



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

PETITION NO.5 OF 2018

IN THE MATTER OF ARTICLE 180(2) OF THE CONSTITUTION OF KENYA

AND

**IN THE MATTER OF THE ADVISORY OPINION OF THE SUPREME COURT OF KENYA VIDE SUPREME COURT OF
KENYA REFERENCE NO.1 OF 2015**

AND

IN THE MATTER OF THE COUNTY GOVERNMENTS ACT NO.17 OF 2012

AND

IN THE MATTER OF NOMINATION OF CAROLINE KARUGA AS NYERI COUNTY DEPUTY GOVERNOR

AND

**IN THE MATTER OF A RULING BY THE SPEAKER OF THE NYERI COUNTY ASSEMBLY HON. JOHN KAGUCHIA
DATED 19TH APRIL, 2018**

BENSON NJUKI KIHORO.....PETITIONER

AND

THE GOVERNOR NYERI COUNTY.....1ST RESPONDENT

THE COUNTY GOVT OF NYERI.....2ND RESPONDENT

CAROLINE WANJIRU KARUGA.....3RD RESPONDENT

THE SPEAKER OF THE COUNTY

ASSEMBLY OF NYERI.....4TH RESPONDENT

THE COUNTY ASSEMBLY OF NYERI COUNTY...5TH RESPONDENT

RULING

INTRODUCTION

1. The Petitioner being aggrieved by the process of the nomination of the 3rd respondent to the office of the Deputy Governor of Nyeri County, filed this instant Petition and seeks the following orders;

(i) A declaration that the nomination by the 1st respondent of the 3rd respondent be declared unconstitutional pursuant to the Supreme Court's Advisory Opinion in Reference No.1 of 2015;

(ii) A declaration that the nomination of the 3rd respondent by the 1st respondent did not comply with the requirements of the

Elections Act 2011 and Article 193(1)(c) of the Constitution; and is therefore unconstitutional;

(iii) A declaration that the ruling by the 4th respondent on the threshold of approval based on a yet to be passed law, county Government (Amendment) Bill, 2017 is unconstitutional and unlawful;

(iv) Costs of the Petition.

2. The petitioner's claim is supported by the grounds on the face of the Petition and on the Supporting Affidavit sworn by the petitioner, Benson NjukiKihoro;

3. The parties were directed to canvass the Petition by filing and exchanging written submissions; the petitioner filed and served his written submissions; the 1st, 2nd and 3rd respondents and the 4th and 5th respondents also filed and served their respective written submissions;

4. The petitioner was represented by learned counsel MrMuhoho; the 1st, 2nd and 3rd respondents were represented by learned counsel MrKamotho and the 4th and 5th respondents were represented by learned counsel MrNjenga; hereunder is a summary of the parties rival submissions;

PETITIONER'S CLAIM

5. In November, 2017 a vacancy arose in the office of the Governor following the demise of the office holder on 7/11/2017; the Deputy Governor took over the position and was sworn in as Governor on the 13/11/2017 in accordance with Article 182(2) of the Constitution 2010; this created the vacancy in the office of the Deputy Governor, and there exists no constitutional or legislative provision for the filling of the said position;

6. On the 9/03/2018 the Supreme Court in case Reference No.1 of 2015 made an advisory opinion on how the position of the Deputy Governor may be filled in the event of a vacancy; and pursuant to the Advisory the 1st respondent nominated the 3rd respondent for the appointment as Deputy Governor and gave the name to the 5th respondent; Notice of the Nominee was duly given by the 5th respondent to the nominee and to members of the public inviting the nominee and informing the members of the public of the vetting to be held on the 20/04/2018;

7. The Notice allowed the members of the public to present any protest they had against the nominee in a written statement on oath supported with evidence; during the said vetting the petitioner was denied an opportunity as a member of the public to present his information neither was he allowed to participate in the process; the vetting was concluded and the next step was the tabling of the Report in the House by the Assembly Committee on Appointment to be followed by a motion of approval or disapproval;

8. That one member of the County Assembly sought clarification on the following issues; whether the Assembly's Committee on Appointment had the mandate to vet and consider the suitability of the nominee for the office of the Deputy Governor; and whether a simple or a two-thirds majority was the vetting threshold of a motion on the suitability of the nominee for the appointment of the Deputy Governor;

9. The 4th respondent in a Ruling made on the 19/04/2018 purported to determine that the committal of the nominee for appointment to the Office of the Deputy Governor to the Assembly Committee on Appointments was procedural; and also purported to determine the threshold of the approval of the motion for approval to be passed by the Nyeri County Assembly by a simple majority; this the petitioner contended was based on a non-existent and yet to be passed law;

10. The petitioner argued that pursuant to the Supreme Court Advisory Opinion in Reference No.1 of 2015 the nomination of the 3rd respondent was unconstitutional; and further that the Advisory Opinion which was couched in mandatory timeframes could not be applied retrospectively to cure or fill a lacuna that was there at the time of assumption of office;

11. That also pursuant to the Advisory Opinion the nomination of the 3rd respondent contravened the constitutional provisions of the articles of the Constitution that prescribe the qualifications for a Deputy Governor notably Article 180(2), Article 180(5) and 193(1) of the Constitution 2010 and Section 13 of the Elections Act No. 24 of 2011; and it was also unconstitutional for the 4th respondent to rely on the County Governments (Amendment) Bill, 2017 when making the Ruling of 19/04/2018;

12. The petitioner urged this court to make a finding that his prayers were merited and to make a finding in his favour.

1st and 3rd RESPONDENT'S CASE

13. After the demise of the then governor of the 2nd Respondent on 7th November 2017, the position was filled by the Deputy Governor who was sworn in on 13th November 2017 in accordance with Article 182(2) of the Constitution; this created a new vacancy in the office of the Deputy Governor and there was no legal mechanism yet to fill the same; on 9th March 2018 the Supreme Court gave an advisory opinion that the office of the Governor can be filled by the Governor nominating a person to fill the vacant position subject to the approval of the County Assembly;

14. Following the said advisory opinion the 1st respondent forwarded the nem of the 3rd respondent to the 4th and 5th respondents for vetting and approval; to fill the vacant office of the Deputy Governor; she was subsequently sworn in and the vacancy was filled; on 9th May 2018 the petitioner withdrew the application for interim orders because the 3rd respondent had already been sworn in the office;

15. The respondents did not err on relying on the said advisory opinion which came later after their decision because this was not prejudicial to anyone; retrospective application of the law is valid if applied appropriately; the respondents relied on **Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others [2012]eKLR** where the Supreme Court stated that a retroactive law is not unconstitutional unless it *interalia* impairs obligations under contracts, divests vested rights or is constitutionally forbidden; the nomination of the 3rd respondent does not fall under any of these exemptions;

16. The respondents also relied on Mistry **Jadva Parbat & Company Ltd v AmeeriKassimLakha& 2 Others [2008]eKLR** where the Court held that whether or not a legislation operates retrospectively depends on the enacting body as manifested by the legislation. The Court noted that if the legislation affects substantive rights it will not be construed to have retrospective operation unless a clear intention to that effect is manifested and that whereas if it affects procedure only, prima facie it operates retrospectively unless where there is good reason to the contrary; since the nomination of the 3rd respondent was a mere procedure the petitioner has failed to provide good reasons why the advisory opinion could not be used retrospectively; if the petitioner was aggrieved with the advisory opinion he should challenge it in the proper forum;

17. The petitioner filed the instant constitutional petition without indicating succinctly his rights under the constitution that were violated by the respondent's; mere pointing out articles of the Constitution without adequately illustrating how the said rights were violated does not meet the requirements for admitting a petition; the respondents relied on **Okiya Omtata Okoiti v Kenya National Examinations Council [2018]eKLR** for this position;

18. It is not correct that the 3rd respondent's nomination contravened Articles 180(2), 180(5) and 193(1) of the Constitution as alleged by the petitioner; the said provisions touch on fresh election of the Governor and Deputy Governor which is not the case in the instant matter; in this case it is assumed that the Deputy Governor was already elected together with the Governor;

19. The respondents relied on the said Supreme Court's advisory opinion where the Court stated that the Constitution does not contemplate the filling of a vacancy in the office of the Deputy Governor through a direct election to the office; the two offices are intimately linked; the office of the Deputy Governor is dependent on the office of the Governor and the Constitution dispenses with a separate election of the Deputy Governor who assumes office upon election of the Governor that nominated him or her;

20. The 3rd respondent was properly appointed according to the law and any challenge to that appointment could only be brought by way of an election petition; the respondents relied on **Moses Mwicigi & 14 Others v IEBC & 5 Others [2016]eKLR**; the respondents urged the court to dismiss the petition with costs to the respondents;

4th and 5th RESPONDENT's CASE

21. The respondents relied on **Advisory Opinion No.2 of 2011 in the matter of the Interim Independent Electoral Commission [2011]eKLR** for the position that an advisory opinion is binding in nature; consequently advisory opinion no.1 of 2015 delivered on 9th March 2018 is not a mere advice but it is binding; it was an authoritative statement of law guiding the conduct of not just the organ(s) that sought it but all governmental or public action thereafter;

22. The said advisory opinion delivered on 9th March 2018 was not used retrospectively by the respondents because when it was so delivered the office of the Deputy Governor of Nyeri was still vacant; like the 1st and 3rd respondents the 4th and 5th respondents also relied on **Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others [2012]eKLR** for the position that retrospective application of constitutional law when sanctioned in some circumstances because unlike other legislation the constitution looks forward and backward, vertically and horizontally, as it seeks to re-engineer the social order;

23. The 1st respondent properly nominated the 3rd respondent on 9th March 2018 in accordance with the said advisory opinion and Section 6 of the Public Appointments (County Assemblies Approval) Act No. 5 of 2017; he later notified the county assembly and the members of the public on the proposed nomination; on 13th April 2018 the 5th respondent invited the nominee to appear before a relevant committee in the county assembly pursuant to Section 5 of the Public Appointments (County Assemblies Approval) Act; this shows that all the parties involved complied with the law in the nomination of the 3rd respondent to the office of the Deputy Governor;

24. The petitioner did not comply with Section 7(10) of the Public Appointments (County Assemblies Approval) Act when he attended the approval hearing of the assembly committee on 20th April 2018; the said provision requires that the person contesting the suitability of a candidate to hold an office should submit a written statement on oath prior to the approval hearing; the petitioner brought his contest on the very day of the approval hearing contrary to the law;

25. Lawful procedure was followed in appointing the 3rd respondent who was sworn in and is now serving the people of Nyeri County; the respondents urged the court to dismiss the petition with costs for lack of merits;

ISSUES FOR DETERMINATION

26. After reading the parties rival written submissions this court has framed the following issues for determination;

- (i) Whether the Advisory Opinion was properly applied by the respondents;
- (ii) Whether the Petition challenging the nomination of the Deputy County Governor is properly before this court;

(iii) Whether this court has jurisdiction to hear and determine issues under the provisions of Articles 180(2), Article 180(5) and 193(1) of the Constitution 2010;

ANALYSIS

Whether the Advisory Opinion was properly applied by the respondents;

27. The petitioner argued that pursuant to the Supreme Court Advisory Opinion in Reference No.1 of 2015 the nomination of the 3rd respondent was unconstitutional;

28. The submissions establish that the position of Governor fell vacant on the 7/11/2017 upon the demise of the holder of the office; and the Deputy Governor took over on the 13/11/2017; consequential thereto the Office of the Deputy Governor fell vacant; on the 9/03/2018 the Supreme Court issued the Advisory Opinion on the process to be followed to fill the position of the Deputy Governor; it held that where a vacancy occurred in the Office of the Deputy Governor the Governor 'shall within 14 days nominate a person to fill the vacancy and the County Assembly shall vote on the nomination within 60 days of receiving it;

29. On the 9/03/2018 the 1st respondent nominated the 3rd respondent to fill the vacancy of Deputy Governor and notified the 5th respondent; the petitioner presented his information contesting the suitability of the 3rd respondent on the 20/04/2018;

30. The petitioner therefore argued that the decision did not apply to the Nyeri situation as the Advisory Opinion which was couched in mandatory timeframes could not be applied retrospectively to cure or fill a lacuna that was there at the time of assumption of office; which meant that the Governor ought to have appointed the 3rd respondent on the 27/11/2017 and the 5th respondent ought to have voted on the nomination within 60 days;

31. There are legions of authorities on the retrospective applicability of a new law particularly where the new law affects procedure it has been held that law prima facie operates retrospectively unless there is good reason to the contrary; refer to **Mistry Jadva Parbat & Co. Ltd vs Ameerikassam Lakha & Anor [2008] eKLR**;

32. This court is also guided by the Supreme Court decision in **S.K. Macharia & Anor vs Kenya Commercial Bank Ltd [2012] eKLR** where it held that a retrospective law was not unconstitutional unless it inter alia impairs obligations under contracts, divests vested rights or is constitutionally forbidden;

33. Going by the above decisions this court is satisfied that the Advisory Opinion was on procedure and that any retrospective application would have been lawful and valid;

34. The above notwithstanding it is noted that the Supreme Court did not state the commencement date of the Advisory Opinion and it goes without saying that this court cannot be the forum to determine this issue;

35. Further whichever way the respondents applied the Advisory Opinion this court is not the proper forum to determine the validity of its applicability; the reasons shall be addressed in the forgoing paragraphs;

Whether the Petition challenging the nomination of the Deputy County Governor is properly before this court;

36. The petitioner's claim arises from the nomination process; and looking at the prayers sought it is quite obvious that the petitioner seeks to have the nomination annulled by a declaration that the process was unprocedural and unconstitutional;

37. It is settled law that once the process of nomination has ended and there is subsequent gazettment of the nominated person any challenge to the said appointment can only be through an Election Petition; this court is guided by the Supreme Court decision in **Moses Mwigigi & 14 Others vs Independent Election and Boundaries Commission & 5 Others [2016] eKLR** where it was held that;

"[117] It is clear to us that the Constitution provides for two modes of 'election'. The first is election in the conventional sense, of universal suffrage; the second is 'election' by way of nomination, through the party list. It follows from such a conception of the electoral process, that any contest to an election, whatever its manifestation, is to be by way of 'election petition'."

38. The court went further to add;

"[119] To allow an electoral dispute to be transmuted into a petition for the vindication of fundamental rights under Article 165 (3) of the Constitution, or through judicial review proceedings, in our respectful opinion, carries the risk of opening up a parallel electoral dispute-resolution regime. Such an event would serve not only to complicate, but ultimately, to defeat the sui generis character of electoral dispute-resolution mechanisms, and notwithstanding the vital role of electoral dispute-settlement in the progressive governance set-up of the current Constitution."

39. The 3rd respondent is found to have been duly nominated and was duly declared a Deputy Governor through a Gazette Notice; therefore the election through nomination having been completed by the process of gazettment of the person, any dispute arising therefrom shifts to an Election Court;

40. This court finds that the petitioner has chosen the wrong forum to address his grievances on the propriety of the nomination process; the

prayers sought can only be ventilated by way of an election petition and not through a constitutional petition; an election court is as defined under the provisions of the Elections Act;

41. This court is not a duly constituted Election Court and therefore lacks the jurisdiction to entertain the instant petition; and the instant petition is found to be not properly before this court.

Whether this court has jurisdiction to hear and determine issues under the provisions of Articles 180(2), Article 180(5) and 193(1) of the Constitution 2010;

42. The above Articles 180(2), Article 180(5) and Article 193(1) were contained in the overview of the Grounds for the Petition and in the submissions made on behalf of the petitioner; the articles relate to eligibility and the qualifications of the candidate;

43. Article 180(2) of the Constitution 2010 reads as follows;

“To be eligible for election as county governor, a person must be eligible for election as a member of the county assembly.”

44. Article 180(5) provides as follows;

“Each candidate for election as county governor shall nominate a person who is qualified for nomination for election as county governor as a candidate for deputy governor.”

45. And Article 193(1) provides;

“Unless disqualified under clause (2), a person is eligible for election as a member of a county assembly if the person—

(a) is registered as a voter;

(b) satisfies any educational, moral and ethical requirements prescribed by this Constitution or an Act of Parliament; and

(c) is either—

(i) nominated by a political party; or

(ii) an independent candidate supported by at least five hundred registered voters in the ward concerned.”

46. This court reiterates that the 3rd respondent having been gazetted to hold the office means that any contest to the issues must by an Election Petition; this court therefore lacks jurisdiction to determine the eligibility and qualifications of the 3rd respondent as set out under the provisions of Articles 180(2), Article 180(5) and 193(1) of the Constitution 2010; the court best suited to canvass these issues would be an Election Court;

FINDINGS & DETERMINATION

47. Fortheforgoing reasons this court makes the following findings and determinations;

(i) The instant petition is an election petition under the guise of a constitutional petition and is found to be incompetent;

(ii) This court finds that this court lacks jurisdiction to determine the eligibility and qualifications of the 3rd respondent as set out under the provisions of Articles 180(2), Article 180(5) and 193(1) of the Constitution 2010;

(iii) The court best suited to canvass all the afore-going issues would be an Election Court;

(iv) The petition is found to be incompetent and the same is hereby struck out;

(v) Each party shall bear their own costs.

It is so ordered.

Dated, Signed and Delivered at Nyeri this 13th day of February, 2020.

HON. A. MSHILA

JUDGE