



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CONSTITUTIONAL PETITION NO. 8 OF 2018

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010

AND

**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS)
PRACTICE AND PROCEDURE RULES, 2013**

AND

IN THE MATTER OF INTERPRETATION OF STATUTES

AND

IN THE MATTER OF INTERPRETATION OF SECTION 35 OF THE COUNTY GOVERNMENT ACT, NO. 17 OF 2012

BETWEEN

COUNTY OF SIAYA.....1ST PETITIONER

THE SPEAKER, COUNTY ASSEMBLY OF SIAYA.....2ND PETITIONER

AND

THE ATTORNEY GENERAL.....1ST RESPONDENT

THE KENYA LAW REFORM COMMISSION.....2ND RESPONDENT

COUNTY GOVERNMENT OF SIAYA.....3RD RESPONDENT

JUDGMENT

1. By a Petition dated 4th July 2018 filed on the even date, the Petitioners being the County Assembly of Siaya County and the Speaker of the County Assembly of Siaya seek the following orders:

1. Spent.

2. That this court be pleased to certify that the petition raises issues touching on devolution, good governance and exercise of powers emanating from an Act of Parliament, County Government Act, No. 17 of 2012, enacted pursuant to Article 200 of the Constitution and the same ought to go for final disposal and determination immediately.

3. That this court gives certain directions as it may deem just and fit.

2. Substantively, the petition seeks the following prayers:

1. A proper and correct interpretation of section 35 of the County Government Act, No.17 of 2012 in line with the spirit and letter of

the Constitution and the rule of law to make it mandatory that the Governor must not divert from the provisions of section 35(3).

2. A declaration whether or not the uncertainty evidenced by the provision of section 35(3) offends the provisions of the leadership and service delivery and Article 174 on objects of devolution.

3. The Petition which was initially filed in Kisumu High Court on 4th July 2018 was transferred to this court vide order of 5.7.2018 by Cherehe J on account of geographical jurisdiction. The petition is supported by an affidavit sworn by Isaac Felix Olwero, the Clerk of the County Assembly of Siaya reiterating the legal basis and arguments in support of the petition as pleaded in the body of the petition.

4. The petitioners essentially claim that section 35(3) of the County Government Act is unclear and vague and that there is danger that it can be exploited and the powers emanating from the section abused for own personal gain at the expense of good governance, in that, should the Governors who are tasked with appointments of the County Executive Committee Members abuse the said provisions and engage in the act of appointments of the County Executive Committee Members contrary to the spirit and letter of the Constitution, the citizenry will be prejudiced.

5. In essence, the petitioner sought for determination of the following issues:

a. Whether this honourable court has the requisite jurisdiction to entertain this matter and to interpret the provisions of the law and or statutes;

b. Rules of interpretation of the Constitution and statutes;

c. The problem with section 35 of the County Government Act and whether the prayers sought have merit.

6. The Petition was opposed by the Respondents Attorney General, the Kenya Law Reform Commission and the County Government of Siaya.

7. The 1st Respondent filed grounds of opposition dated 4th December 2018 accompanied by written submissions and authorities whereas the 2nd Respondent did not file any response. The 3rd Respondent filed a response by way of Grounds.

8. In the grounds of opposition filed by the 1st Respondent, it was contended that the petition is immature and not ripe for adjudication; that the petitioners have not addressed the correct forum and that they ought to have sought redress via the Kenya Law Reform Commission and not the High Court; that the petition present no real, earnest or actual controversy; that the petition is entirely and merely academic and or moot hence not justiciable; that the petition is wholly anchored on speculation in that the petitioners are speculating a danger which has not occurred in reality and that no Governor has abused the section and no party has suffered prejudice and no right has been violated and the petitioners have no evidence to support their averments and finally that the petition is bad in law, fatally defective , unmaintainable and an abuse of the court process.

9. In the 3rd Respondent's reply to the petition dated 4th December 2018, it was contended that the petition is unfounded, greatly incompetent and an abuse of the court process; that there is a general presumption that every Act of Parliament is constitutional and the burden of proof lies on the person who alleges otherwise; that the petitioners have merely alleged that section 35(3) of the County Government Act is vague but have not provided evidence to substantiate the said claims hence the petition must fail; that the petitioners base their arguments on the use of the words 'shall 'and 'may 'without considering the general context of the whole section which is contrary to the principle that a statute should be read as a whole and that every clause should be construed with reference to the other clauses of the Act and its context to the greatest extent possible. Further, that in matters of interpretation, a party should not focus o too much on one word and pay little attention to other words as no words or expressions used in any statute can be said to be redundant or superfluous and that every expression must be looked at generally and in the context in which it is used and not in isolation.

10. It was further contended that in exercising judicial authority, the court must have regard to the scheme and legislative history of the provision and that the court must act in manner that promotes the purposes, values and principles of the Constitution, advances the rule of law, permits the development of the law and attributes to good governance.

11. The 3rd Respondent also contended that the court must also determine the object and purpose of the impugned statutes, and must have regard not only to its purpose but also its effect. Further, that the court should attach such meaning and interpretation that meets the purpose of guaranteeing constitutionalism, nondiscrimination, separation of powers and enjoyment of fundamental rights and freedoms.

12. It was further contended that it is not the duty of the court to enlarge the scope of the legislation or the intention of the legislature when the language of the provisions is plain and unambiguous, as is the case of section 35(3) of the County Government Act. Further, that a law is vague and ambiguous only where it is open to more than one interpretation, which is not the case of section 35(3) of the County Government Act.

13. The 3rd Respondent maintained that the petitioners had failed to give specific evidence to show the mischief that is likely to be caused by section 35(3) of the County Government Act, when read as it is presently and that a bare complaint on the part of the petitioners should not be a basis for allowing the petition. They urged the court to dismiss the petition as it has no substance in law and in fact and that it fails to satisfy the evidential threshold to validate the factual assertions made by the petitioners and is devoid of merit.

14. The petition was canvassed by way of written submissions which were also highlighted by the petitioners' 'counsel and the 3rd Respondent whereas the 1st Respondent relied wholly on the written submissions as filed together with the grounds of opposition.

15. In the written submissions filed by counsel for the Petitioners framed the issues as isolated above and addressed each of the said issues, relying on constitutional, statutory and case law. The petitioners' counsel reproduced several constitutional provisions relied on and cited Article 165 (3)(1) of the Constitution on the jurisdiction of this Court and submitted that this court is vested with jurisdiction to determine issues arising out of the provisions of Section 35 of the County Government Act which, according to the petitioners, are not clear and give room for breach or violation.

16. Several decisions were cited in support of the arguments by the petitioners, where the jurisdiction of the High Court under Article 165(3) (d)(i) and (ii) was restated and discussed.

17. The submissions by the petitioner's and the 3rd Respondent's counsel essentially mirror the matters in the petition and the response to the petition as reproduced herein above hence it will not serve any useful purpose to reproduce them here verbatim.

DETERMINATION

18. I have carefully considered this Petition and the Response thereto. I have also considered the written submission and the authorities relied on by both parties' counsel. The main question for determination, in my humble view, is whether there is any ambiguity with **Section 35 of the County Government Act. It is not about the constitutionality of section 35(3) of the County Governments Act as framed by the third Respondent's Counsel. Other ancillary questions will be resolved in this sole issue.** This is so because there is no dispute in law and in fact that this court has jurisdiction to interpret the provisions of any Statute and the Constitution, and the Jurisdiction of this court is primarily derived from **Article 165(3)(d)(i) and (ii) of the Constitution.**

19. The principles of Constitutional interpretation are well spelt out in **Articles 259 of the Constitution** and on what provision to be applied in construing the Constitutional provisions, **Articles 10 of the Constitution** on values and principles of Governance provide a solution. These provisions must be read together with **Article 232 of the Constitution** on values and principles of Public Service, which principles apply to public service in all State Organs in both levels of government and all State Corporations.

20. Having said that, as the main issue is on whether there is any ambiguity in **Section 35 of the County Government Act**, I would not belabour importing Constitutional provisions and or interpreting any particular Constitutional provision, save to apply the Constitutional provisions in answering this question.

21. It follows that all the verbose write ups by both parties to this Petition was not necessary. Further, I resist the temptation to make a finding of whether **Section 35 of the County Government Act** is unconstitutional since that is not, in my humble view, the issue that this Court is asked to determine.

22. This court has been petitioned to determine the proper interpretation of **Section 35 of the County Government Act**, in line with the spirit and letter of the Constitution and the rule of law, to make it mandatory that the Governor must not divert from the provisions of **Section 35(3) of the County Government Act in making any appointments.**

23. In addition, I have been asked to declare whether or not the (*alleged*) uncertainty evidenced by **Section 35(3) of the County Government Act** offends the Leadership service delivery and **Article 174** of the Constitution on objects of devolution.

24. First and foremost, is that a Court of law is not expected to engage in abstract arguments. It is indeed prevented from determining an issue when it is too early or simply out of apprehension hence, the **principle of ripeness**. An issue before the court must be ripe, through a factual matrix, for determination. Conversely, the Court is also prevented from determining an issue when it is too late. When an issue no longer presents an existing or live controversy, then it is said to be moot and not worthy of taking the much sought judicial time. The exception exists, however, where the court is allowed by law to offer an advisory opinion as espoused in Article **163(6) of the Constitution** which empowers the Supreme Court to give advisory opinions at request of the National Government on matters concerning County Governments. See J.L. Onguto – J (*as he then was*) in **Wanjiru Gikonyo & 2 Others V. National Assembly of Kenya and 4 others [2016] eKLR**.

25. In other words, as was correctly stated in **Blackburn Vs Attorney General [1971]2 ALL ER138, and in REVEREND DR. TIMOTHY M. NJOYA AND 6 OTHERS v HONOURABLE ATTORNEY GENERAL AND ANOTHER[2004] eKLR** cases, the most fundamental aspect of the court's jurisdiction is not an academic forum and courts do not act in vain. The court cannot be subjected to proceedings where the questions for determination are abstract and hypothetical.

26. In **Blackburn V Attorney General** [supra], it was stated that it is the duty of the court in proper cases to interpret those laws when made, but it is not part of the court's function or duty to make declarations in general regarding the powers of Parliament, more particularly where the circumstances in which the court is asked to intervene are partly hypothetical.

27. In **Matalinga and Others Vs Attorney General [1972] E.A. 578. Simpson – J** held, *inter alia*, that before a declaration can be granted, there must be a real and not theoretical questions in which a person raising it must have a real interest and there must be someone with a present interest supporting it.

28. The Petitioners herein County Assembly of Siaya and its Hon Speaker claim that **Section 35(3) of the County Government Act** is unclear and vague and that there is a danger that it can be exploited and the powers emanating from this Section abused for own personal gain at the expense of good governance.

29. Further, the Petitioners claim that should the Governors abuse the said provisions and engage in the act of appointments of the County Executive Committee Members Contrary to the spirit and letter of the Constitution, the citizenry will be prejudiced.

30. In their view, the impugned Section is not clear whether the Governor should, during his nomination, strictly seek to make his nomination in conformity with the provisions of **Section 35(3)** of the County Government Act or he can opt to disregard the said provisions and as such, import a danger of exploitation by the Governors and confusion in the side of vetting by the applicants.

31. The Petitioner therefore call upon the Courts to exercise their mandate to construe Statutes and in doing so, try to find out the mischief which the law makers intended to remedy and then to construe the legislation in such a way as to achieve that purpose.

32. A careful reading of the Petition does not impugn any decision taken by the Governor of Siaya County Government that disregards the said impugned provisions or that tends to violate the spirit and letter of the Constitution or the Statute. To that extend, the Petition is hypothetical and theoretical in its substance.

33. However, as this court is empowered to interpret Statutes to breath into them the spirit and letter of the Constitution, I shall proceed to examine the impugned provisions, without purporting to lay blame on the Respondents for doing anything as nothing has been imputed against them.

34. **Section 35 of the County Government Act No. 17 of 2012** provides:

1) The Governor shall, when nominating members of the Executive Committee:-

a) Ensure that to the fullest extent possible, the composition of the Executive Committee reflects the Community and cultural diversity of the County; and

b) Take into account the principles of affirmative action as provided for in the Constitution.

2) The County Assembly shall not approve nominations for appointment to the Executive Committee that do not take into account:

a) Not more than two thirds of either gender,

b) Representation of the Minorities, Marginalized groups and Committees and

c) Community cultural diversity within the County.

3) A person may be appointed as a member of the County Executive Committee if that person:

a) Is a Kenyan citizen;

b) Is a holder of at least a first degree from a University recognized in Kenya;

c) Satisfies the requirement of Chapter six of the Constitution; and

d) Has knowledge, experience and a distinguished career of not less than five years in the field relevant to the portfolio of the department to which the person is being appointed.

35. The powers of the County Government to appoint members of the County Executive Committees (County Executive Committee) are derived from **Articles 170(2)(b) of the Constitution and Section 30(2)(b) of the County Government Act**. But before such appointments are made, **Section 35(2)** of the same Act is clear that the Governor shall present the nominees to the County Assembly for vetting purposes.

36. It is only after such vetting and approval by the Country Assembly that the Governor may appoint the nominees who meet the minimum qualifications, as stipulated in **Section 35(3) of the County Government Act**.

37. **On the other hand, Section 9 of the Appointments (Parliamentary Approval) Act No. 33 of 2012** provides that upon expiry of 14 days from the date of submission of the names of nominees to the County Assembly, if no approvals are made, the County Assembly is deemed to have approved the list.

38. Thus, after the Governor Submits the name of nominees to the County Assembly for vetting and approval, the law mandates the Speaker of the County Assembly to constitute a Committee on Appointments to hold sessions to consider those nominees, including placing such names of nominees in an advertisement inviting members of the public to submit memoranda on the suitability of the said nominees.

39. The Committee on Appointments thereafter then holds sessions to physically or virtually vet each of the nominees, and only those nominees who are found to be suitable or who meet the criteria set out in the law or who are found to be fit for the positions will be resubmitted to the Governors for appointment to various positions in the County's respective Executive Committees while giving reasons for rejecting any of the nominees, without of cause, violating their right to fair administrative action as stipulated in **Article 47 of the Constitution**.

40. **Section 7 of the Public Appointments Approval Act No. 33 of 2011** provides for the issues to be considered by the County Assembly during the vetting process in relation to nominees which issues or matters are:

(a) The procedure used to arrive at the nomination.

(b) Any Constitution or Statutory requirements relating to the office in question, and

(c) The suitability of the nominee for the appointment proposed, having regard to whether the nominee's abilities, experience and qualities meet the needs of the body to which nomination is being made such consideration, in my humble view, in addition, must be in accordance with the leadership and Integrity Chapter Six of the Constitution.

41. The provisions of **Section 35(2)** of the County Government Act places a legal duty on the County Assembly not to approve nominations for appointments to the executive committee that do not take into account the listed matters and the section provides as follows:

“35 (2) The County Assembly shall not approve nominations for appointment to the Executive Committee that do not take into account:

a) Not more than two thirds of either gender,

b) Representation of the Minorities, Marginalized groups and Committees and

c) Community cultural diversity within the County.”

and in addition, where such nominees do not qualify in terms of being either citizens of Kenya, holders of a first degree from a recognized University, or did not satisfy and in what manner the requirements of Chapter six of the Constitution, or that they did not have knowledge, experience and distinguished careers of not less than five years in the field relevant to the portfolio of the department to which the person is appointed, or that they held other Public Office.

42. The above matters are also contained in Article 232 of the Constitution on Values and Principles of public service.

43. **Section 7 of the Public Appointment (Parliamentary Approval) Act** requires that an **approval hearing** shall focus on a candidate's academic credentials, professional training and experience, personal integrity and background, and the criteria set out in the schedule shall be used by a committee during an approval hearing for the purpose of vetting a candidate.

44. The above criteria, in my humble view, are cumulative in effect, and none of them should be taken in isolation or regarded as more important than the other.

45. On the part of the County Assembly, it must, in exercising its administrative function of approval of nominees to the County Executive Committee, exercise that function to the fullest extent within the requirements of the enabling law, and failure to do so may render its findings, determinations decisions and recommendations **ultra vires** the Act and/or unconstitutional and in particular, in violation of **Sections 35(2) and (3) of the County Government Act and Section 7 of Public Appointment (Parliamentary Approvals) Act No. 33 of 2011.**

46. Having said the above, it follows that the whole of **Section 35 of the County Government Act** must be read as a whole. For avoidance of doubt, the Sub-Sections thereto are cumulative and not in isolation with each other. The said Sections must in addition be read with **Section 7 of the Public Appointments (Parliamentary Approvals) Act No. 33 of 2011** as stipulated above, Article 232 of the Constitution on values and Principles of Public Service and **Chapter six of the Constitution on leadership and integrity.**

47. The **provisions in Section 35(1), (2) and (3) of the County Government Act** also echo **Article 232 of the Constitution** on values and principles of Public Service. In Particular, **Article 232 (1) (g) (b), (1) and (2) which provides:**

(g) Subject to paragraphs (h) and (i) fair competition and merit as the basis of appointments and promotions;

(h) Representatives of Kenya's diverse Communities; and

(i) adequate and equal opportunities for appointment, training and advancement, at all levels of the Public Service, of

i. men and women;

ii. The members of all ethnic groups; and

iii. Persons with disabilities.

(2) The values and principles of Public Service apply to Public Service in:

(a) all State Organs in both levels of government; and

(b) all State Corporations.

48. Under **Articles 73 (2) (b) of the Constitution**, the guiding principles of leadership and integrity include:

a - **Selection on the basis of Personal Integrity, Competence and Suitability, or election in free and fair elections.**

49. A plain reading of **Section 35 of the County Government Act** which is sought to be interpreted reveals that there is absolutely no ambiguity or vagueness as there are checks and balances mechanisms embedded therein in the appointment of County Executive Committee Members. The Act sets out the Minimum mandatory qualifications for one to be nominated for such appointment by the Governor.

50. The impugned provisions are also buttressed by the **Public Appointments (Parliamentary Approvals) Act No. 33 of 2011** such that where a nominee does not meet the criteria set out in the **Section 35 of the County Government Act** and **Section 7 of the Public Appointment (Parliamentary Approvals) Act**, and the Principles of Leadership and integrity and of Personal Integrity, Competence and Suitability among others, then the County Assembly is **specifically prohibited** from approving such person or nominee from being appointed as County Executive Committee Member.

51. In my conviction, the usage of the term “**May**” in Sub-Section (3) of **Section 35 of the County Government Act** does not give the Governor discretion to relax the minimum requirements for appointment stipulated under the Act. “**May**” is only used to give discretion to appoint or not to appoint one as a County Executive Committee Member. The use of the term **May** in the section only demonstrates that the Governor is not mandated to appoint every person who is nominated and approved for appointment by the County Assembly. For example, even after nomination and approval for appointment by the County Assembly, and before such appointment is effected, a situation might arise where the Governor subsequently receives some material information concerning the approved nominee which shows that the nominated person is no longer suitable for appointment. In such a case, it is my humble view that the Governor or appointing authority cannot and should not be compelled to appoint the nominated person.

52. In addition, the Governor might be served with a Court Order prohibiting or injuncting him from appointing such nominated person who is approved by the County Assembly for appointment as Executive Committee member on account, for example that the person is a non-citizen or does not possess the relevant academic qualifications required or that the documents submitted were a forgery, etcetera etcetera.

53. In such circumstances, the Governor is not obliged to appoint such member to the County Executive Committee. My finding above is informed by the elementary rule of statutory interpretation which is that the provisions of the Statute must be read in light of the document as a whole and the circumstances attendant upon its coming into existence.

54. Having said so, I find and hold that **Section 35(3)** of the County Government Act is not vague or ambiguous as to require a declaration of sorts affecting **Article 174 of the Constitution** on objects of devolution.

55. I however observe that in drafting the Act, Section 35(3) should have been the first Sub-section to the Section because it sets out minimum requirements for appointment for County Executive Committee member, whereas **Section 35(1) and (2)** are the procedural aspects of how that appointment is arrived at, and nothing more or less. I would therefore ask the Attorney General and the Kenya Law Reform Commission to relook into the section and seek to align the subsections through a minor amendment by Parliament.

56. I reiterate that from a careful reading of the above section 35 of the County Governments Act, there is no importation of discretion on the Governor in considering qualifications of a person during appointment as the County Executive Committee Member, since the Assembly would already have vetted the person on their suitability and approved them before submitting the names to the Governor for appointment. The Governor has no opportunity to appoint a person who is unqualified unless the County Assembly approves a person who does not meet the criteria and misleads the Governor to appoint such a person. Where such happens, there are watchdogs in the country. Such appointments can easily be successfully challenged in court.

57. For the above reasons I find the Petition herein to be too hypothetical. The alleged contemplated mischief is speculative. The Petition is found to be devoid of any merit and is hereby dismissed.

58. As both parties to this petition are public bodies, I order that each Party shall bear their own costs of the Petition.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 20TH DAY OF NOVEMBER 2019

R.E. ABURILI

JUDGE

In the presence of:

Mr. Ochanyo h/b for Mr. Ogola Advocate for the Petitioner

Ms. Ndeda Advocate h/b for Ms. Langat for the 1st and 3rd Respondent

CA: Brenda and Modestar