that the Petition does not disclose which provisions of the Constitution were violated and how they were violated. In addition, it is based on violation of a statute, that is, the County Governments Act and not the Constitution.
58. Article 22 (1) and (2) of the Constitution of Kenya provides as follows;
- (1) 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.
 - (2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by--
 - (a) a person acting on behalf of another person who cannot act in their own name;
 - (b) a person acting as a member of, or in the interest of, a group or class of persons;
 - (c) a person acting in the public interest; or
 - (d) an association acting in the interest of one or more of its members.
59. The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 ('the Mutunga Rules') contain a proviso on the contents of petitions in Rule 10 wherein it is provided that;
- (1) An application under rule 4 shall be made by way of a petition as set out in Form A in the Schedule with such alterations as may be necessary.
 - (2) The petition shall disclose the following—
 - (a) the petitioner's name and address;
 - (b) the facts relied upon;



- (c) the constitutional provision violated;
 - (d) the nature of injury caused or likely to be caused to the petitioner or the person in whose name the petitioner has instituted the suit; or in a public interest case to the public, class of persons or community;
 - (e) details regarding any civil or criminal case, involving the petitioner or any of the petitioners, which is related to the matters in issue in the petition;
 - (f) the petition shall be signed by the petitioner or the advocate of the petitioner; and
 - (g) the relief sought by the petitioner.
- (3) Subject to rules 9 and 10, the Court may accept an oral application, a letter or any other informal documentation which discloses denial, violation, infringement or threat to a right or fundamental freedom.
- (4) An oral application entertained under sub rule (3) shall be reduced into writing by the Court.

60. The Supreme Court in *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR had the following in the manner in which constitutional Petitions ought to be presented before Court for adjudication: -

Although Article 22(1) of the *Constitution* gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in *Anarita Karimi Njeru v Republic*, (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of the *Constitution* alleged to have been contravened, and the manifestation of contravention or infringement. Such principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement.”

61. Mrima, J in Constitutional Petition No. E495 of 2021 *Kinoti & 7 others v Chief Magistrates Court Milimani Law Courts & 4 others; Sanga & 2 others (Interested Parties)* stated as follows with regard to the nature of Constitutional Petitions;

- “ 109. Petitions, therefore, must be clear on what they challenge. The nexus between the *Constitution* and the alleged violation ought to be precise, hence, the precision principle.
110. The precision principle basically emphasizes the position that petitions must raise constitutional issues. I will, therefore, albeit briefly look at what constitutional issues are.
111. In *Fredricks & others v MEC for Education and Training, Eastern Cape & Others* (2002) 23 ILJ 81 (CC), the South Africa Constitutional Court, rightly so, delimited what a constitutional issue entails and the jurisdiction of a constitutional court as follows: -the *Constitution* provides no definition of ‘constitutional matter’. What is a constitutional matter must be gleaned from a reading of the *Constitution* itself: if regard is had to the provisions of... constitution, constitutional matters must include disputes as to whether any law or conduct is inconsistent with the *Constitution*, as well as issues



concerning the status, powers and functions of an organ of state.... the interpretation, application and upholding of the Constitution are also constitutional issues. So too is the question of the interpretation of any legislation or the development of the common law that promotes the spirit, purport and object of the Bill of Rights. If regard is had to this and to the wide scope and application of the Bill of Rights, and to the other detailed provisions of the Constitution, such as the allocation of powers to various legislatures and structures of government, the jurisdiction vested in the constitutional court to determine constitutional matters and issues connected with decisions on constitutional matters is clearly on extensive jurisdiction...

112. In the United States of America, a constitutional issue refers to any political, legal, or social issue that in some way confronts the protections laid out in the US Constitution.
113. Taking cue from the foregoing, and broadly speaking, a constitutional issue is, therefore, one which confronts the various protections laid out in a constitution. Such protections may be in respect to the bill of rights or the Constitution itself. In any case, the issue must demonstrate the link between the aggrieved party, the provisions of the Constitution alleged to have been contravened or threatened and the manifestation of contravention or infringement. In the words of Langa, J in Minister of Safety & Security v Luiters, (2007) 28 ILJ 133 (CC): -...

When determining whether an argument raises a constitutional issue, the court is not strictly concerned with whether the argument will be successful. The question is whether the argument forces the court to consider constitutional rights and values...

114. Whereas it is largely agreed that the Constitution of Kenya, 2010 is transformative and that the bill of rights has been hailed as one of the best in any constitution in the world, as Lenaola, J (as he then was) firmly stated in Rapinder Kaur Atal v Manjit Singh Amrit case (supra) ‘... courts must interpret it with all liberation they can marshal...’
115. Resulting from the above discussion and the definition of a constitutional issue, this court is in agreement with the position in Turkana County Government & 20 others v Attorney General & others (2016) eKLR where a multi-judge bench affirmed the profound legal standing that claims of statutory violations cannot give rise to constitutional violations.”

62. I have perused the Petition herein, it has several parts including the description of the parties, factual background, constitutional foundation of the petition, the factual matrix, statutory foundations of the Petition, analysis and the reliefs sought. The Constitutional foundations of the petition are anchored Art 10 on National values and principles of governance that ought to be adhered to by all persons and state organs Art 23 that mandates the High Court in accordance with Art 165 of the Constitution to hear and determine applications for redress of denial, violation infringement or threat to a right or fundamental Bill of Rights. Art 27 that provides for non-discrimination and equality of all persons to the benefit and protection of the law. Art 73 outlines guiding principles of leadership and integrity and Art 232 on the values and principles of public service & Art. 232(h) includes representation of Kenya’s diverse communities. Art 259 (1) which provides for the Constitution to be interpreted in



a manner that promotes purposes values and principles, advances of rule of law, human rights and fundamental freedoms in the Bill of Rights. I find that the petition brings out the alleged violations of the Constitution, the manner the violations were violated according to the Petitioner and the effect of the violations on the Petitioner.

Whether the Petitioner is entitled to the orders sought or the Petition is a mere academic exercise since the nominations the Petitioner is challenging have since been acted upon and the nominees substantially appointed to their positions.

63. It is not in contention that Consolata Mutisya (Devolution), Onesmus Muia (Finance), Dr. Daniel Yumbya (Health), Nathaniel Nganga (Roads/Transport), Philip Kilonzo (Lands), Bishop Zoel Nzomo (Agriculture), Mutanu Raphael (Water), Joyce Mwikali (Education), Sharon Mutua (Trade) And Onesmus Muasya (Sports/Gender) were nominated as County Executive Committee members and were appointed to office vide Gazette Notice Vol CXXIV No 236.
64. The Respondent contends that the Petition has been over taken by events as the said county executive members are already in office serving the people of Machakos County. In order to decide on this issue; the jurisdiction of the High Court in the Constitution Article 165 of the Constitution provides;
- (3) Subject to clause (5), the High Court shall have--
- (a) unlimited original jurisdiction in criminal and civil matters;
 - (b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;
 - (c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;
 - (d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of--
 - (i) the question whether any law is inconsistent with or in contravention of this Constitution;
 - (ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;
 - (iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and
- (6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.
- (7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.
65. The High Court draws jurisdiction from Article 23. Which mandates the Court to uphold and enforce the Bill of Rights



- (1) The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.
66. The question of the High Court exercising its supervisory jurisdiction while sitting as a judicial review Court was addressed by Odunga J in the case of *Musyoka v Returning Officer, Independent Electoral and Boundaries Commission, Machakos County & 3 others* [2022] eKLR where he observed as follows;
- “What I understand the Supreme Court to be saying in that case is that the jurisdiction of the High Court, sitting as a judicial review Court, or in exercise of its supervisory jurisdiction under article 165 (3) and (6) of the *Constitution* is not lost in election matters simply because an election has taken place. That jurisdiction must always be retained in order to uphold and preserve the authority of the *Constitution*, in the event of the occurrence of what the Supreme Court termed as “certain tragedies”.
40. Based on the said decision I find that this court is not deprived of the jurisdiction to entertain this petition merely because the challenge is to the qualification for nomination of the 3rd respondent which is a pre-election dispute and by the mere fact that an election has already been concluded”
67. The *ratio decidendi* of this case above is that Jurisdiction ought to always be retained in order to uphold and preserve the authority of the *Constitution* in the event of the occurrence of certain tragedies.
68. The decision in *Attorney General & 2 Others v Okiya Omtatah* [2020] eKLR makes the same point, that interpretation of the *Constitution* and statute on the constitutionality and the legality of an action of a public body, in recruitment into a public office, was the preserve of the High Court.
69. Now, back to the issue of the petition being an academic exercise, the same was discussed by the late Hon. Onguto J in the case of *Wanjiru Gikonyo and Others v National Assembly of Kenya and 4 Others* Petition No. 453 of 2015 [2016] eKLR where he stated that;
27. Effectively, the justiciability dogma prohibits the court from entertaining hypothetical or academic interest cases. The court is not expected to engage in abstract arguments. The court is prevented from determining an issue when it is too early or simply out of apprehension, hence the principle of ripeness. An issue before the court must be ripe, through a factual matrix, for determination.
28. Conversely, the court is also prevented from determining an issue when it is too late. When an issue no longer presents an existing or live controversy, then it is said to be moot and not worthy of taking the much sought judicial time. The exception it must be noted exists where the court is allowed by law to offer advisory opinions. A good example is Article 163(6) of the *Constitution* on powers of the Supreme Court of Kenya to give advisory opinions at the request of the national government on matters concerning county governments.
29. The justiciability dogma and all principles under it are part of our Constitutional law and jurisprudence. The court in *John Harun Mwau & 3 Others –v- AG & 2 others* HCCP No. 65 of 2011 (unreported) stated as follows:
- “We also agree with the submissions of Prof. Ghai that this Court should not deal with hypothetical and academic issues. In our view, it is correct to state that the jurisdiction to interpret the *Constitution* conferred under Article 165(3) (d) does not exist in a vacuum and it is not exercised independently in the absence



of a real dispute. It is exercised in the context of a dispute or controversy.” The court considered several authorities and discussed the question whether there was a justiciable dispute in the case. It was said that even in a case where a rule gave the court a wide discretion, it cannot still make justiciable disputes which are not justiciable. It was also contended that the jurisdiction to give a declaratory judgment must be exercised “sparingly” with great care and jealousy and “with extreme caution.”

33. Most recently in Hon. Kanini Kega –v- Okoa Kenya Movement & 6 Others HCCP No. 427 of 2014 the court expressed itself as follows:
- “[82] Therefore whether or not an issue is justiciable will depend on the legal principles surrounding the particular act done as discernible from the legal instruments appurtenant to the said action. As was held in the above case, when the law proceeds to impose on the executive legally prescribed duties and responsibilities, the performance of which depends upon the enhancing or handling of public interest, the political officers of the executive must act consistent and according to the laws of the land and since the performance of certain duties and responsibilities is dependent upon individual rights and responsibilities, there is a duty to act consistently with and according to the law. If public officers fail to so act, and their failure harms the interests of the public and rights of individual citizens, their actions and omissions are subject to judicial review.”
34. The extensive quotations were deliberate. It is clear from a review of the above case law that there is now a distinct and coherent jurisprudence within our jurisdiction on the justifiability dogma. There is settled policy with clear arguments as well as out of repetitive precedent that courts and judges are not advise-givers. The court ought not to determine issues which are not yet ready for determination or is only of academic interest having been overtaken by events. The court ought not to engage in premature adjudication of matters through either the doctrine of ripeness or of avoidance. It must not decide on what the future holds either.
35. It is however to be noted that the court retains the discretion to determine whether on the circumstances of any matter before it still ought to be determined.
70. In this case, the Petition was necessitated by the nominee list of the County Executive members who have since been appointed. The Petitioner did not amend his petition but continued with it as is. The Petitioner submitted that there still exists controversy between the parties as the appointments were done in contravention of the *Constitution* and written law. Further, that the matter remains practical in human nature and the orders sought are substantial despite the appointment having taken place. It was also submitted that there is no deadline for the court to intervene and make a declaration of unconstitutionality and any act or omission that is in breach of the *Constitution* is null and void ab initio.
71. This Court finds that parties are bound by their pleadings. As new developments arise a party retains the legal right to amend pleadings so as to enable the Court adjudicate on the real and substantive controversy at the time.
72. The court has dealt with similar questions before that will guide this court in making arriving at a just determination.



73. In the case of *Alex Arani Kabinga v Governor, Nyamira County & another* [2021] eKLR the court stated as follows;

With due respect I do not agree with Mr. Makura’s submission that this petition is now an academic exercise. In my view the only prayer that was overtaken by events and hence cannot be granted by this court is prayer (d) – A permanent injunction to stop the 1st Respondent from re-nominating the 2nd Respondent for vetting and approval as the Deputy Governor of Nyamira County. This prayer can obviously not be granted because it has been overtaken by events the candidature of the 2nd Respondent having been resubmitted to the County Assembly, debated and approved and the 2nd Respondent having subsequently been sworn in as the Deputy Governor of Nyamira County. Be that as it may the issues of whether the nomination, vetting and approval was illegal, unlawful and thus null and void and whether declarations can issue in terms of prayers (a) and (b) are issues that are yet to be determined. The prayer for judicial review in terms of prayer (c) is still pending.

74. In the case of *G’Oganyo v Independent Electoral Commission Selection Panel & 2 others; Independent Electoral and Boundaries Commission & 6 others (Interested Parties)* (Constitutional Petition E345 of 2022) [2022] eKLR the court held that;

“Even as the petitioner was well aware that the 4th interested party had been appointed and sworn into office, the petition was not amended to seek a specific prayer on the removal. Given the history of Kenya on women empowerment and the clamour on the gender rule, it would be imprudent and against public interest to reduce the current number of women in the Commission. Whereas there were other women who could be qualified to serve as Commissioners of the IEBC, the process of replacing a Commissioner took time. The selection panel stood dissolved by operation of the law.”

75. Similarly, in *Kenya Youth Parliament & 2 others v Attorney General & 2 others* [2012] eKLR it was observed that;

“No doubt the amendment of the Petition filed on 16th June, 2011 was necessitated by the appointment and gazettelement of the 2nd Respondent subsequent to the 16th June, 2011. No doubt the Petitioners realized that their petition had been overtaken by events, as it were. Nevertheless, they did not amend their prayers appropriately to require the revocation or nullification of the Director of Public Prosecutions’ appointment. They retained the prayer for restraining the Respondents by themselves or through agents or representative or their Principal from swearing the 2nd Respondent into office. We must pose here to observe that the Attorney General herein named as the 1st Respondent has no constitutional function in the appointment of the Director of Public Prosecutions.”

76. I have considered the positions held by all the respective parties to this suit, the Petition ought to have been amended to reflect the position in the County Government once the nominees ceased to be nominees. To ask the court to hear and determine the petition and grant the orders as prayed for would be asking the court to issue orders in vain. For clarity, the Petitioner seeks the following orders;

- a. A declaration that the list of nominees made by Governor of Machakos County (1st Respondent) is discriminatory against the Petitioner and other minority groups within the County, does not represent the community and cultural diversity of Kenya and there was a clear violation of Article 27 of the *Constitution of Kenya* 2010 and section 35 of the *County Governments Act, 2012*



- b. An order of *certiorari* quashing the list of nominees to the County Executive Committee announced by the Governor of Machakos H.E. Wavinya Ndeti on October 19, 2022
 - c. An order that the Governor of Machakos County conducts fresh nominations adhering to the relevant provisions of the Constitution, the County Governments Act and taking into account the ethnic balance among the nominees.
 - d. Costs of the Petition.
 - e. Any other orders that the court may deem fit and just to grant.
77. Prayer (a) and (b) have been overtaken by events by virtue of the appointment of the nominees into the said positions. In the case of *John Waigi Migwi v Governor Mike Mbuvi Sonko & another; Jubilee Party (Interested Party)* [2019] eKLR the court held that

“ 36. I find that this scenario is not acceptable as we cannot have a case where the facts of the case do not support the prayers sought. My humble view is that an amendment of the petition was necessary following the withdrawal of prayers 2, 5 and 6 of the said petition. It is therefore my finding that the petition herein has been overtaken by events

78. As regards Prayer 3 this falls within the purview of the Employment and Labour Relations Court as the nominees are now employees of the Machakos County Government. Whereas the jurisdiction of the High Court remains intact by virtue of the Constitution under Article 165(3) which is to determine the constitutionality, or otherwise, of acts or conduct of public officers and institutions, the underlying dispute falls under Article 162(2) of the Constitution and removal, dismissal or termination of employment even if it does not take away the jurisdiction of the High Court to exercise jurisdiction under Article 165(3), upon appointment now employment of members of County Assembly is the predominant issue. The Employment and Labour Relations Court, relates to hearing and determining disputes relating to employment and labour relations matters and retention or termination of these employees of the County Government falls squarely on ELRC.

79. In the case of *Wickliffe Odhiambo Okeyo & another v Clerk Homa Bay County Assembly & 3 others* [2018] eKLR where it was observed that

- (5) For avoidance of doubt, the petitioners are specifically applying for a declaratory order against the first respondent to the effect that he conducts a fresh nomination in accordance with the Constitution and the County Governments Act 2012 and an injunctive order against the subject nominees or appointees to permanently restrain them from reporting to their office and undertaking their duties.

With regard to the first prayer, there seems to be nothing to declare in terms of ordering a fresh nomination of nominees to represent the public. This is because the nomination has since been undertaken and the two nominees have since been appointed as Members of the County Assembly Service Board.

They are now employees of the County Assembly Service Board and not the County Public Service Board established under Section 57 of the County Governments Act No.17 of 2012.

- (6) Any dispute regarding the nomination and subsequent appointment of the two nominees to the County Assembly Service Board ought therefore be referred to the Employment and Labour Relations Court rather than this court.



- (7) With regard to the second prayer, it is clearly overtaken by events as the two nominees were sworn into office and have been discharging their duties since then. Clearly, there is nothing to injunct at this juncture.

In sum, this petition is wanting in terms of clarity in the prayers sought and the manner in which the respondents breached the constitutional rights and requirements under Articles 27 and 196 of the Constitution or the applicable statutory requirements.

80. This brings us to the issue of public participation.

Whether there was public participation in the appointment of the members of county executive committee.

81. The Petitioner ought to prove that indeed he undertook steps provided in law to raise his issues before coming to the court. The impugned nominees having been appointed to office means that the said list of nominees sought to be quashed and declared discriminatory does not exist and therefore the court cannot issue orders in vain.

82. Article 10(1)(a) of the Constitution of Kenya, 2010 lists public participation as one of the national values and principles of governance allowing the people of Kenya to have a say in the formulation and implementation of legislation and policy at both the national and county levels.

83. Article 174 of the Constitution of Kenya, 2010 recognizes the necessity to enhance the participation of the people in the exercise of the powers of the State and in the making of decisions affecting them. It provides that;

The objects of the devolution of government are--

- (a) to promote democratic and accountable exercise of power;
- (b) to foster national unity by recognising diversity;
- (c) to give powers of self-governance to the people and enhance the participation of the people in the exercise of the powers of the State and in making decisions affecting them;
- (d) to recognise the right of communities to manage their own affairs and to further their development;
- (e) to protect and promote the interests and rights of minorities and marginalised communities;
- (f) to promote social and economic development and the provision of proximate, easily accessible services throughout Kenya;
- (g) to ensure equitable sharing of national and local resources throughout Kenya;
- (h) to facilitate the decentralisation of State organs, their functions and services, from the capital of Kenya; and
- (i) to enhance checks and balances and the separation of power

84. Article 196 of the Constitution of Kenya, 2010 requires county assemblies to conduct their business in a transparent manner, and to open their sittings and those of their committees to the public. The county assemblies and their committees are specifically required to facilitate public participation and involvement in their legislative and other businesses.



85. Sections 87 of the *County Governments Act, 2012* provides for the principles governing citizen participation, which include timely access to information, reasonable access to the process of policy and law formulation and protection of the rights of minorities. Section 115 of the same Act deepens the principle by requiring county assemblies to provide specified mechanisms, unambiguous information and to develop laws and regulations that give effect to public participation.

86. The importance of Public participation was discussed in the case of *Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others* [2015] eKLR where the court expressed itself as follows;

“92. The main question in this context then becomes, what is the test for determining if the threshold of public participation has been met? We are aware that several Courts in Kenya have dealt with the issue. The emerging position in Kenya is exemplified by the decision and reasoning of Justice Emukule in *John Muraya Mwangi & 495 Others & 6 Others V Minister For State For Provincial Administration & Internal Security & 4 Others* [2014 eKLR. Since it demonstrates the emerging consensus, we apologise for quoting at length the reasoning of the Learned Judge thus:

“The concept of public participation enshrined in Articles 10 and 12 of the *Constitution of Kenya* 2010, is a difficult one but needs to be given effect both before and after legislative enactment. This may take several forms:-

The concept envisages political participation in the conduct of public affairs, such as the right to vote, and to be elected or appointed to public office,

The right to be engaged in public debate and dialogue with elected representatives at public hearings,

The duty to facilitate public participation in the conduct of public affairs,

Ensuring that ordinary citizens the “hoi polloi,” the “lala hoi” have the necessary information and are given opportunity to exercise their say not merely in election and appointment to political office but also economic participation, and conduct of their affairs.

94. Taking the same view as Merafong (*supra*) Emukule J agreed that the obligation to facilitate public involvement maybe fulfilled in different ways and is open to innovation. He added that public meetings must be well documented and turned into records of public participation. We agree and echo this rationale that public participation can be facilitated in different ways; each circumstance is different and hence how to facilitate this is open to innovation. However, it must be well documented and clear records kept.”

87. The conditions to be met in order to fulfil the requirement of public participation were summarized in the South African case of *Matatiele Municipality and Others vs President of the Republic of South Africa and Others* (2) (CCT73/05A) [2006] ZACC 12; 2007 (1) BCLR 47 (CC) as follows: -

“This may include providing transportation to and from hearings or hosting radio programs in multiple languages on an important bill, and may well go beyond any formulaic requirement of notice or hearing. In addition, the nature of the legislation and its effect on the provinces undoubtedly plays a role in determining the degree of facilitation that is



reasonable and the mechanisms that are most appropriate to achieve public involvement. Thus, contrary to the submission by the government, it is not enough to point to standing rules of the legislature that provide generally for public involvement as evidence that public involvement took place; what matters is that the legislature acted reasonably in the manner that it facilitated public involvement in the particular circumstances of a given case. The nature and the degree of public participation that is reasonable in a given case will depend on a number of factors. These include the nature and the importance of the legislation and the intensity of its impact on the public. The more discrete and identifiable the potentially affected section of the population, and the more intense the possible effect on their interests, the more reasonable it would be to expect the legislature to be astute to ensure that the potentially affected section of the population is given a reasonable opportunity to have a say.

88. The Court has considered the evidence presented by the parties herein and note the Respondents presented evidence to confirm that there was notice to the Public on Wednesday, October 19,2022 there was a notice in the Daily Nation for vetting on 27th and 28th October 2022 and the notice read;

Vetting/Public Hearing

In the matter of consideration for appointment of Members of the County Executive Committee pursuant to Article 170 (2) of the *Constitution of Kenya*, Section 5 of Public Appointments (County Assemblies Approval) Act and the County Assembly Standing orders;

.....

Members of the public are invited to attend the public hearing and/or submit any information or comments on suitability or otherwise for appointment of the nominated persons. The submissions can be made by way of sworn affidavits or hand delivered to the office of the Clerk in sealed envelopes and addressed to the Clerk , County Assembly of Machakos, P.O. Box 1168-90100, Machakos, to be received on or before 25th October,2022.

Further details can be assessed on the Assembly website www.machakosassembly.go.ke

J.L Mutusya

Clerk Of County Assembly

89. On Thursday , October 20,2022 there was an addendum in the newspaper for vetting on 27th and 28th October 2022 that stated as follows;

Vetting /Approval Hearing

Reference is made to an advertisement appearing on the Daily Nation on Wednesday, 19th October, 2022 announcing a vetting exercise for the County Executive Committee Members and County Secretary nominees to respective County Departments.

.....

Note: The Vetting For The County Secretary Nominee Will Not Be Done At The Date And Time Earlier Indicated But Will Be Communicated Later. Other details in the announcement remain unchanged.

We highly apologize for any inconveniences caused.

90. There is no evidence before the court that the Petitioner whether through attendance, memoranda, letter or in any other way personally participated in the vetting process and raised concerns. There is



also no evidence from the Respondents as to what dates the vetting took place because as far as the latest notice is concerned, the date was to be communicated later and lack of communication means that the Petitioner was greatly prejudiced on the subsequent event.

91. The 1st, 2nd and 3rd Respondents attached an Official Report of 8-11-2022 titled “the 1st Report of the committee on appointments of the third assembly on the vetting of nominees for appointment to the position of County Executive Committee members and position of County Secretary” and the Report for the committee on appointments. At page 13 of the later report, it stated that;

7 Consideration of Memoranda from the public

“

The clerk of the County Assembly placed an advertisement in the print media on 19th October 2022 (Annexure 3) inviting the public to submit any information or comments on suitability or otherwise of the nominees in conformity with section 7 (10) of the Public Appointments (County Assemblies Approval) Act, 2017.

In this regard, by 26th October 2022, the Committee had not received any memoranda.”

92. This report referred to the advertisement of 19th October 2022 which had been amended. I agree with the Petitioner that to this extent the members of public who wished to participate were prejudiced. How would they have known the deadline? They had legitimate expectation that the same would be communicated in due course as per the notice of 20-10-2022.
93. I also take note that there is nothing on record to show that the Petitioner was excluded from the sittings of the County Assembly or those of its committees with regard to the impugned nominations on the said 27th and 28th October 2022.
94. In Robert N. Gakuru & others v Kiambu County Government & 3 others [2014] eKLR the Court observed;

“ [P]ublic participation ought to be real and not illusory and ought not to be treated as a mere formality for the purposes of fulfillment of the Constitutional dictates. It is my view that it behooves the County Assemblies in enacting legislation to ensure that the spirit of public participation is attained both quantitatively and qualitatively.

Whether the Petition herein offends the provisions of section 40 County Governments Act.

Therefore whereas there is evidence that public participation was followed in the vetting of the nominees and notices and information was given to the public except that the vetting of the County Secretary was deferred.

95. Section 40 County Governments Act is a proviso on removal of members of county executive committees. The Petitioner has been clear on the provisions of the law that he felt were violated and he did not raise the said section. That section could not have been relevant at the time of filing this Petition in the form that it is.

Whether the list of nominees made by Governor of Machakos County (1st Respondent) is discriminatory and violates Article 27 of the Constitution and Section 35 of the County Governments Act

96. Article 27 of the Constitution provides as follows;



- 1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.
- (2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.
- (3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.
- (4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.
- (5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).
- (6) To give full effect to the realisation of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.
- (7) Any measure taken under clause (6) shall adequately provide for any benefits to be on the basis of genuine need.
- (8) In addition to the measures contemplated in clause (6), the State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender

97. Section 35 (2) of the [County Governments Act](#) provides that;

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

98. The Petitioner contends that there was discrimination based on tribe in the nominations. Reference was made to a document titled “ unmasking Ethnic Minorities and Marginalized Communities in Kenya; who and where” by NGEK, 2017 which states as follows on the composition of minorities in Machakos County.



Category	Name	Location
Minority	Asian	Mavoko, Machakos Town, Kangundo, Yatta
	Kikuyu	Yatta, Masinga. Kilimambogo, Matu, Kithimani & Ngoliva
	Borana	Machakos town
	Kisii	Kayatta, Komarock, Kilimambogo
Minority & Marginalized	Maasai	Athi River North, Mlolongo
	Luo	Kivaa, Ekalakala, Ndithini, Mananza, Yatta Matuu
	Swahili	Township

99. I also note that the Petitioner contended that there are 4 women out of the 10 who were nominated and now appointed. The facts placed before court did not demonstrate by tangible evidence on any discrimination based on tribe in the impugned process. The Petitioner did not place before court the tribal composition of the applicants' vis a vis the shortlisted candidates. The composition of minorities as at 2017 as per the Report could not be static/constant as at 2022. the Constitution enshrines every person the right to movement, association and liberty; every Kenyan can and may reside in any part of the country Kenya. the Constitution upholds non – discrimination and equality to all persons as provided by Article 27 of the Constitution. As such representation ought to be of 45-50 tribes of Kenya and not those ear-marked as minority in the County and each County has diverse regional and ethnic population at a given time.
100. Therefore, the current/uptodate demographic data/report on the population of Machakos County and ethnic spread would inform interrogation of gender and ethnic balance in nomination vetting and appointment of County Assembly Members.
101. In the case of Commission for the Implementation of the Constitution v The Attorney General and Others Civil Appeal No. 351 of 2012 (which dealt extensively with the question of the marginalized) as follows;

“ Article 90 of the Constitution decrees that the party lists must comply with two discernible principles namely;

The requirement for gender equity in that the qualified candidates must be listed in order of priority but that order must alternate between men and women.

The requirements for the lists to reflect the regional and ethnic diversity of the people of Kenya. This is meant to ensure that no ethnic group or region of the country dominates the lists provided by the parties. The exception to this, naturally, is the county assembly which from the nature of things may be from an ethnic majority or from the one region in which the county is located. We would venture that on a proper reading of Article



90(2) (c), the requirement for regional and ethnic diversity should apply so as to reflect the face and diversity, not of the people of Kenya necessarily, but definitely of the county in question.” (emphasis mine).

Joinder Of Parties

Whether the members of county executive committee should have been enjoined in the Petition

102. Order 1 Rule 10 (2) of the [Civil Procedure Rules](#) that state;

- 2) The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.

103. The Supreme Court decision in the case of [Methodist Church in Kenya v Mohammed Fugicha & 3 others](#) [2019] eKLR where it held, citing the Muruatetu case;

“Therefore, in every case, whether some parties are enjoined as interested parties or not, the issues to be determined by the Court will always remain the issues as presented by the principal parties, or as framed by the Court from the pleadings and submissions of the principal parties.

104. In the recent Consolidated Petitions E080 of 2023 the 3 Bench [Kimondo Ongudi & A.Visram JJ] considering the appointment of 50 CAS, each and all of them were joined to the petition as interested parties in the matter between the Petitioners and the Respondents for effective hearing and determination of the dispute.

105. The Petition relates to the impugned advertisement nomination recruitment appointment of the 10 members of the Executive Committee of Machakos County. The 10 nominees the now appointed members of the Executive Committee have a right to be heard in these proceedings and not to be condemned unheard especially in light of adverse effect of their employment in the County Government. This position fortifies the legal position the members of the County Executive Committee ought to be joined to these proceedings as illustrated by the case of;

106. [Technomatic Limited T/A Promopack Company –versus- Kenya Wine Agencies Limited & Another](#) [2014] eKLR where the court stated; -

“When the above principles are applied to the facts of these applications it is clear that the guiding principles when an intending party is to be joined are as follows:

1. He must be a necessary party.
2. He must be a proper party.
3. In the case of a defendant there must be a relief flowing from that defendant to the plaintiff.
4. The ultimate order or decree cannot be enforced without his presence in the matter.



5. His presence is necessary to enable the Court to effectively and completely to adjudicate upon and settle all questions involved in the suit”.

107. There is no formal application before the court. The decision on who should be enjoined to a suit rests solely on the parties as they have the liberty to do so and are the ones in charge of the case before the court. This court cannot thus engage its mind into this question without a formal application so as to consider the petition on its merits. The Civil Procedure Rules provide that ‘either party may apply’. I leave it to the parties to do the necessary if need be.

Amendment Of Pleadings/Petition

108. The Petitioner deposed that the 1st Respondent named her Cabinet expected to assist in rolling out her agenda. The 1st Respondent named 10 County Executive Committee members among them 4 women.
109. The Petitioner deposed that the Vetting/approval process was scheduled to be conducted on 27th October 2022 and Friday 28th October 2022 which seems to have been postponed.
110. The Petitioner took issue that the nomination was contrary to Section 35 (1) of [County Governments Act](#) and Art 197 of the [Constitution](#).
111. The 1st 2nd & 3rd Respondents deposed that the nominees had since been sworn in and now serving as County Committee members of the County Assembly and their removal as anticipated by the Petition would only be under Section 40 of 78 of [County Governments Act](#).
112. From these averments it was/is necessary to amend pleadings to reflect the new development, changed circumstances and/or position. The Court and Parties are bound by pleadings on the cause of action and relief sought.
113. In [Institute For Social Accountability & another v Parliament of Kenya & 3 others](#) [2014] eKLR the court held:-

“The object of amendment of pleadings is to enable the parties to alter their pleadings so as to ensure that the litigation between them is conducted, not on the false hypothesis of the facts already pleaded or the relief or remedy already claimed, but rather on the basis of the true state of the facts which the parties really and finally intend to rely on. The power of amendment makes the function of the court more effective in determining the substantive merits of the case rather than holding it captive to form of the action or proceedings....The court will normally allow parties to make such amendments as may be necessary for determining the real questions in controversy or to avoid a multiplicity of suits, provided there has been no undue delay, no new or inconsistent cause of action is introduced, and no vested interest or accrued legal right is affected and that the amendment can be allowed without an injustice to the other side.”

114. In the case of [Raila Amolo Odinga & Another v IEBC & 2 others](#) (2017) eKLR;

“In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law



is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings.....”

Fair Hearing

115. The Petitioner challenged the nomination vetting and recruitment of members of County Assembly and they were not joined to these proceedings yet adverse consequences/orders/declarations would result and affect them without an opportunity to be heard on merit.

116. In the case of *David Gicheru v Gicheba Farms Limited & Another* [2020] eKLR the Court held that:-

“The fundamental duty of the Court is to do justice between the parties. It is in turn, fundamental that to that duty, those parties should each be allowed a proper opportunity to put their cases upon the merits of the matter...”

117. *Msagha v Chief Justice & 7 Others* Nairobi HCMCA no. 1062 of 2004 (Lessit, Wendo & Emukule, JJ on 3/11/06) (HCK) [2006] 2 KLR 553 it was held:

“The Court observes firstly that the rules of natural justice “audi alteram partem” hear the other party, and no man/woman may be condemned unheard..... An essential requirement for the performance of any judicial or quasi-judicial function is that the decision makers observe the principles of natural justice. A decision is unfair if the decision-maker deprives himself of the views of the person who will be affected by the decision. If indeed the principles of natural justice are violated in respect of any decision, it is indeed immaterial whether the same decision would have been arrived at in the absence of the departure from essential principle of justice. The decision must be declared to be no decision...It is paramount at this juncture that this court establishes the ingredients and/or components of natural justice. The principles of natural justice concern procedural fairness and ensure a fair decision is reached by an objective decision maker. Maintaining procedural fairness protects the rights of individuals and enhances public confidence in the process.

Disposition

118. In the end, the petition is spent and is dismissed. This being a public interest litigation, each party shall bear its own costs.

JUDGMENT DELIVERED SIGNED DATED IN OPEN COURT IN MACHAKOS ON 13TH JULY, 2023 (VIRTUAL/PHYSICAL CONFERENCE).

M.W.MUIGAI

JUDGE

In The Presence/Absence Of:

Ms Leah Ezekiel H/b Willis Otieno

For 1st, 2nd & 5th Respondents

Mr. Nthiwa H/b Mr. Muthui for 3rd & 4th Respondents

Geoffrey/Patrick - Court Assistant(s)

