



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**PETITION NO. 13 OF 2018**

**IN THE MATTER OF ARTICLES 1, 2, 3, 10, 22, 23, 73, 159 (2), 165 (3), (B), (D)(I-III), 179 (2B), 201, 207, 232, 258 (1 AND 2) AND 259 (1) (2) (3A) OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF SECTION 4 OF THE PUBLIC APPOINTMENTS (COUNTY ASSEMBLIES APPROVAL) ACT NO. 5 OF 2017**

**AND**

**IN THE MATTER OF THE SECTIONS 8 AND 35 OF COUNTY GOVERNMENTS ACT**

**AND**

**IN THE MATTER OF THE CONTRAVENTION AND VIOLATION OF THE CONSTITUTION ARTICLES 1, 2, 73(1) (1) (A) AND (B) AND 179 (2) (B) OF THE CONSTITUTION OF KENYA**

**BETWEEN**

1. CHRISTOPHER MUTINDA MUTUA
2. SIMON KIOKO MAKAU.....PETITIONERS

**AND**

1. HON. GOVERNOR DR. ALFRED NGANGA MUTUA
2. THE COUNTY GOVERNMENT OF MACHAKOS
3. RUTH MUTUA MUTIE
4. NAOMI MUTIE
5. FAITH SYOKAU WATHOME
6. KIMEU MBITHI KIMEU
7. EVELYNE KAVUU MUTIE
8. MORRIS OMUYONGA ALUANGA
9. TITUS NZEKI MATIKU KAVILA
10. FRANCIS MWAKA
11. URBANUS WAMBUA MUSYOKA
12. LAZARUS KIVUVA.....RESPONDENTS

AND

THE COUNTY ASSEMBLY

OF MACHAKOS.....INTERESTED PARTY

JUDGEMENT

1. The petitioners filed this petition on 2<sup>nd</sup> August, 2018 essentially seeking:

a) A declaration that the County Executive Committee appointments of **RUTH MUTUA MUTIE, NAOMI MUTIE, FAITH SHOKAU WATHOME, KIMEU MBITHI KIMEU, EVELYNE KAVUU MUTIE. MORRIS OMUYONGA ALUANGA, TITUS NZEKI MATIKU KAVILA, FRANCIS MWAKA, URBANUS WAMBUA MUSYOKA** and **LAZARUS KIVUVA** made by Hon. Dr. Alfred Nganga Mutua, the Governor of Machakos County, for the County Government of Machakos and published in the Kenya Gazette Number 7468 and dated 27<sup>th</sup> July, 2018 are unconstitutional, illegal and void for contravening Articles 10, 47, 179 (2B), 192 and 232 of the Constitution of Kenya, 2010.

b) A declaration that the County Executive Committee appointments of **RUTH MUTUA MUTIE, NAOMI MUTIE, FAITH SHOKAU WATHOME, KIMEU MBITHI KIMEU, EVELYNE KAVUU MUTIE. MORRIS OMUYONGA ALUANGA, TITUS NZEKI MATIKU KAVILA, FRANCIS MWAKA, URBANUS WAMBUA MUSYOKA** and **LAZARUS KIVUVA** made by Hon. Dr. Alfred Nganga Mutua, the Governor of Machakos County, for the County Government of Machakos, on 20<sup>th</sup> July, 2018 are illegal and void for contravening section 4 and 10 of the Public Appointments (County Assemblies Approval) Act, No. 5 of 2017.

c) An order of certiorari to remove into this court and quash the decision of the 1<sup>st</sup> respondent contained in the Kenya Gazette Number 7468 and dated 27<sup>th</sup> July, 2018 purporting to appoint **RUTH MUTUA MUTIE, NAOMI MUTIE, FAITH SHOKAU WATHOME, KIMEU MBITHI KIMEU, EVELYNE KAVUU MUTIE. MORRIS OMUYONGA ALUANGA, TITUS NZEKI MATIKU KAVILA, FRANCIS MWAKA, URBANUS WAMBUA MUSYOKA** and **LAZARUS KIVUVA** as members of the Machakos County Executive Committee.

2. The 1<sup>st</sup> Respondent announced the appointment of the 5<sup>th</sup> to 12<sup>th</sup> respondents as new cabinet members for Machakos County. He appointed the 3<sup>rd</sup> to 12<sup>th</sup> respondents as Members of the Machakos County Executive Committee and the same was published in the Kenya Gazette Number 7468 of 27<sup>th</sup> July 2018.

3. It is the petitioners' case that prior to the said appointments, the County Assembly of Machakos had on 8<sup>th</sup> November 2017, rejected the nomination of the 3<sup>rd</sup> to 5<sup>th</sup> respondents having adopted a report of the County Committee on Appointments. The said Committee is said to have found the three unsuitable for appointments as County Executive Committee Members for Machakos County Government. That despite the rejection, the 1<sup>st</sup> respondent arbitrarily and illegally purported to disregard the same and proceeded to appoint the same people for various positions in the County Executive Committee of Machakos County Government by a notice published on its official website [www.machakosgovernment.com](http://www.machakosgovernment.com) dated 16<sup>th</sup> May, 2018.

4. The petitioners contend that the appointment of the 6<sup>th</sup> to 12<sup>th</sup> respondents as members of the County Executive Committee members of Machakos ('**CEC**') was done prematurely and with impunity as the process of approval of the 6<sup>th</sup> to 12<sup>th</sup> respondents is still pending before the County Assembly of Machakos. That the 6<sup>th</sup> to 12<sup>th</sup> respondents were sworn in as CEC on 23<sup>rd</sup> July, 2018 in a private and secret ceremony before gazettelement of the appointees. The ceremony was said to have been presided over by the Chief Magistrate at Machakos Law Courts Hon. Alfred Kibiru. That the interested party on 24<sup>th</sup> July, 2018 passed a motion and resolved that the appointments of the 6<sup>th</sup> to 12<sup>th</sup> respondents as CEC was a nullity as the approval process was still pending before the Assembly. The petitioners further termed the appointments of the 3<sup>rd</sup> to 12<sup>th</sup> respondents as CEC illegal and averred that as a result of the appointments, there is imminent danger that the 1<sup>st</sup> respondent shall continue to exercise his power arbitrarily and in utter disregard of the Constitution of Kenya, 2010 as read with relevant legislation touching on public appointments and exercise of powers by the Governor among others. They stated that they are aggrieved by the manner in which the 1<sup>st</sup> respondent has exercised his constitutional and statutory powers in regard to the appointment of the CEC and they seek the same to be annulled.

5. The Petitioners outlined the legal basis of their petition thus; Article 1, 2(1)(4), 3, 10, 22(1) read together with 258 (1), 22(2) read together with 258(2), 27(1), 38, 47, 165 (3)(d), 179 and 232 of the Constitution of Kenya, 2010, section 4 and 10 of the Public Appointments (County Assemblies Approval) Act No. 5 of 2017 and section 8 & 35 of County Governments Act, No. 17 of 2012.

6. It was specifically averred that the 1<sup>st</sup> respondent arbitrarily exercised his powers and appointed persons to the County Executive Committee of Machakos County illegally and in contravention of the Constitution and various statutes; arbitrarily and secretly appointed the 3<sup>rd</sup> to 12<sup>th</sup> respondents as CEC without approval of the County Assembly of Machakos contrary to Article 179 (2)(b) of the Constitution; arbitrarily made appointments to the County Executive Committee without involving the members of the public or their elected representatives which action goes against the principles of good governance on participation of the people, equity, inclusiveness, transparency and accountability; that the 1<sup>st</sup> respondent's actions are in breach of the provisions of Article 196 of the Constitution which demands that the County Government must conduct its business in an open air manner, and facilitate participation and involvement of the people in its business and the businesses of the Assembly and the Committees; arbitrarily exercise of powers by the 1<sup>st</sup> respondent is in contravention of the values and principles of public service under Article 232 of the Constitution including efficient, effective and economic uses of resources, involvement of the people in the process of policy making accountability for administrative acts and fair competition and

merit as the basis of appointments and promotions; the 1<sup>st</sup> respondent's actions of appointing the 3<sup>rd</sup> to 5<sup>th</sup> respondents despite them having been rejected and for being found to be unsuitable to serve in the County Executive Committee by the County Assembly is in contravention of the provisions of Article 232 (g) of the Constitution on fair competition and merit as the basis of appointments; the 1<sup>st</sup> Respondent's action of arbitrarily appointing members of the County Executive Committee of Machakos County Government is in contravention of Article 47 of the Constitution as read with the provisions of the Fair and Administrative Actions Act and the action is unreasonable, illegal and procedurally unfair; that the actions by the 1<sup>st</sup> Respondent are further in contravention of section 4 of the Public Appointments (County Assemblies Approval) Act No. 5 of 2017 which required that such approvals be made by the County Assembly before any such appointments are made and that the actions by the 1<sup>st</sup> respondent of appointing the 3<sup>rd</sup> to 5<sup>th</sup> respondents are in contravention of section 10 of the Public Appointments (County Assemblies Approval) Act No. 5 of 2017.

7. The 1<sup>st</sup> Respondent filed a reply to the petition on 4<sup>th</sup> October, 2018 where he contended as follows. That the petition is incompetent, fatally defective and an abuse of court process and ought to be dismissed with costs. That the appointment of the CEC was proper, within the law and that the allegations of any violations are both unfounded and in bad faith. He stated that the petition is motivated by political underpinnings and people cannot politic all through at the expense of the welfare of, and service delivery to, the citizen of Machakos County whom the petitioners purport to represent. He contended that the petitioners have not demonstrated the interest that they have in the petition hence he perceives that they are just being used as proxies by his political detractors to settle long protracted political scores. That for instance, while the petitioners insinuate that they are voters as in their annexures CMM1 and SKM1, the handwritten annexures are stamped by a Returning Officer when it is common knowledge that a Returning Officer is appointed for returning an election and not giving extracts of the register of voters. That the annexures were commissioned on 1<sup>st</sup> August, 2018 yet the affidavits were done on 31<sup>st</sup> July, 2018 and the signatures appear to be of different Commissioners of Oath further supporting his belief that the petitioners are merely being used and did not initiate the petition on their own. He contended that the 1<sup>st</sup> petitioner is on record stating that the 1<sup>st</sup> respondent was not his preferred candidate for gubernatorial position for Machakos. That he even testified in **Machakos Election Petition No. 1 of 2018** against the 1<sup>st</sup> Respondent's win and his actions are thereby actuated by malice and in bad faith.

8. He contended that the same scheme had been attempted earlier through Constitutional Petition No. 10 of 2018 which was filed before this court where the petitioners wanted the court to stop the County Assembly of Machakos from vetting the same persons named as 3<sup>rd</sup> to 12<sup>th</sup> respondents. That the petition was dismissed by a judgment delivered on 17<sup>th</sup> September, 2018. That from the foregoing, relentless political games can be discerned. That the petitioners' ill motives can also be seen through their enjoining of County Assembly of Machakos in this petition without demonstrating to the court the reason for the joinder. That the petitioners have certified copies of Hansard extract of the County Assembly of Machakos which they cannot explain how they got. That they have not produced any letter showing they requested for the same from the Assembly. That he is convinced that sections of the Assembly leadership must also be behind all these political gimmicks merely because they would want to see him fail since they do not share similar political views.

9. He stated that the matter is also being litigated by the Speaker of the County Assembly of Machakos before other forums, further reinforcing his belief that there is a well-orchestrated scheme to ensure that he does not perform his constitutional and legal duties as Governor to portray him in bad light. That there has been whimsical and ego driven supremacy battles occasioned by the Speaker of the interested party as against the County Executive in that the interested party has been extremely reluctant in processing budgets, nominees to various positions and generally hostile to his government's initiatives, policies, plans and programs since the formation of the second County Government of Machakos after August, 2017 general elections. That the supremacy wars are impacting negatively on service delivery to the people of Machakos and yet members of the County Assembly and other public officers continue to earn their salaries to their comfort from tax payers' money. That the petitioners had not exhausted available mechanisms for resolving their alleged dispute before coming to court. That first, they did not petition the interested party to investigate the allegations before this court, which has powers to determine the allegations while using its constitutional powers to receive and hear petitions as well as its oversight powers over the executive. That the petitioners did not also petition the Senate of the Republic of Kenya, which has supervisory powers over the County Governments, to investigate the alleged complaints. That the petitioners have never even written to the 1<sup>st</sup> respondent requesting information on how the appointments were done before moving to court. He contended that the petitioners have not informed the court how they knew that the interested party had not vetted and or approved the names of the nominees making the petition speculative. That by producing unverified documents to wit CMM3 which speaks of the nomination of Chief Officers and CECs, his response is jeopardized because it is not clear on how to reply given such confusion and lack of specificity.

10. The 1<sup>st</sup> respondent contended that the Public Appointments (County Assemblies Approval) Act No. 5 of 2017 provides for procedure for the nomination and appointment of CECs and the Governor is given exclusive mandate to make them. That guided by the provisions of section 2 and 3 of the Act, he submitted 7 nominees of the County Executive Committee Members to the Assembly on 17<sup>th</sup> July, 2018 for vetting and approval and were duly qualified for their respective portfolios. That subsequently, the Speaker of the interested party committed the names to the Assembly through a communication on 21<sup>st</sup> May, 2018. That the Committee on Appointments notified members of the public of the said nominations and invited them to make representations on their suitability or otherwise through newspaper advertisement of 25<sup>th</sup> May, 2018. That the Public Appointments (County Assemblies Approvals) Act as well as the Machakos County Assembly Standing Orders establish timelines within which the nominated County Executive Committee members should be vetted, approved or rejected by the County Assembly thus section 9 (1) of the Act and Standing Order No. 42 of the Machakos County Assembly Standing Orders. That the Committee started vetting and approval hearings on 29<sup>th</sup> May, 2018 which proceeded on different dates. On 26<sup>th</sup> June, 2018, a statement was moved by Hon. Kamitu categorically stating that the report for the said vetting and approvals was due for tabling in the County Assembly on 29<sup>th</sup> June, 2018 but sought extension of time to 17<sup>th</sup> July, 2018. That the said extension was granted. That as per the County Assembly's calendar, the sittings should have started on Tuesday 5<sup>th</sup> June, 2018 and terminated on Wednesday 5<sup>th</sup> July, 2018 because as per the said calendar, the house was to be sitting on Tuesday and Wednesday with each day having two sittings; morning and afternoon.

11. That from the extracts of the Hansard for 17<sup>th</sup> July, 2018, the committee even sat outside the normal sitting calendar namely 29<sup>th</sup> May, 2018, 1<sup>st</sup> June, 2018, 2<sup>nd</sup> June, 2018 and 10<sup>th</sup> June, 2018. That the Committees having sat first on 29<sup>th</sup> May, 2018, time for debate and decision making started running on 29<sup>th</sup> May, 2018 inclusive and terminated on 21<sup>st</sup> sitting day. That the calendar having been extended on 26<sup>th</sup> June, 2018 to 17<sup>th</sup> July, 2018 that meant that from 29<sup>th</sup> May to 17<sup>th</sup> July, the sittings were 28 in number i.e.:

29 <sup>th</sup> May, 2018	1 sitting
1 <sup>st</sup> June, 2018	1 sitting
2 <sup>nd</sup> June, 2018	1 sitting
10 <sup>th</sup> June, 2018	1 sitting
11 <sup>th</sup> June, 2018	2 sittings
12 <sup>th</sup> June, 2018	2 sittings
13 <sup>th</sup> June, 2018	2 sittings
14 <sup>th</sup> June, 2018	2 sittings
18 <sup>th</sup> June, 2018	2 sittings
19 <sup>th</sup> June, 2018	2 sittings
20 <sup>th</sup> June, 2018	2 sittings
26 <sup>th</sup> June, 2018	2 sittings
27 <sup>th</sup> June, 2018	2 sittings
3 <sup>rd</sup> July, 2018	2 sittings
4 <sup>th</sup> July, 2018	2 sittings
17 <sup>th</sup> July, 2018	2 sittings.

12. The 1<sup>st</sup> respondent contended that the 21<sup>st</sup> sitting lapsed on 27<sup>th</sup> June, 2018 meaning that the Committee as well as the County Assembly of Machakos fell outside the Statutory set timelines. That they neither approved nor rejected the names of the nominees. That a reading of section 9 of the Public Appointments (County Assemblies Approval) Act does not state the procedure to be followed when the nominees are not vetted within 21 days' statutory period. That after extensive consultation, his attention was drawn to Supreme Court Advisory Opinion [Reference No. 1 of 2015] where the Court found that there was no procedure provided for in law for appointment of Deputy Governor in case of a vacancy. That the court therefore resulted to other provisions of the law relating to appointment of Deputy Governor to cure the lacuna. That guided by the said advisory, the 1<sup>st</sup> respondent reverted to the procedure established for vetting of similar vacancies in the national government, specifically, Public Appointments (Parliamentary Approval) Act No. 33 of 2011 for guidance.

13. He contended that he had no other choice but to appoint the CECs as per the Public Appointments (Parliamentary Approval) Act No. 33 of 2011 to fill the lacuna left by the action of the County Assembly. He stated that the failure to approve the nominees within the stated timelines and the continued sabotage on the approval of the members as nominated without any justifiable reasons is clear indication that the County Assembly is not acting for the well-being and benefit of the people of Machakos County which they purport to represent. That the County Executive cannot function without CECs. That the inaction of the County Assembly to vet and approve the nominees without any justifiable reasons show open sabotage of the County Government to the detriment of the citizens. That from the provisions of section 36 of the County Governments Act No. 17 of 2012 and Article 183 of the Constitution, it is clear that the County Government cannot function without an Executive Committee.

14. The 1<sup>st</sup> Respondent contended that the allegations by the petitioners that the 3<sup>rd</sup> to 5<sup>th</sup> respondents were rejected by the County Assembly but were appointed have no basis. That section 10 (2) of the Public Appointments (County Assemblies Approval) Act provides for the circumstances under which a rejected nominee may be nominated again and appointed. That the circumstances relied on by the Assembly to reject the nomination of the 3<sup>rd</sup> to 5<sup>th</sup> respondents did not exist at all and they were thus eligible to be nominated again and subsequently appointed. He stated that the County Assembly did not give any justifiable reasons for rejecting the nominees and was therefore motivated by ulterior motives and political underpinnings. That in any event, the issue for their rejection is still active before the High Court therefore *sub judice*. It was stated that the orders sought are akin to asking the court to aid an illegality in that the County Assembly has deliberately and without any justifiable reason rejected and declined to approve the nominees for CEC within legal timelines which amounts to violation of the constitution and rights of the people of Machakos to get good service delivery.

15. In addition, the 1<sup>st</sup> respondent filed a preliminary objection on 11<sup>th</sup> October, 2018 on ground that the petition offends the provisions of Articles 96 (1), 119, 125, 185 (3) and 195 of the Constitution, provisions of the County Government Act and Standing Orders No. 194 of the Machakos County Assembly Standing Orders and that the issues raised fall within the jurisdiction of the Senate and the County Assembly of Machakos and not the Court.

16. The 2<sup>nd</sup> Respondent answered the petition through the replying affidavit of James Kathili who is its Chief Officer Legal Affairs. He contended that the 2<sup>nd</sup> respondent is a creature of the Constitution of Kenya established pursuant to Article 176 and consists both the County Assembly of Machakos and County Executive. That in view thereof, the joinder of the 2<sup>nd</sup> respondent as a respondent and the County Assembly of Machakos as an interested party in these proceedings is a misnomer and incurably defective. That the 2<sup>nd</sup> respondent as an entity exercising Constitutional authority is a body corporate with perpetual succession and thus the 2<sup>nd</sup> respondent and the interested party are not severable. That the 1<sup>st</sup> respondent is the governor of the subject county who by dint of Article 179 (4) of the Constitution is the Chief Executive of Machakos County. That the CECs are appointees of the Governor with the approval of the Assembly as provided under Article 179 (1) (b) of the Constitution. That section 6 (6) of the County Governments Act, 2012 requires the County Government in exercising its powers or performing any of its functions to ensure efficiency, effectiveness, inclusivity and participation of the people. That in order to further the objectives of Section 6 of the County Government Act, 2012, Article 174 and 183 of the Constitution, it was imperative for the 1<sup>st</sup> respondent to promptly appoint CECs. That as a body corporate, the 2<sup>nd</sup> respondent did not participate in the appointment of the 3<sup>rd</sup> to 12<sup>th</sup> respondents as executive committee members. That on 17<sup>th</sup> May, 2018, the 1<sup>st</sup> respondent submitted names of seven (7) nominees for County Executive Committee members to the County Assembly. That through a newspaper advertisement published on 25<sup>th</sup> May, 2018, the Assembly Committee of appointments informed the public of the nominations and invited memoranda of views from the public. That section 9 (1) of the Public Appointments (County Assemblies Approval) Act, 2017 requires the County Assembly to consider nominations and table its report for debate within 21 days from the date when the committee first sits to consider the nomination. That the County Assembly record of debate attached to the petition, the Assembly Committee on appointments prepared a report which was due to be debated in the Assembly on 18<sup>th</sup> July, 2018. That the County Assembly did not approve or reject the nominations for CECs. That in the absence of express legal provision on the proceedings to be followed where the County Assembly fails to approve or reject a person nominated to an office which requires the approval of the Assembly, the 1<sup>st</sup> respondent was entitled to revert to the corresponding provision for the National Government.

17. The 3<sup>rd</sup> to 12<sup>th</sup> respondents filed grounds of opposition on 1<sup>st</sup> November, 2018. The grounds are that the petition is bad in law, lacks merit, is an abuse of court process, speculative, vexatious, malicious, scandalous and or intended to defeat the ends of justice. That the petitioners are busy bodies who have not demonstrated any definite interest in the matter. That the petitioners have not exhausted all avenues available especially through a petition to the County Assembly in exercise of rights springing from Article 1 and 185 of the Constitution of Kenya, 2010. That the petitioners have disregarded the role of the County Assembly of Machakos and moved this court on matters that are capable of being dealt with by the County Assembly of Machakos. That the petition is misconceived in terms of eligibility of the 11<sup>th</sup> respondent to be appointed as a County Executive Committee member as it seeks to bar him when he had not been charged in a court of law to warrant disqualification from holding public office. That the petition is misconceived in view of the exceptions provided by law as the nomination and appointment of the 3<sup>rd</sup> to 5<sup>th</sup> respondents herein falls under the exceptions provided under section 10 (2) of the Public Appointments (County Assemblies Approval) Act No. 5 of 2017. That the petition is premised in disregard of the principle that the rule of law abhors a vacuum. That the petition is speculative and a clog to the objects of devolution as espoused under Chapter 7 of the Constitution of Kenya and that the petition is bent on dragging politics into court.

18. The 3<sup>rd</sup> respondent in answer to the petition filed a replying affidavit on 13<sup>th</sup> November, 2018. Her contentions therein are same as those raised in the 1<sup>st</sup> respondent's replying affidavit.

19. The interested party supported the petition through the affidavit of its Accounting Officer, Felix G. Mbiuki filed on 4<sup>th</sup> October, 2018. He stated that upon receipt of a letter dated 26<sup>th</sup> September, 2017 by 1<sup>st</sup> respondent, the interested party constituted a Committee as mandated by the law for vetting of the 3<sup>rd</sup> to 6<sup>th</sup> respondents. That after vetting the said respondents, the interested party in compliance with the provisions of section 35 (5) of the County Governments Act, 2012 and section 7, 8, 9, 10 and 11 of the Public Appointments (County Assemblies Approval) Act, 2017 forwarded a report made by the Committee to the 1<sup>st</sup> respondent rejecting the nominees. That the said rejection was on the basis of section 35 (2) of the County Government Act. That no circumstances had changed when their names were resubmitted by a letter dated 17<sup>th</sup> May, 2018. That the rejection of the nominees having been based on section 35 of the County Government Act, section 10 and Schedule 2 of the Public Appointments (County Assemblies Approval) Act, 2017, the 1<sup>st</sup> respondent had no authority to resubmit their names.

20. That the 3<sup>rd</sup> to 6<sup>th</sup> respondents filed petition 12-16 of 2018 but were denied interlocutory orders at the first instance. That again on 17<sup>th</sup> May, 2018, the 1<sup>st</sup> respondent by a letter dated the same date forwarded to the interested party names of 6<sup>th</sup> to 12<sup>th</sup> respondents as nominees to be vetted by the interested party. Upon receipt of the letter, the interested party put a notice in the newspaper and notice of invitations for vetting were issued to the nominees as necessary and also sought for confirmation of any adverse reports from the Ethics and Anti-Corruption Commission. That in compliance with the provisions of Articles 185 of the Constitution of Kenya read with section 8 of the County Governments Act, the interested party convened a meeting after putting up the necessary vetting notice in the newspaper and designed the qualifications for the nominees. That the last two nominees; Kimeu Mbithi Kimeu and Urbanus Musyoka Wambua were to be vetted on 15<sup>th</sup> June, 2018 but owing to the declaration of the said date as a public holiday, the vetting was rescheduled to 21<sup>st</sup> June, 2018.

21. That after vetting the nominees and before the interested party in compliance with the provisions of section 35(3) of the County Governments Act, 2012 and sections 7, 8, 9, 10 and 11 of the Public Appointments (County Assemblies Approval) Act, 2017 could forward a report made by the Committee to the 1<sup>st</sup> respondent either approving or rejecting the names of the nominees, the 1<sup>st</sup> respondent appointed them. That in this particular case, the interested party made a resolution changing its plenary sittings under the Standing Orders from Tuesdays (Half-day morning), Wednesday (full day) and Thursday (Half-day morning) to Tuesdays and Wednesdays on full day basis. That the days the Assembly is on recess do not count. That as can be discerned from the minutes, the first sitting of the committee of vetting to deliberate on the issue was on 29<sup>th</sup> May, 2018 and the Assembly had up to 21<sup>st</sup> August, 2018 to finish the 21 sitting days from the date the committee first sat and send back the report to the 1<sup>st</sup> respondent calculated as follows:

May 24 – 4<sup>th</sup> June (Recess)

Tuesday 5<sup>th</sup> June, 2018 and Wednesday 6<sup>th</sup> June, 2018

Tuesday 12<sup>th</sup> June, 2018 and Wednesday 13<sup>th</sup> June, 2018

Tuesday 19<sup>th</sup> June, 2018 and Wednesday 20<sup>th</sup> June, 2018

Tuesday 26<sup>th</sup> June, 2018 and Wednesday 27<sup>th</sup> June, 2018

Tuesday 3<sup>rd</sup> July, 2018 and Wednesday 4<sup>th</sup> July, 2018

5<sup>th</sup> July, 2018 to 16<sup>th</sup> July, 2018 (Recess)

Tuesday 17<sup>th</sup> July, 2018 and Wednesday 18<sup>th</sup> July, 2018

Tuesday 24<sup>th</sup> July, 2018 and Wednesday 25<sup>th</sup> July, 2018

Tuesday 31<sup>st</sup> July, 2018 and Wednesday 1<sup>st</sup> August, 2018

Tuesday 7<sup>th</sup> August, 2018 and Wednesday 8<sup>th</sup> August, 2018

Tuesday 14<sup>th</sup> August, 2018 and Wednesday 15<sup>th</sup> August, 2018

Tuesday 21<sup>st</sup> August, 2018.

22. He contended that section 9 of the Public Appointments (Parliamentary Assemblies Approval) Act cited by the 1<sup>st</sup> respondent is inapplicable in the County Government affairs. That section 9 of the Public Appointments (County Assemblies Approval) Act, 2017 has no proviso for deeming as appointed nominees who have been approved and or rejected and the 1<sup>st</sup> respondent's action was unconstitutional and illegal. That in view of the provisions of Article 179 (2) of the Constitution, the 2<sup>nd</sup> respondent's executive authority is being exercised unconstitutionally and illegally by virtue of illegal nominations and that the affairs of the County are in wrong hands. That the affairs and business of the interested party has been paralyzed as the Controller of Budget has not released funds as the approval of the County Integrated Development Projects (C.I.D.P.) through public participation cannot take place without the properly constituted county executive committee members who are the policy makers. That the county executive committee members herein are in office illegally and as such, the interested party will be committing an illegality by engaging them while conducting the County Assembly affairs.

23. He contended that the 1<sup>st</sup> respondent has not complied with the requirements that all state organs, state officers, public officers and all persons must whenever applying or interpreting any law or when making or implementing public policy decisions abide by the national values and principles of governance as provided for under Article 10 (1) (a) (b) and (c) of the Constitution. That the 1<sup>st</sup> respondent in carrying out his mandate, failed to take into consideration the following provisions of the law; Article 176 (1) of the Constitution that established the county government for each county and shall consist of the county assembly and the county executive, that the executive authority of the county is vested in the county executive and shall be exercised by the county executive committee which is comprised of the county governor, deputy governor and member appointed by the governor with the approval of the assembly from persons who are not members of the county assembly in accordance with Article 179 (1) and (2) (a) and (b) of the Constitution. That the Public Appointments (County Assemblies Approval) Act, 2017 makes provision procedure for the approval of public appointments by County Assemblies and for connected purposes and the provisions of Section 4 of the Public Appointments (County Assemblies Approval) Act which makes approval of appointments by the County Assembly mandatory and section 35 (3) and (4) of the County Governments Act.

24. It was the petitioners' submission that this court has jurisdiction to pronounce itself on the proceedings of the County Assembly and the action of the 1<sup>st</sup> respondent. That nomination and vetting was a joint venture of the County Executive Committee and the County Assembly both of which are constitutional organs drawing power from the constitution. That this court has jurisdiction to determine the petition under Article 159 (2), 165 (3) (b) and (d) (6) and 258 of the Constitution. In this regard the petitioners cited **Mumo Matemu v. Trusted Society of Human Rights Alliance & 5 others [2013] eKLR** and **John Kipng'eno Koech & 2 others v. Nakuru County Assembly & 5 others [2013] eKLR**. That Article 259 (11) of the Constitution provide that if a function or power conferred to a person such as the 1<sup>st</sup> respondent, the same is exercisable by the person with the approval or consent of another person. That in this case under Article 179 (2) gives the approval of the County Assembly to appoint the CECs. That the function may be performed or power exercised only with the approval or consent except to the extent that the Constitution provides otherwise. That this court therefore ought to decide the petition within the parameters of the Constitution and not any other law. That any law that is inconsistent with the Constitution is void to the extent of the inconsistency. It was submitted that the 1<sup>st</sup> respondent in seeking to justify the appointments has sought refuge under the Public Appointments (Parliamentary Assemblies Approval) Act No. 33 of 2011. That the Constitution is supreme and violations of Article 179 (2) cannot be cured or justified under an Act of Parliament. It was further submitted that the Public Appointments (Parliamentary Assemblies Approval) Act is not relevant to the County affairs. That if Parliament had intended that the provisions of Section 10 of Public Appointments (Parliamentary Assemblies Approval) Act apply to appointments under the County Governments Act, it should have so incorporated expressly. It was submitted that by the 1<sup>st</sup> respondent's act of appointing CECs without the approval of the County Assembly, he abused power and undermined the principles of separation of power. This court was urged to adopt the same stand as those in **Moses Kiprotich Langat v. Kericho County Assembly Committee on appointments & 3 others [2018] eKLR** and **John Mining Temoi & another v. Governor of Bungoma County & 17 others [2014] eKLR**.

25. The 1<sup>st</sup> respondent submitted that where the Constitution and Statutes establish other mechanisms for settlement of disputes and allegations, the court ought to exercise restraint before entertaining a petition. That the court must be satisfied that the petitioners exhausted all other avenues available to them under the law before invoking the powers of the court. The 1<sup>st</sup> respondent cited **Diana Kethi Kilonzo &**

**another v. Independent Electoral & Boundaries Commission and 10 others [2013] eKLR** where the same was restated. It was submitted that the Constitution empowers County Assemblies and Senate to exercise oversight over Executive Committees of County Governments. That under Article 179 of the Constitution, the governor is a member of the County Executive Committee. That the interested party has under Article 185 (3) of the Constitution powers, in the first instance, to oversee any actions of the governor. That under the said power, the interested party has power to secure attendance of witnesses or persons of interest on the subject of investigation and oversight. That if the court of law were to accept to adjudicate on all matters within the Republic, it would thus defeat the intention of the drafters of the Constitution and as ratified by the citizens. In this regard the 1<sup>st</sup> respondent cited Article 195 of the Constitution.

26. It was submitted that the predecessor of the interested party went further to adopt the Machakos County Assembly Standing Orders of 9<sup>th</sup> July, 2014. That the said Standing Order No. 194 provide an elaborate procedure on presenting petitions to the interested party. That the Standing Order provides clear mechanisms for sanctioning Executive Committee members who do not comply with summons or directives of the interested party. That Standing Order No. 185 establishes Public Account and Investments Committee whose functions under sub paragraph 2 are examination of accounts, reports and examination in the context of the autonomy and efficiency of the county public investment among others. That the interested party has powers to examine the accounts showing the appropriation of the sum voted by itself as expenditure. That it cannot be said that the operations of the 2<sup>nd</sup> respondent have been crippled by assumption of office by the CECs. That Standing Order No. 186 establishes Budget and Appropriations Committee whose function is to investigate, inquire into and report on all matters related to coordination, control and monitoring of the County Budget, discuss and review the estimates and make recommendations to the assembly, examine the county budget policy statement presented to the assembly and examine bills related to the County Budget, including appropriation bills. That the committee has power to monitor the implementation of the County Budget and report to the County Assembly. It is submitted that there is no report or evidence before this court showing that the petitioners approached the interested party for settlement of their alleged grievances. That this court cannot therefore be called upon to take the powers of the County Assembly, at the first instance. It was added that Standing Order No. 188 establishes yet a Committee on implementation with powers to examine whether decisions and undertakings have been implemented and whether or not legislation passed by the Assembly has been operationalized. That the Committees prepare reports on the queries revolving around vetting of CECs, the Committee on implementation supervises and establishes the veracity of any allegation contained. If the Committee on implementation is satisfied that the decision, undertakings or legislations are not fully enforced or are violated, it recommends to the whole House sanctions against the concerned Executive Committee member. That throughout the said procedures, there is no provision allowing court or granting it jurisdiction to question any of the issues raised in the petition.

27. It was further submitted that in addition to County Assemblies, the Senate under Articles 96 (1), 119, and 125 of the Constitution is empowered to exercise somehow similar powers as the County Assembly to address the issues being raised in the petition. That the powers of the Senate and County Assembly are quasi-judicial in nature. That it is only after a decision is made by the Senate or interested party that the court is clothed with jurisdiction under Article 165 (6) and (7) of the Constitution.

28. It was submitted that the petitioners have no locus in this petition since they have not demonstrated their interest. The case of **Mumo Matemu** (supra) was cited to support the argument. Reference was made to **Petition No. 10 of 2018** and it was submitted that the petitioners filed the same seeking to stop the vetting of the CECs but the case was dismissed. That the petitioners have certified copies of Hansard extract of the interested party but which they cannot explain how they accessed the same. It was submitted that the appointments were within the law and in this regard the 1<sup>st</sup> respondent basically reiterated the averments in the replying affidavit.

29. The 2<sup>nd</sup> respondent submitted that the joinder of the 2<sup>nd</sup> respondent and the interested party muddles up the proceedings making the description of the parties imprecise. The 2<sup>nd</sup> respondent relied on **Mumo Matemu** (supra). It was submitted that having joined the County Assembly as an interested party, the petitioners probably intended to enjoin the other arm of the County Government which is the County Executive. That this was not done making it difficult to determine the exact grievances of the petitioner against the County Government generally or the county executive in particular. That the Petitioners have not set out the exact acts of the 2<sup>nd</sup> respondent complained about making the pleadings relating to the 2<sup>nd</sup> respondent imprecise and offending the rule of clarity of pleadings. That the Petitioners have further failed to set out any specific allegation on any act or omission on the part of the 2<sup>nd</sup> respondent in relation to the appointment of seven (7) CECs complained about.

30. It was submitted that section 30 (3) of the County Government Act, 2012 enjoins the 2<sup>nd</sup> respondent in the performance of its functions under sub section 2 of the latter section. That pursuant to section 30, the 1<sup>st</sup> respondent nominated seven (7) CECs and submitted the names to the interested party for approval on 17<sup>th</sup> May, 2018. The names were committed to the Assembly on 21<sup>st</sup> May, 2018. Subsequently, the Committee on appointments of the interested party invited representations from the public on the suitability of the nominees through newspaper advertisement on 25<sup>th</sup> May, 2018. That from the Hansard report of 26<sup>th</sup> June, 2018, it appears that the interested party recognized that the 21 days timeline provided for under section 9 (1) of the Public Appointments (County Assemblies Approval) Act for tabling a report on the nomination had lapsed and an extension of time was approved by the interested party until 17<sup>th</sup> July, 2018. That Standing Order No. 42 of the County Assembly provides that upon notification of appointment, the nomination shall stand committed to relevant committee and that the committee shall table its report in the house within 14 days of the date on which the notification was received. It was submitted that the 21 days sitting days lapsed on 27<sup>th</sup> June, 2018 since the nominations stood committed to the Assembly on 17<sup>th</sup> May, 2018 and the relevant committee held its first sitting on 29<sup>th</sup> May, 2018. That the interested party's committee on appointments sat on a total of 28 sittings to vet the nominees. That to date, the report of the committee on nominations has never been tabled in the County Assembly for debate and decision six (6) months since the 1<sup>st</sup> respondent notified the Assembly of the appointments. That the effect of the Assembly's failure to perform its Constitutional duty of approving or rejecting the CECs stalled the functions of the 2<sup>nd</sup> Respondent. That in the absence of a CEC, the 2<sup>nd</sup> Respondent would be rendered incapable of supervising the administration and delivery of services in the County thus defeating the objects of devolution as set out under Article 174 of the Constitution. It was submitted that the objective of section 9 of the Public Appointments (County Assemblies Approval) Act, 2017 providing for consideration of nominees with 21 days was to provide a procedure for the timely appointments into vital offices of the County Government and the CEC is such one vital office. That Section 8 (2) of the County Government Act allows the application of corresponding national legislation in the event of a lacuna in the laws applicable to County Assemblies. That unlike the Public Appointments (Parliamentary Approval) Act No. 33 of 2011 which at section 9 prescribes a solution to parliamentary failure to consider appointments within the time stipulated by the Act, the Public Appointment (County Assemblies Approval)

Act does not prescribe a similar solution. That section 8 of the National Legislation relating to Parliamentary approvals is however worded in similar terms to section 9 of the law relating to County Assemblies approval of appointments. That it was therefore legitimate for the 1<sup>st</sup> respondent to have borrowed the solution prescribed in section 9 of the Public Appointments (Parliamentary Approval) Act No. 33 of 2011 in line with section 8 (2) of the County Government Act and the Supreme Court of Kenya Advisory opinion in **Re Speaker, County Assembly of Embu (2018) eKLR**.

31. It was submitted on behalf of the 3<sup>rd</sup> to 12<sup>th</sup> respondents that the petitioners lack locus standi to institute this petition. That much as the Constitution confers wide scope to individuals in form of a substantive test in determining locus standi, in view of the Court of Appeal finding in **Mumo Matemu** (supra), the petitioners are not acting bona fide and it is clear that they are acting out of political motivation. That Article 10 (1) and (2) of the Constitution provides for national values and principles of governance which bind all state organs, state officers, public officers and all persons whenever any of them makes or implements public policy decisions. That initiating this petition in the public interest is tantamount to making or implementing policy and as such the petitioners are bound by the principles enunciated in the latter Article which they have grossly failed to uphold.

32. It was further submitted that the petitioners did not exhaust all available remedies before filing this petition. It was pointed out that they did not write to the 1<sup>st</sup> respondent requesting for information on how the appointments were done as provided for under section 15 (1) of the County Government Act, 2012. That the petitioners disregarded the role of the interested party when they moved this court on matters that are capable of being dealt with by the interested party. It was submitted that the courts must exercise restraint and first give an opportunity to the relevant bodies or state organs to deal with the dispute as provided in the relevant statute. To support the argument, the cases of **Speaker of National Assembly v. Njenga Karume (2008) 1 KLR 425**, **Kenya Revenue Authority & 2 others v. Darasa Investments Limited (2018) eKLR** and **Rich Productions Limited v. Kenya Pipeline Company & Another (2014) eKLR**. It was further submitted that the court is barred from reviewing administrative actions or decisions by the 1<sup>st</sup> respondent unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.

33. It was submitted that there is evidence of bad faith and or political motivation in filing the petition. That the fact that the petitioners testified in **Machakos Election Petition No. 1 of 2018**, Petition No. 10 of 2018 and this petition without exhausting all available remedies clearly demonstrates bad faith on the part of the petitioners. They cited **Muchanga Investments Limited v. Safaris Unlimited (Africa) Ltd & 2 others Civil Appeal No. 25 of 2002 [2009] KLR 229** to illustrate what constitutes abuse of court process and submitted that the petitioners cannot invoke the jurisdiction of the court and keep petitioning it first in Petition 10 of 2018 then again institute this petition before judgment is entered in petition 10 of 2018. In support thereof, they cited **Mitchell and others v. Director of Public Prosecutions and Another (1987) LRC (Const) 128** which was cited in approval in **Iris Properties Limited & Another v. City Council of Nairobi (2016) e KLR**. On whether their appointments were lawfully done, the averments in their answer to the petition were reiterated and the cases of **Mumo Matemu** and **John Kipng'eno Koech** (supra) were cited. It was further submitted that the petitioners have failed to demonstrate reasonable grounds to warrant the grant of the orders sought.

34. The interested party's submission was a reiteration of the averments in the affidavit of its Accounting Officer. The same was supported by **Benson Riitho Mureithi v. Wakhungu & 2 others [2014] eKLR**, **Republic v. Attorney General & 3 Others Ex parte Tom Odoyo Oloo [2015] eKLR** and **The County Government of Nyeri & another v. Cecilia Wangeci Ndungu [2015] eKLR**.

35. I have considered the petition. The issues for determination are:

- a) *Whether or not internal dispute solving mechanisms are available and if so whether or not they were exhausted before filing this petition.*
- b) *Whether or not the petitioners have locus standi to file this petition.*
- c) *Whether or not the procedure with which the 3<sup>rd</sup> to 12<sup>th</sup> respondents were appointed was within the law.*

36. Article 185 of the Constitution of Kenya provides as follows:

***“Legislative authorities of county assemblies***

- (1) *The legislative authority of a county is vested in, and exercised by, its county assembly.*
- (2) *A County Assembly may make any laws that are necessary for, or incidental to, the effective performance of the functions and exercise of the powers of the county government under the Fourth Schedule.*
- (3) *A County Assembly, while respecting the principle of the separation of powers, may exercise oversight over the county executive committee and any other county executive organs.*
- (4) *A county assembly may receive and approve plans and policies for –*
  - (a) *the management and exploitation of the county's resources; and*
  - (b) *the development and management of its infrastructure and institutions.”*

37. There is no doubt the County Assembly has oversight authority as stated therein. In my understanding, oversight in this case entails supervision of systems put in place to ensure effectiveness and efficiency of government organs, departments and agencies. It is no wonder

Parliament thought it wise to have the provisions of section 15 of the County Government Act, 2017 which provides:

***“Right to petition County Assembly***

***(1) A person has a right to petition a county assembly to consider any matter within its authority, including enacting, amending or repealing any of its legislation.***

***(2) Each county assembly shall prescribe a procedure for exercising the right under subsection (1).”***

38. In accordance with the subsection 2 of the latter provision, the predecessor of the interested party adopted Machakos County Assembly Standing Orders of 9<sup>th</sup> July, 2014. The petitioners therefore had the right to petition the interested party. Specifically Standing Orders No. 193 to 203. Relevant to my disposition is Standing Orders No. 193 and 196 which provide:

*Standing Order No. 193*

***“For purposes of this Part a petition means a written prayer to the Assembly by a member of the public requesting the Assembly to consider any matter within its authority, including enacting, amending or repealing any legislation.”***

*Standing Order No. 196*

***“A member shall give to the Clerk two sitting days’ notice of intention to present a petition and the Clerk shall examine such petition and ensure that the petition is presented in the manner, form and content required by these Standing Orders.”***

39. There is no evidence that the petitioners that the petitioner submitted a petition as provided for under Standing Order No.194 and 199 of Machakos County Assembly Standing Orders of 9<sup>th</sup> July, 2014. Alternative dispute resolutions mechanisms are under Article 159 (2) (c) of the Constitution complementary to court processes and the court is under duty to promote the same. It is in that spirit, coupled with the doctrine of separation of power and avoidance in usurping the powers of such tribunals that the courts keep their hands-off matters in which internal dispute resolution mechanism have not been fully explored. The courts have vastly emphasized the need to first explore internal dispute resolution mechanisms before running to court. The court in the case of **Darasa Investments** (supra) held:

***“The ratio decidendi which runs through those cases is that where Parliament has provided statutory mechanism for resolving disputes, parties must exhaust the available mechanisms for resolving disputes...except in exceptional circumstances where facts are not disputed...”***

40. The Petitioners have not demonstrated any unique facts to make this court hear the petition before exploring the internal mechanisms available. The Petitioners ought to have presented their grievances before the interested party for deliberations and once the interested party makes a decision thereon the same crystallizes into a court action where necessary vide Article 165 (6) and (7) of the Constitution. The Petitioners are noted not to have first taken such a route before moving to this court. They should first exhaust the available avenues for redress before rushing to this court as herein.

41. As regards the issue of locus standi, I find the Petitioners indeed have the requisite locus standi under the Constitution to seek for redress following violation of rights due to them or on behalf of other persons. However, in view of my finding above that the Petitioners have not exhausted all the available avenues for redress the petition herein is in my view premature.

42. As regards the third issue and in view of my above observations in issue one above, this issue becomes moot.

43. In the result, it is the finding of this court that the Petitioner’s petition is premature and same lacks merit. The same is ordered dismissed. This being a public interest matter I order that each party shall bear their own costs.

**Orders accordingly.**

**Dated and delivered at Machakos this 2<sup>nd</sup> day of April, 2019.**

**D. K. KEMEI**

**JUDGE**