



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CORAM: R. MWONGO, J

PETITION NO 11 OF 2019

IN THE MATTER OF: ARTICLES 21, 22, 23, 35, 232 AND 235 OF THE CONSTITUTION OF KENTS AND PROVISIONS OF THE COUNTY GOVERNMENT ACT, 2012, AND SECTION 10(1) AND (2) OF THE URBAN AREAS AND CITIES (AMENDMENT BILL 2017) AND ALL RELATED PROVISIONS OF THE LAW

AND

IN THE MATTER OF: ESTABLISHING OF NAIVASHA MUNICIPAL BOARD AS ADVERTISED IN THE MEDIA OF 21/3/2019 AND OBJECTIONS THERETO

AND

IN THE MATTER OF: SEEKING COMPLIANCE WITH DUE PROCESS OF LAW, PRINCIPLES OF TRANSPARENCY ACCOUNTABILITY AND INTEGRITY IN RECRUITMENT, ADVERTISING, NOMINATING VETTING AND EVENTUAL APPOINTMENT AND OPERATIONALISATION OF MEMBERS OF NAIVASHA TOWN MUNICIPAL BOARD BY THE COUNTY GOVERNMENT OF NAKURU

AND IN THE MATTER

BETWEEN

ESKIMOS KOBIA1ST PETITIONER

HAKI JAMII RIGHTS CENTRE2ND PETITIONER

LUCAS KAROBIA KIRATU.....3RD PETITIONER

AND

NAKURU COUNTY GOVERNMENT.....1ST RESPONDENT

COUNTY ASSEMBLY OF NAKURU.....2ND RESPONDENT

COUNTY EXECUTIVE COMMITTEE MEMBER IN CHARGE

OF LANDS HOUSING AND PHYSICAL PLANNING.....3RD RESPONDENT

COUNTY SECRETARY NAKURU4TH RESPONDENT

JUDGMENT

Background and Parties' cases

1. This petition was commenced by chamber summons notice of motion dated 9th April, 2019, and is supported by the affidavit of the 1st Petitioner. In the petition, the petitioner's main complaint is that the 1st, 3rd and 4th respondents conducted a flawed and irregular recruitment process for the Naivasha Municipal Board. They assert that the process lacked transparency, openness, accountability and integrity resulting

in an outcome that was prejudicial to the residents, business community, professionals and stakeholders of Naivasha town.

2. In paragraph 12 of the petition of the petitioners, the petitioners list thirteen grounds of irregularity in the recruitment process. That, despite protests, the respondents ignored the public concerns.

3. The petition seeks the following prayers:

“ 1). That the honourable court do halt, stay, stop and forestall any process of recruitment, nomination and or appointment of members of Naivasha Municipality Board pending determination of validity of the process or at all.

1. That the process of recruitment, nomination, vetting and appointment of Naivasha Municipality Board and advertised in newspaper of 25/03/2019 be nullified and declared null and void.

2. That the respondents most specifically the 1st, 3rd and 4th respondents be compelled and obliged by the Honourable Court to commence fresh process that comply with the process that comply with provisions of law, and public services and practice in line with the constitution, County Government Act and any other law.

3. That the respondents be compelled to adhere to the principals of public participation, competitiveness, integrity and involvement of all stakeholders, affiliate botchs (sic), associations in the advertisements, nomination, interviews, shortlisting nomination and appointment of Naivasha Municipal Board.

4. Any other orders and costs the court may deem fit”

5. Annexed to the 1st petitioners supporting affidavit is a copy of the advertisement showing the list of names of the nominees to the Naivasha Municipal Board, which the petitioners assert is contentious and irregular and should be nullified. The names include that of one Ruth Kahura, nominated to represent the informal sector. They aver that the nominee lacks basic requirements under the law, including permanent residence, business establishment and educational qualifications. The petitioners object to her nomination and seek that the allegedly flawed process be revoked and nullified.

6. The matter first came up during court recess and was certified urgent in Nakuru on 12th April, 2019. Directions for service to all respondents and orders to file responses were then issued. Despite the orders, the respondents failed to comply. I issued interim orders stopping the operations of Naivasha Municipal Management Board on the same date.

7. However, moved by a notice of motion dated 15th May, 2019, under urgency by the respondents, the orders issued were lifted and the parties agreed to the hearing of the substantive petition. Parties were then directed to complete pleadings and file submissions, which they did.

8. Although the petition in its title invokes Articles 21, 22, 23, 35, 232 and 235 of the Constitution, and prayer 3 of the prayers seeks that the respondents be obliged to commence a fresh recruitment process in line with the constitution, it does not in any of its paragraphs identify the provisions of the Constitution that are alleged to have been violated. Instead, violations alleged concern provisions of the County Governments Act, 2012, the Public Appointments (County Assembly Approval) Act 2017 and the County Urban Areas and Cities (Amendment Bill 2017). To that extent, the petition is not substantively a constitutional petition.

9. The respondents oppose the petition. The 1st, 3rd and 4th respondents’ response was filed by way of affidavit of Francis Mwangi Njuguna, the 3rd respondent. In summary, he states: that the petition is incompetent as it raises no constitutional issues; that the provisions of the Urban Areas and Cities Act were duly followed and complied with; that after advertisements were issued and applications received, and interviewing panel was appointed; that applicants who met the threshold were shortlisted and interviewed; that the 1st Petitioner was amongst those shortlisted, interviewed, awarded marks and was unsuccessful.

10. The 1st, 3rd and 4th respondents exhibited, through the 4th Respondent’s affidavit, documents showing how the advertisements, interviews and nomination process were conducted in accordance with the law. The documents included: the appointment letter for the interviewing panel; the interview schedule for Board members; interview scores for each interviewee; letters of nomination; resolutions of various nominating institutions; letters of appointment by the Governor; Intergovernmental Participation Agreement between Kenya Urban Support Programme (KUSP), National Government and County Government of Nakuru; and Programme Operations Manual of Kenya Urban Support Programme (KUSP) (final draft of November, 2017).

11. The respondents in paragraphs 8 and 9 of their affidavit pointed out that the 1st petitioner was one of the persons interviewed and awarded marks, but that he was not successful. His interview results were exhibited in Exhibit FMN6 of the affidavit. Further, in paragraphs 24 and 25 of the affidavit, the resp[ondents point out that the 1st petitioner and his advocate also proposed the name of one Absalom Juma for appointment to the Board as the nominee from Naivasha Professional Association whose chairman was the 1st Petitioner(See Exb FMN9). Thus, the respondents assert that it is the failure of the said proposed nominees to be nominated that has fueled the 1st petitioner’s petition, which the respondents consider to be malicious.

12. The 2nd respondent filed grounds of opposition asserting, in essence: that the petition was in conflict with the binding Supreme Court decision of **Justus Kariuki Mate & Another v Hon Martin Nyaga Wambora & Another [2017]eKLR** that settled the issue of court orders against legitimate constitutional processes undertaken within a county assembly; that the petition violated of the doctrine of separation of powers for inviting the Courts to intrude into the functional autonomy of the other arms of government; that the petition does

not allege any constitutional violations

13. They also filed a preliminary objection seeking to strike out the petition for failure by the petitioner: first, to enjoin the members of the Naivasha Municipal Board whose appointment was challenged in the petition; and second, failure to enjoin the Governor of Nakuru County whose act of nomination of members is challenged and impugned.

14. Finally, the 2nd respondent filed a replying affidavit which repeated the assertions in the grounds of opposition and asserted: that the nomination process was conducted in accordance with the law; that members of the public were invited to participate in the nomination exercise; and that the petition was not only lacking in particularity, but contained speculative disputes camouflaged as constitutional disputes that were unspecified.

15. The 2nd respondent attached to the affidavit the advertisement for nomination published in the press, and signed detailed Reports of the **Joint Committees on Appointment on Lands Housing and Physical Planning** and the **Report on the Vetting of Eighteen nominees for Appointment to the Nakuru and Naivasha Municipal Boards**. The reports outline the whole process which was undergone by the respondents in coming up with the nominees from the inception and legal background underpinning the nomination process, through the interviews, and up to the point of recommendation for nomination of the nominees finally appointed to the Municipal Boards of Naivasha and Nakuru.

Parties' Submissions

16. The parties' submissions highlighted the representations set out in their pleadings. The petitioners' submissions impugn several aspects of the respondents' actions: First, on the wide mandates of the Naivasha Municipal Board under the Urban Areas and Cities Act: that the persons appointed to the Board should have the integrity and qualifications that fulfil the constitutional requirements under Articles 10 and 232 of the Constitution, but that the recruitment process did not bother to confirm such qualifications.

17. Secondly, on interviews: that there was only one interviewer and the marks awarded are not comprehensible, nor were the venue of the interviews or timelines known, the interview panel was not advertised to the public, and that one interviewer, Benjamin Njoroge was also the appointing authority hence there was a conflict of interest.

18. Thirdly, on qualification of appointees: that the appointing and recruiting authority and the appointment panel were constituted opaquely and without transparency; and that the said Benjamin Njoroge may have influenced the interview outcome

19. Fourthly, on qualifications of the interviewees: that the newspaper advertisements gave requirements but that the interviewees certificates of qualification, clearances and other integrity papers were not availed

20. Fifthly, on nominations by associations: that detailed minutes of association nominations were not availed, in breach of section 10(4) a, b and c, of the Urban Areas and Cities Bill 2017. It may, however, be noted that a Bill has no force of law.

21. Sixthly, on residence and business requirements: that there was no involvement of the local lawyers' body, jua kali sector, chamber of commerce, clergy and business people as no minutes and criteria of participation were demonstrated, nor was it shown that the nominees were running businesses in the area.

22. Counsel attached, but did not highlight, the cases of **R v Cabinet Secretary, Ministry of Education & Another Ex parte Thadayo Obanda [2018]eKLR** and the ruling of the ELRC Court in Kericho in **Moses Kiprotich Lagat v Kericho County Assembly Committee on Appointments & 3 Others[2018]eKLR**. In the latter case of **Moses Kiprotich** this was an application for temporary stay of execution pending appeal, and it has no substantive relevance to the matter in issue.

23. As for the **Thadayo Obanda** case, the gravamen of the case is that the court will not hesitate to issue appropriate judicial review orders, even where a gazette of an appointment has occurred, if an appointment to public office was made through a flawed appointment procedure such as: non-competitive recruitment; failure to meet constitutional thresholds, the appointments being in breach of statute, and so on.

24. The 1st 3rd and 4th respondents urged that the court had no jurisdiction to hear the matter as it was a purely administrative exercise undertaken by the County Assembly and the County Executive. The respondents relied on the case of **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others [2013]eKLR** where they state the Court of Appeal adopted the High Court's dicta that:

“[separation of powers] must mean that the courts must show deference to the independence of the legislature as an important institution in the maintenance of our constitutional democracy as well as accord the Executive sufficient latitude to implement legislative intent. Yet, as the respondents concede, the courts have an interpretive role – including the last word in determining the constitutionality of all governmental actions”

25. They also relied on the Supreme Court Opinion Reference **Speaker of the Senate & Another v AG & 4 Others SC Ref No 2 of 2013 [2013 eKLR** where it was stated as follows:

“The Court will not question each and every procedural infraction that may occur in either of the houses of Parliament. The Court cannot supervise the workings of Parliament the institutional comity between the three arms of government must not be endangered by the unwarranted intrusions into the workings of one arm by another”

26. The respondents submit that the Urban Areas and Cities (Amendment) Act stipulates the clear procedures for appointment of members of the Board and these were followed strictly. As such the court has no basis for interfering with the appointment exercise as conducted.

27. As regards the process of recruitment, the respondents assert that there were advertisements of the process, that the public were involved, and that shortlisted candidates were interviewed, including the 1st petitioner who participated in the process without complaint. The respondents cited the case of **Nyathuna Quarry Self Help Group v County Government of Nakuru & the AG Pet No 12 of 2017** in which the court cited **Law Society of Kenya v AG & Another [2016] eKLR** which held that:

“The law is not however that all persons must express their views or that they must be heard and that the hearing must be oral.....what is required is that reasonable steps be taken to facilitate the said participation... Therefore even in cases where the mere fact that a particular person has not been heard does not necessarily warrant the whole process being nullified”

28. The 2nd respondent’s relied on their pleadings and submitted as follows: section 11 of the Urban Areas and Cities Amendment Act which amends the relevant provisions of section 14 came into force on 28th March 2019. That the new Act provides a new legal regime for appointment of Boards of Municipalities, with which the respondents fully complied.

29. Further, the respondents in supplemental submissions assert that the petitioners seek to overturn the appointment of members of the Naivasha Municipality Board but that they failed to enjoin the members of that Board who will inevitably be affected; they rely on the case of **Fairmont the Norfolk Hotel v the Industrial Court of Kenya [2012] eKLR**. In that case, the petitioner had failed to enjoin the AG in a constitutional petition for the enforcement of fundamental rights and freedoms. The court held that the AG must be enjoined as a party as the state is the guarantor of fundamental rights and freedoms, and it is on the state that the primary obligation is imposed at Article 21 of the constitution to “*observe, respect, protect, promote and fulfill*” fundamental rights. The failure to enjoin the AG was a serious technical omission which rendered the petition fatally defective. The court there also found that there had been a failure to enjoin the Kenya Hotel and Allied Workers Union which would be adversely affected by the decision.

Issues

30. After careful consideration of the parties’ representations and upon perusal of documents availed, my view is that the issues for determination are as follows:

- a. whether this court has jurisdiction to determine the matter
- b. whether the recruitment exercise followed due process requirements
- c. costs

Analysis and Determination

Jurisdiction

31. This issue was raised by the second respondent and argued articulately. They rely on the **Mumo Matemu case** for their position that the court has no jurisdiction to interfere with matters where the separation of powers demands that each arm of government essentially sticks to its own lane. In **Mumo Matemu**, the court, after discussing separation of powers concluded:

“ Yet, as the respondents concede, the courts have an interpretive role – including the last word in determining the constitutionality of all governmental actions”

32. I think that is the bottom-line position, for the constitution in **Article 165(3)(d)** clearly vests original and unlimited:

“ jurisdiction to hear any question respecting the interpretation of this constitution...”

This power includes the right to make determination on inconsistencies of the law with the constitution, and inconsistency with the constitution of any actions done by any authority (see Article 165(3)(d) (i)-(ii)).

33. In light of this expansive jurisdiction of the court, there is no doubt that the court is entitled to first hear and consider each case on its own merits and thereafter determine whether the matter in issue should or should not be subjected to court interference based on the doctrine of separation of powers.

34. The ultimate position held in **Mumo Matemu** was as follows:

“87(2) The High Court had jurisdiction to review and set aside the appointment of the appellant on grounds of constitutionality or legality. We make this conclusion based on Article 165(3)(d)(ii) of the Constitution which grants the High Court jurisdiction to hear any question respecting the interpretation of the Constitution, including the determination of a question regarding whether an appointment by any organ of the Government is inconsistent with, or in contravention of the Constitution”

35. There is therefore no doubt in my mind that that is the position that applies in the present case. I have no hesitation in finding, holding

and determining that this court has jurisdiction to entertain the present petition and to determine the issues therein, notwithstanding that they to some extent involve an inquiry into the role played by the devolved legislature and county executive.

36. On the point as to the respondents' argument that the petition did not meet the threshold for a petition set out in the case of **Anarita Karimi Njeru v R (1976-1980)KLR 1272** I would merely point out what I have already alluded to. That is, that the petition invokes the provisions of the constitution but nowhere in the body of the petition is there any mention of any breach of the provisions of the constitution.

Whether the recruitment exercise followed due process requirements under law

37. It is not in dispute that the recruitment exercise for Municipal Boards is required to be conducted under the **Urban Areas and Cities Act (UACA)**. In this case the exercise was commenced before the advertisements put out in the press by the 1st respondent, Nakuru County Government on 21st March 2019.

38. Section 13 of the UACA, 2011, which was in force up to 27th March 2019, provided for appointment of a board of a city through a competitive process by the county executive committee with approval of the county assembly. Members of the board would be nominated by stated associations.

39. This section equally applied to Boards of Municipalities pursuant to section 14 thereof for a Board of a Municipality. The two sections of UACA provided as follows:

“13. (1) A board of a city shall consist of not more than eleven members, six of whom shall be appointed through a competitive process by the county executive committee, with the approval of the county assembly. (2) Of the members referred to in subsection (1), at least five shall be nominated by—

(a) an umbrella body representing professional associations in the area; (b) an association representing the private sector in the area;

(c) a cluster representing registered associations of the informal sector in the area;

(d) a cluster representing registered neighbourhood associations in the area; and

(e) an association of urban areas and cities, and appointed by the county executive committee with the approval of the county assembly.

(3) The executive committee shall, while appointing members of the board, ensure gender equity, representation of persons with disability, youth and marginalised groups.

(4) A person shall not be appointed a member of the board unless that person? (a) is a citizen of Kenya; (b) is ordinarily resident or has a permanent dwelling in the city; (c) carries on business in the city; or (d) has lived in the city for at least five years.

14. The provisions of section 13 shall apply with respect to the board of a municipality except that such board shall comprise nine members of whom four shall be appointed and five elected in the prescribed manner

40. The key requirements under UACA for recruitment may be summarized as follows: Up to eleven persons were to be appointed to the [Naivasha] Board; five of them would be nominated by associations; the recruitment exercise should: be competitive; be carried out by the county executive; be approved by the county assembly; that gender equity and representation of marginalized and disabled persons be taken into account; and that the persons appointed must be: citizens; ordinarily resident in the area; or carry on business in the area; or have lived in the area for at least five years.

41. The UACA was amended by the Urban Areas and Cities (Amendment) Act (UACAA) No 3 of 2019 which commenced on 28th March 2019. The relevant provision for appointments of municipality boards is Section 11 UACAA which amended section 14 UACA and provides as follows:

“11 Section 14 of the principal Act is repealed and replaced with the following new section –

14. (1) A board of a municipality shall consist of nine members appointed by the county governor with the approval of the county assembly.

(2) The members of the board appointed under subsection (1) shall be constituted as follows—

(a) the county executive member for the time being responsible for cities and urban areas or his representative;

(b) three members who shall be appointed by the county governor, with the approval of the county assembly;

(c) four members who shall be nominated by an association and appointed by the county governor, with the approval of the county assembly;

(d) the chief officer responsible for urban development; and

(e) the municipal manager appointed under section 28 who shall be the secretary of the board and an ex officio member of the board.

(3) The four members of the board of a municipality specified under subsection (2) (c), shall be nominated by —

(a) an umbrella body representing professional associations in the area;

(b) an association representing the private sector in the area;

(c) a cluster representing registered associations of the informal sector in the area; and

(d) a cluster representing registered neighbourhood associations in the area.

(4) The county governor shall, while appointing the members of the board, ensure gender equity, representation of persons with disability, youth and marginalised groups.

(5) The county governor shall while considering the nominated members identified by the organizations specified under subsection (2), require the organizations to produce —

(a) signed minutes as evidence of an accountable process of nomination;

(b) evidence of compliance with statutory obligations; and

(c) vetting form to establish that the nominee has complied with the prescribed criteria for appointment as a member of the board.

(6) A person shall be qualified for appointment as a chairperson of the board if that person—

(a) holds at least a degree from an institution recognized in Kenya;

(b) has a distinguished career in a medium level management position in either the private or public sector;

(c) holds at least ten years' post qualification professional experience;

(d) satisfies the requirements of Chapter Six of the Constitution;

(e) is ordinarily resident or has a permanent dwelling in the municipality; and

(f) carries on business in the municipality or has lived in the municipality for at least five years.

(6) A person shall be qualified for appointment as a member of the board if that person —

(a) holds at least a diploma from an institution recognized in Kenya;

(b) has a distinguished career in a medium level management position in either the private or public sector;

(c) holds at least five years' post qualification professional experience; and

(d) satisfies the requirements of Chapter Six of the Constitution;

(e) is ordinarily resident or has a permanent dwelling in the municipality; and

(f) carries on business in the municipality or has lived in the municipality for at least five years.

(7) A person shall not be appointed as a member of the Board if that person —

(a) is an undischarged bankrupt;

(b) has been removed from office for contravening the Constitution or any other law;

(c) is not a citizen of Kenya; or

(d) has in the conduct of his or her affairs not met any statutory obligations.”

42. The evidence available shows that the process undertaken by the respondents commenced with the advertisements in the press on 21st March 2018, exhibited in the Replying Affidavit of Francis Mwangi Njuguna as Exhibit FMN2. They are entitled: *Advertisement for Nakuru and Naivasha Municipal Boards*. The advertisement required that applicants should apply for membership to the Boards by sending in sealed applications by 4th April, 2018 to the County Secretary. This was in accordance with sections 13 and 14 of UACA for filling the slots in the Board not reserved for association nominees.

43. The County Secretary then appointed an interviewing panel by letter dated 5th June, 2018 (Exhibit FMN 3). Interviews of applicants for non- association slots for Naivasha Board were held on 12th June, 2018 (Exhibit FMN 4(b)). The interviewees included the 1st Petitioner, Eskimos Kobia. The result of his interview by percentage – by each of the appointed interviewers – is shown in Exb FMN 5-6 as follows: 48%, 61%, 53%, and 62%.

44. Thereafter, and in fulfillment of the requirements of section 13(2) UACA, the County Secretary wrote letters dated 23rd July, 2018 (see Exhibit FMN 7), to the Chairmen of various organisations inviting them to provide names of three (3) persons each for nomination to the Naivasha Municipal Board. The letters were sent to the Architectural Association of Kenya, the Institute of Engineers of Kenya, the Institute of Surveyors of Kenya and Lakeview Residents Association, the Law Society of Kenya, the Kenya Association of Manufacturers, and the Kenya Institute of Planners.

45. In respect of association nominations, the 3rd respondent’s affidavit exhibited responses with nominations from the Kenya Association Manufacturers, the Institution of Engineers of Kenya, the Association of Professional Societies in East Africa (APSEA), the Naivasha Municipal Tenants Self Help Group, the Law Society of Kenya and the Naivasha Professionals’ Association (signed by its Chairman, the 1st Petitioner). As an example, the letter dated 31st August 2018, (in Exhibit FMN 8” of 3rd respondent’s affidavit), received by the 4th respondent from the Institution of Engineers stated:

“Nomination of Members to Naivasha Municipal Board:

Pursuant to the provisions of section 14 of the Urban Areas and Cities Act, 2016, and your letter reference NCG/S/BOARD.com/VOL.1/84, te Institution of Engineers is pleased to submit the following three nominees to enable you to select the engineer to represent the Institution of Engineers of Kenya on the Nakuru Municipal oard.

a. Eng. Maureen Adhiambo

b. Eng. Paul Mwangela

c. Eng. Henry Kiragu

We have enclosed the nominees Curriculum Vitae and Council Resolution of the 447th Council Meeting where the three names were approved”.

46. There is also attached to the said letter, a resolution of the Institution of Engineers of Kenya dated 31st August 2018 and signed by the Institution’s President and Secretary, together with a copy of the Institution’s certificate of registration as a society and the CV’s of the nominees.

47. The 1st petitioner states in paragraph 9 of his supporting affidavit as follows:

“That I aver that no interviews or constitution of interview or nomination panels of nominee (sic) was constituted, advertised or involved to vetting, interview or interrogation of the interviewees which is illegal”

This is false or misleading because in 2018 the 1st petitioner was interviewed for the position of a Board member, and also the fact that as chairman of Naivasha Professionals’ Association, he forwarded for nomination a name of a person who was eventually nominated to the Board.

48. After interviews of nominees, the 1st respondent published an advertisement dated 21st March, 2019 with the names of nominees to be approved by the County Assembly. Nominees were required to collect vetting questionnaires from the office of the Clerk on or before 26th March, 2019. Approval hearing dates were set out against the names. Members of the public were also invited through the advertisement to attend the hearings and /or submit information under oath that may have a bearing on the vetting of the named nominees/candidates. The named nominees for vetting were:

- a. Francis K Mwangi – appointed from interviews
- b. Arch Gerald Ndungu – appointed from interviews
- c. Weru Sammy Murathi – appointed from interviews

- d. Benson Njenjeri – Nominated by APSEA
- e. Absalom Juma – Nominated by Naivasha Professionals’ Association
- f. Peninah Muigai – Nominated by Law Society of Kenya
- g. Ismael Lugalia Abisai – Nominated by Kenya Association of Manufacturers
- h. Ruth Kabura – Nominated to represent Informal Sector (nominee of Naivasha Municipal Tenants Self Help Group)
- i. Sarah Mutare Mwangi – Appointed by County Executive

49. The respondents also exhibited the curricula vitae of the various nominees. According to the advertisement, the approval interviews by the County Assembly were to be conducted between 29th March and 1st April, 2019.

50. Letters of appointment dated 18th April, 2019, by the Governor, were exhibited showing appointments of seven persons to the Naivasha Board. They are: Weru Sammy Murathi; Benson Njenjeri; Absalom Juma; Peninah Muigai; Ismael Lugalia Abisai; Ruth Kabura and Sarah Mutare Mwangi; all listed as c) – i) in the list of nominees advertised for approval by the County Assembly. The letter pointed out that the Governor was acting in accordance with section 14(1) of UACA as amended by section 11 of UACAA following approval by the County Assembly on 10th April, 2019.

51. The question is whether in terms of section 14(2)(b) and (c) UACAA the appointees were approved by the County Assembly and whether four of them are nominees of associations? From the evidence availed and the exhibits in the affidavit of Francis Njuguna for the 1st, 3rd and 4th respondent and the affidavit of Joseph Malinda for the 2nd respondent, it is undoubtedly clear that section 14(2) UACAA was substantially complied with.

52. I have noted that section 14(2)(a)-(c) UACAA required that, when considering the nominees from associations, the Governor was to ensure that signed minutes of the respective associations’ accountable process of nomination were availed, and that evidence of compliance with statutory obligations, and a vetting form showing compliance with appointment criteria were availed. It must be remembered, however, that the commencement date of UACAA was 28th March 2019, and that until that date the repealed provisions of section 13 and 14 UACA were in force and were duly complied with by the respondents, and that Act did not have the requirements of section 14(2).

53. Further, if as appears true, the County Assembly hearings were held on 29th March and 1st April, 2019, the new Act was then just come into force. Nevertheless, it would be impracticable and unfair to require the respondents to re-start the whole recruitment process all over again from scratch, when essentially there had been full compliance with the then extant law. It is only in respect of section 14(2)(a)-(c) UACAA that I have found a slight irregularity, which does not reach the standard of a substantive procedural impropriety or defect, and for the reasons given, I decline to hold it against the respondents.

54. In the **Mumo Matemu case** (supra) the Court of Appeal stated as regards procedural improprieties:

“70. The general evidentiary standard applicable in judicial review of of the procedural impropriety of appointments process is that there must be a showing by the claimant that there were substantive defects in that procedure, fundamental omissions, or a consideration of extraneous considerations as to render the cumulative process unconstitutional. We note the importance and import of the principle recently stated by the High Court in Kenya Youth Parliament [Kenya Youth Parliament & 2 others v Attorney General & 2 others [2012] eKLR] as follows:

“They [the Petitioners] failed to show any defects in that procedure and process. There was no evidence that all the allegations, complaints and all matters complained of against the second respondent were not considered by all the organs....

.....

The Constitution vests different functions on different organs and to ask this court to fault the processes by those organs without presenting material to prove any wrongdoing is to ask the court to usurp the functions of those organs”

55. I have, further, taken into account that the 1st respondent fully participated in the whole recruitment exercise from early 2018, without complaint. He applied to be considered to the Board and was personally interviewed. In addition, the 1st petitioner was a member of the Naivasha Professionals’ Association, and as its Chairman, he duly forwarded a nominee namely, Absalom Juma, to the County Assembly as part of the competitive and public participative exercise. The said gentleman was subsequently appointed to the Board by the Governor after undergoing the recruitment process. There is no complaint that his appointment was irregular or improper in any way. Nor has the Naivasha Professionals Association or its nominee been enjoined as an interested party by the petitioners.

56. There is a final point of interest here. The 3rd petitioner was the executive director of the 2nd petitioner. Neither he nor his organization, have made any assertion or demonstrated that they were in any way prevented from participating in, or were disadvantaged in any manner from, any aspects of the recruitment exercise. Nor is there any claim in the petition of breach or derogation of constitutional provisions.

57. The petitioners relied on the case of **exparte Thadayo Obanda** in aid of their petition, and I have carefully studied that case. In

Thadayo, the court found as a matter of law under the Universities Act, 2012, that the members of the Council of the University of Nairobi were required to be competitively recruited through an open process. Further the Court held that information as to whether those requirements were complied with was information uniquely within the knowledge of the respondents. Ultimately, the Court in **Thadayo** held:

“48. Whether or not there were invitations for persons to apply for the said positions, whether or not there were in fact such applications, whether or not invitations were extended to the public to comment on such applicants’ suitability was, in my view, peculiarly within the knowledge of the said Cabinet Secretary and his said panel. Therefore, it behoved them to place before the Court credible material supporting the fact that they had fulfilled the legal obligation placed on them. Without such evidence, it would be unreasonable to expect the applicant to prove the negative that the Cabinet Secretary and the panel did not so comply apart from making an allegation to that effect.

49. In the absence of such evidence, there is no material on the basis of which this Court can find that the constitutional and statutory requirements were complied with.”

58. In the present case, it has been shown that the respondents provided ample evidence disclosing the procedures they followed and how they made the recruitments of Naivasha Board members. I am satisfied that the information supplied by the respondents was credible and satisfactorily answered the allegations of the petitioners. To that extent, the cited authority did not assist the petitioners’ case.

59. In light of all I have said herein, I am unable to find in favour of the petitioners on any of their prayers.

Costs

60. The 1st 3rd and 4th respondents argued that the petitioners should be condemned to pay the costs of the petition

61. I have considered the question of costs carefully. The respondents assert that they discharged their mandate properly as stipulated in UACA and the County Government Act. They argue that the court has power to exercise its discretion to condemn the petitioners to pay costs under section 27(1) of the Civil Procedure Act. They rely on the case of **Cecilia Karuru Ngayu v Barclays Bank of Kenya & Another [2016]eKLR** where the court awarded costs to the second defendants who were struck off from the proceedings.

62. In that case the court considered in fair detail the arguments propounded by Kuloba in **Judicial Hints on Civil Procedure 2nd Edition, 2011**, where it stated:

“ Justice (Rtd) Richard Kuloba in the earlier cited book states as follows:-

The words “the event” mean the result of all the proceedings to the litigation. The event is the result of the entire litigation. It is clear however, that the word “event” is to be regarded as a collective noun and is to be read distinctively so that in fact it may mean the “events” of separate issues in an action. Thus the expression “the costs shall follow the event” means that the party who on the whole succeeds in the action gets the general costs of the action, but that, where the action involves separate issues, whether arising under different causes of action or under one cause of action, the costs of any particular issue go to the party who succeeds upon it. An issue in this sense need not go to the whole cause of action, but includes any issue which has a direct and definite event in defeating the claim to judgement in the whole or in part”

At page 101 of the same book, Kuloba authoritatively states as follows:-

“The law of costs as it is understood by courts in Kenya, is this, that where a plaintiff comes to enforce a legal right and there has been no misconduct on his part-no omission or neglect, and no vexatious or oppressive conduct is attributed to him, which would induce the court to deprive him of his costs-the court has no discretion and cannot take away the plaintiffs right to costs. If the defendant, however innocently, has infringed a legal right of the plaintiff, the plaintiff is entitled to enforce his legal right and in the absence of any reason such as misconduct, is entitled to the costs of the suit as a matter of course”

63. The circumstances pertaining in the present case are of course different from **Cecilia Ngayu’s** case in that no party has been struck out from the proceedings thereby incurring wasted costs. The argument I would have expected to be made, and which was not made by the respondents here, is that the petitioner’s petition was not made in the public interest and had no public interest element; that if it had been made in the public interest that would have entitled the petitioner to avoid any costs exposure as it could be propounded that public interest matters ought not attract costs as a matter of policy, their aim being to enrich the public law jurisprudence and create a better society.

64. I nevertheless find that the petitioners have not only lost the case and therefore the event is that they should be liable to costs. But the 1st petitioner also clearly and fully participated in the recruitment process, and once responses to the petition were filed, it would have been clear to the petitioners from the documentation supplied that there had been detailed documents readily showing how the respondents had acted with fealty to the law. In addition, I found that the petition did not specifically raise any constitutional issues or allegations of breach of constitutional provisions.

65. To that extent I am prepared to exercise the court’s discretion to direct that the petitioners shall carry twenty percent (20%) of the respondents’ party and party costs. It is so ordered.

Disposition

66. In conclusion, I decline to grant any of the prayers sought by the petitioners for all the reasons aforesaid. In particular:

- a. Prayer 1 and 3, seeking to forestall and stop the recruitment process, and to compel a fresh recruitment process to be re-started, fail inter alia, for the reason that I have not found any constitutional or statutory irregularity in the process which requires this Court's interference.
- b. Prayer 2, seeking to nullify and void the nomination, vetting and appointment advertised on 23rd March, 2019, fails inter alia, for the reason that the process leading up to that advertisement was wholly in accordance with the Urban Areas and Cities Act, 2011, which was in force until repealed on 28th March, 2018.
- c. A Prayer 4 seeking that the respondents to be compelled to adhere to the principles of public participation fails, inter alia, for the reason that the respondents reasonably demonstrated that there was public participation in the recruitment process.

67. The petitioners shall bear 20% of the respondents' costs.

Administrative directions

68. Due to the current inhibitions on movement nationally, and in keeping with social distancing requirements decreed by the state due to the Corona-virus pandemic, this Judgment has been rendered through Zoom video/tele-conference with the consent of the parties noted hereunder, who were also able to participate in the conference. Accordingly, a signed copy of this judgment shall be scanned and availed to the parties and relevant authorities as evidence of the delivery thereof, with the High Court seal duly affixed thereon by the Executive Officer, Naivasha.

69. A printout of the parties' written consent to the delivery of this judgment shall be retained as part of the record of the Court.

70. Orders accordingly.

Dated and Delivered in Nairobi by video-conference this 9th Day of April, 2020

Signed

RICHARD MWONGO

JUDGE

Attendance list at video/teleconference:

1. G. N. Kimani for the Petitioners, consenting by teleconference but unable to videoconference
2. Caleb Nyamwange for 1st and 2nd for Respondents
3. B Akang'o for 3rd and 4th Respondents
4. Court Clerk – Quinter Ogutu