



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NANYUKI

CONSTITUTIONAL PETITION NO 6 OF 2017

(FORMERLY NYAHURURU HC CONST PETITION NO 25 OF 2017)

MARY KANYAMAN EKAI.....PETITIONER

VERSUS

COUNTY ASSEMBLY OF SAMBURU.....RESPONDENT

AND

GOVERNOR, SAMBURU COUNTY.....INTERESTED PARTY

J U D G M E N T

1. Following the *General Elections* of 2017, the Interested Party herein, **Governor of Samburu County**, nominated the Petitioner, **Mary Kanyaman Ekai**, to the Samburu County Executive as member in charge of Medical Services, Public Health and Sanitation, and her name was submitted to the Respondent, the **County Assembly of Samburu**, for purposes of vetting under the *Public Appointments (County Assemblies Approval) Act, 2017*. Upon such vetting the Petitioner was found unsuitable for the proposed appointment and was rejected.

2. The Petitioner has, by her **amended petition dated 06/11/2017** (the original petition was dated 30/10/2017), challenged the process of her vetting and the finding of unsuitability upon the following grounds as set out in the amended petition –

(i) That it did not comply with Article 47 of the Constitution in that it was not in consonance with rules of natural justice, it was not fair, and it was discriminatory.

(ii) That the Respondent was actuated by oblique considerations.

(iii) That the findings of the Respondent were not in sync with the evidence produced before it.

(iv) That the Respondent relied almost entirely on a report of an ad hoc committee which had been constituted to enquire into allegations of financial mismanagement, maladministration, demoralization and harassment of staff at the department of medical services, public health and sanitation.

(v) That the inquiry by the ad hoc committee was done and completed, and the resulting report compiled, in total contravention of the Petitioner's right to fair administrative action and fair hearing in that –

(a) The scope of the mandate of the ad hoc committee of the Respondent was inquisitorial in nature and was never meant to make any adverse finding against any party but only to inquire into the allegations made.

(b) The Petitioner was not informed in advance of the nature of the allegations made against her in order to prepare her defence and counter the allegations.

(c) The Petitioner was never granted an opportunity to cross-examine witnesses who implicated her, or to call her own witnesses to counter the allegations.

(d) There was no clarity in the proceedings of the ad hoc committee.

(e) The select committee of the Respondent made findings which had no connection with the evidence tendered, which findings were against the Petitioner's right to a fair administrative process.

(vi) That the vetting committee (the Committee on Appointments) had at least three members (out of eleven) who had been in the ad hoc committee whose report the Committee on Appointments had adopted to find the Petitioner unsuitable.

3. The Petitioner therefore sought the following reliefs –

(a) A declaration that the process of inquiry, collection of evidence and compilation of the special report into allegation of financial mismanagement, maladministration, demoralization and harassment of staff at the department of medical services, public health and sanitation contravened the petitioners' right to fair administrative action under Article 47 of the Constitution; was against the petitioner's right to be heard; and was biased and discriminatory.

(b) A declaration that the vetting process of the petitioner from the position of member of the Samburu County Executive in charge of medical services, public health and sanitation was solely based on the special report into allegations of financial mismanagement, maladministration, demoralization and harassment of staff at the department of medical services, public health and sanitation and that the same was a procedural derivative of the contravention of the petitioner's right to fair administrative action guaranteed under Article 47 of the constitution.

(c) An order of certiorari to quash the findings of the vetting committee of the Respondent that the petitioner was unfit for the position of member of the Samburu County Executive in charge of Medical Services, public health and sanitation based on the findings of the special report into allegations of financial mismanagement, maladministration, demoralization and harassment of staff at the department of medical services, public health and sanitation.

(d) An order that the petitioner is competent and fit for the position of Samburu County Executive in charge of medical services, public health and sanitation, and she be sworn in forthwith.

(e) Costs of the petition.

4. The petition was supported by the Petitioners' affidavit sworn on 30/10/2017 and filed together with the petition. In that affidavit all allegations of fact are set out. A number of documents mentioned in the petition are annexed to the affidavit.

5. Despite being accorded several extensions of time amounting to about seven (7) months, the Respondent never filed any replying affidavit or other response to the petition.

6. The Interested Party however filed a replying affidavit on 15/02/2018. In the affidavit he takes objection to being sued and states that he duly performed his role of nominating the Petitioner and forwarding her name to the Respondent for vetting. On 17/05/2018 the Interested Party's learned counsel informed court that the Interested Party supports the Petitioner's claims subject to the caveat that the Interested Party had no control over what happened in the **Samburu County Assembly**.

7. In these circumstances, and without any replying affidavit by the Respondent to join issue with the Petitioner upon any allegation of fact stated in the Petitioner's affidavit sworn in support of the petition, there was clearly no issue of fact needing trial by oral evidence. All the matters of fact pleaded by the Petitioner were uncontroverted. The court therefore directed that the petition be disposed of by way of written submissions.

8. The Petitioner's submissions were filed on 31/05/2018. Those of the Interested Party were filed on 18/06/2018. The Respondent did not file any submissions, again exhibiting a singular lack of interest in this important matter.

9. I have considered the submissions filed, including the cases cited. The petition is basically and factually unopposed.

10. I am satisfied from the material now before the court that the vetting of the Petitioner by the Respondent did not accord with the requirements for fair administrative action set out in **Article 47** of the **Constitution of Kenya, 2010**. The vetting was substantially based upon an adverse report of a previous ad hoc committee compiled without according the Petitioner an opportunity to cross-examine the witnesses who had given adverse evidence against her, and without according her an opportunity to testify and call witnesses to counter the allegations made against her. The case against her had not been served upon her before-hand as it should have been, so that she could prepare her defence. Her participation in the proceedings of the ad hoc committee was only as a witness who had been summoned to testify, just as other witnesses had been called to testify. It is not clear at what point the mandate of the ad hoc committee changed and became an investigation into the Petitioner's conduct. In any event, if there was any such change of mandate, the ad hoc committee ought to have put in place all necessary measures to ensure that from thence there was administrative fairness in respect to the Petitioner. She should at that point have been served with the allegations made against her and accorded necessary opportunity to prepare her defence, confront her accusers in cross-examination, and to testify on her own behalf and to call witnesses if she were so minded.

11. The resulting adverse findings against the Petitioner in the report were thus founded upon a process that was grossly unfair to her for want of administrative justice and cannot be allowed to stand.

12. The vetting committee of the Respondent that subsequently adopted the flawed report to find her unsuitable for appointment for which she had been nominated, merely perpetuated an unjust process. That finding cannot be allowed to stand.

13. I will in the event allow amended petition in prayers (a), (b) and (c). As for prayer (d), it is not the function of this court to vet the Petitioner for suitability or otherwise to serve as a member of the **Samburu County Executive** in charge of medical services, public health and sanitation. That is a function for the Respondent. What this court can properly do is to direct that the vetting of the Petitioner for that purpose be done afresh in accordance with the law and the standards of fairness set out in **Article 47** of the Constitution. It is so ordered.

Prayer (d) of the amended petition is therefore denied.

14. The Petitioner shall have the costs of the petition as against the Respondent.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NANYUKI THIS 19TH DAY OF JULY 2018

HPG WAWERU

JUDGE