



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT NAIROBI  
CONSTITUTIONAL AND HUMAN RIGHT DIVISION

PETITION NO 603 OF 2017

HALIMA ALI ABDULLAHI.....PETITIONER

VERSUS

THE COUNTY GOVERNMENT OF WAJIR.....1<sup>ST</sup> RESPONDENT

THE GOVERNOR OF WAJIR COUNTY.....2<sup>ND</sup> RESPONDENT

THE COUNTY ASSEMBLY WAJIR COUNTY.....3<sup>RD</sup> RESPONDENT

JUDGMENT

1. *Halima Ali Abdullahi*, the petitioner, has brought this petition against the *County government of Wajir*, the *Governor*, as well as the *County Assembly of Wajir*, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents respectively, contending that the three respondents have violated or stand to violate Article 27 of the Constitution.

2. According to the petition, on 15<sup>th</sup> December 2017, the 2<sup>nd</sup> respondent announced names of persons who had been nominated as Chief Officers in Wajir County vide letter dated 13<sup>th</sup> December 2017. In the said letter, it is averred, the 2<sup>nd</sup> respondent expressed the view that a majority of the people of Wajir County do not want women to represent their interests in the county irrespective of their qualifications and or expertise.

3. The petitioner averred that out of the 25 nominated chief officers only 4 were women and contended that the 1<sup>st</sup> and 2<sup>nd</sup> respondents' action of nominating the Chief Officers was contrary to Article 27(8) of the Constitution. She claimed that the 3<sup>rd</sup> respondent was about to commence the process of approving the nominated chief officers which would be in violation of Article 27 of the Constitution in so far as the principle of two third genders is concerned.

4. The petitioner therefore sought the following reliefs:-

*i. A declaration that the nomination by the 1<sup>st</sup> and 2<sup>nd</sup> respondents, and the impending vetting and/or approval by the 3<sup>rd</sup> respondent, of persons for the Chief officers positions was and/or is being done in contravention of the principles of rule of law and good governance because it contravenes article 27(8) requirement that an appointive body should not have more than two thirds of persons of the same gender.*

*ii. A declaration that the 3<sup>rd</sup> respondent will act in violation of the Constitution by approving nominees for Chief Officers positions when it is clear that it would effectively result in violation of the rule of law and specifically Article 27(8) of the Constitution.*

*iii. A declaration that respondents have contravened and/or stand to contravene Articles 10, 27 and 28 of the Constitution in nominating and approving nominees for the chief officers positions.*

*iv. An order of certiorari calling up and forthwith quashing the 2<sup>nd</sup> respondent's letter dated 13<sup>th</sup> December 2017 for having nominated persons for the chief officers positions in contravention of Articles 10 and 27 of the Constitution.*

*v. Cost of the petition*

*vi. Any other order that this Honourable court deems fit and just in the circumstances.*

## **Response**

5. The respondents filed grounds of opposition dated 25<sup>th</sup> February 2018 and filed in court on 9<sup>th</sup> March 2018. The respondents contended that the petition had been overtaken by events in that the chief officers had already been vetted, approved and duly appointed; that the appointment of chief officers took into account all valuable and marginalized groups including persons with disabilities, the youth, minority groups, women and the elderly in conformity with Articles 21(2) 27(1)(2) and (4) of the Constitution; that there was no violation of Article 21(1) m, (3) & (4) since women were not ignored and that the vetting and approval of the chief officers by the county assembly was done in accordance with the provisions of the Public Appointments (County Assemblies) Approval Act.

6. It was contended that the two third gender rule in relation to appointments is to be realized progressively and that the 1<sup>st</sup> respondent acted properly in appointing women to the position of Chief Officers.

7. The respondents also filed a replying affidavit by **Ahmed Sahal Omar**, the County Secretary of the 1<sup>st</sup> respondent, deposing that the appointment of chief officers took into account all groups; that it did not violate the provisions of the Constitution but took into account various groups including vulnerable groups and women as well as their qualifications. He also deposed that the process of vetting and approval had already been finalized and appointments done.

## **Submissions**

8. **Miss Cuna**, learned counsel for the petitioner, relied on their written submissions dated 27<sup>th</sup> October 2018 and filed on the same day and urged for the grant of prayers 3, 5 and 6 of the petition.

9. In the written submissions, the petitioner maintained the contention that the respondents violated the two third gender principle in the appointment of chief officers. It was contended that the principle is to be realized immediately and relied on the case of **Marlyin Muthoni Kamuru & 2 others v Attorney General & 2 Others** [2016]eKLR to support their submissions.

10. The respondents did not file written submissions. **Miss Chebole**, learned counsel who held brief for **Mr. Mwiti** for respondents, relied on their responses to the petition and urged the court to dismiss the petition.

## **Determination**

11. I have considered this petition and the response thereto. I have also considered submissions and the authority relied on. Only one question arises for determination, namely; whether the nomination and appointment of the chief officers of the county government of Wajir violated Article 27(8) of the Constitution. The petitioner has argued that it has but the respondents hold a contrary view.

12. The Constitution in Article 27 prohibits in absolute terms any form of discrimination and states in sub Article (1) that **“every person is equal before the law and has the right to equal protection and equal benefit of the law.”** It goes on to state in sub Article (2) that **“equality includes the full and equal enjoyment of all rights and fundamental freedoms.”** The Constitution further makes it clear that (3) **“women have the right to be treated equally and have the right to equal appointments in all sectors not least political economic cultural and social spheres.”**

13. To that extent, therefore, the state, which includes county governments, should not, either directly or indirectly, discriminate against any person on any grounds including gender. And in order to realize the equality among her citizens, the state was to legislate among other measures, to redress any disadvantages that individuals or groups may have preferred due to discriminates on.

14. Article 27(8) is more forthright that **“in addition to the measures contemplates in Article 27(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.”**

15. In that regard, therefore, the question of the right of women in all spheres of human endeavors, is beyond debate and many decisions on this issue bear a true testimony to its Constitutional place in a democratic state.

16. This petition has been brought to challenge what the petitioner calls open discrimination against women in violation of Article 27(8) of the Constitution in the appointment of chief officers in the county government of Wajir. She has stated that only 4 out of those nominated to the position of chief offices are women. The respondents have on their part denied this and stated that all aspects of equality were taken into account, including women, the marginalized, the youth and even the elderly in the nomination and final appointment.

17. I have perused the averments in the petitions well as depositions in the supporting affidavit and the annexures thereto. The petition and affidavit does not disclose the names of the persons nominated and or their gender. The annexure which contains the names of those nominated does not also show the gender of those nominated. Even in her written submissions, the petitioner does not disclose the identity and or gender of the people nominated to the positions of chief officers.

18. From the above perspective, I am unable to understand how the petitioner expected this court to determine the issue of discrimination based on gender given that the facts that would be relevant to her petition have not been fully disclosed. It is a cardinal principle of pleading in Constitutional petitions that a party should plead clearly and precisely and bring forth all relevant facts to enable the court address the Constitutional question presented before it for determination. The court was not expected to use names, without more, to determine the issue of gender which is a factual and central question in this petition.

19. Secondly, even if the court was to agree with the petitioner, I have perused the petition as well as the reliefs sought. It is clear from averments in the petition as well as the reliefs sought that the petitioner intended to challenge the nomination and intended vetting of the nominees. The process was not stopped and, as the respondents have stated in their responses, the process was concluded, the officials' nomination approved and that they were eventually appointed. The petitioner did not find it necessary to amend her petition to address the state of affairs obtaining where the appointments have been finalized so that it is no longer a threat but actual violation of the rights. The petition is still talking of nomination when the process has been concluded so that the court would no longer be addressing nomination but appointment.

20. Taking the above considerations into account, I am not satisfied as to the merit of this petition. Consequently, the petition dated 15<sup>th</sup> December 2017 is declined and dismissed with no order as to costs.

**Dated, Signed and Delivered at Nairobi this 18<sup>th</sup> Day of January 2019**

**E C MWITA**

**JUDGE**