



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CONSTITUTIONAL PETITION NO. 10 OF 2018

BETWEEN

PETER KYALO PETITIONER

~VERSUS~

DR ALFRED MUTUA,

GOVERNOR MACHAKOS COUNTY 1ST RESPONDENT

THE CLERK, COUNTY ASSEMBLY OF MACHAKOS.....2ND RESPONDENT

THE SPEAKER, COUNTY ASSEMBLY OF MACHAKOS..3RD RESPONDENT

THE COUNTY ASSEMBLY OF MACHKOS 4TH RESPONDENT

MS. EVERLYNE KAVUU MUTIE 1ST INTERESTED PARTY

ENG. MORRIS OMUYOMA ALUANGA 2ND INTERESTED PARTY

MR TITUS NZEKI KAVILA 3RD INTERESTED PARTY

MR FRANCIS KIIO MWAKA 4TH INTERESTED PARTY

MR KIMEU MBITHI KIMEU 5TH INTERESTED PARTY

MR URBANUS MUSYOKA WAMBUA6TH INTERESTED PARTY

MR LAZARUS KIVUVA7TH INTERESTED PARTY

JUDGEMENT

Parties

1. The Petitioner herein described himself as an adult individual, resident of Machakos County (hereinafter referred to as “the County”), a voter and a law abiding citizen.
2. The 1st Respondent is the Governor of the County Assembly of Machakos (hereinafter referred to as “the Governor”) conferred with the powers pursuant to Articles 179(1)(b) of the Constitution and section 30(2)(d) of the *County Governments Act* (hereinafter referred to as “the Act”), to nominate the County Executive Members in compliance with sections 35 and 36 of the Act.
3. The 2nd Respondent is the administrative officer of the County Assembly of Machakos (hereinafter referred to as “the Assembly”) responsible for the day to day management and functioning of the Assembly.
4. The 3rd Respondent is the Speaker of the Assembly (hereinafter referred to as “the Speaker”), with the mandate to appoint an appointing

committee for the purposes of vetting nominees for the position of County Executive Committee.

5. The 4th Respondent is the County Assembly of Machakos having the mandate inter alia of vetting nominees for the position of member of the County Executive Committee.

6. The interested parties were the persons nominated by the Governor for appointment by the Assembly for the position of member of the County Executive Committee Members.

Petitioners' Case

7. The facts of this petition, according to the petitioner herein are that the Governor, through a letter dated 17th May, 2018 addressed to the Speaker pursuant to Articles 179(2)(b) of the Constitution and section 30(2)(d) of the Act and sections 4, 5, 6, 10 and 11 of the **Public Appointment (County Assemblies Approval) Act** (hereinafter referred to as "the Approval Act") forwarded the names of 7 nominees to be vetted by the Assembly for the purposes of their appointment as members of the Machakos County Executive Committee Members.

8. According to the petitioner, the aforesaid nominees were done in gross contravention of the said constitutional and statutory provisions as required under section 5(1) of the **Approval Act**, in that he did it in an opaque manner, discriminatively, without transparency, openness and accountability thereby locking out eligible members of the public from applying to be nominated by him for the various positions in the County Executive Committee.

9. It was therefore the petitioner's case that the actions of the Governor infringe on his constitutional rights and those of other members of the public and are in violation of the rule of law, democracy and participation of the people, good governance, integrity, transparency and accountability and values and principles of public service as envisaged in the Constitution. It was further averred that the national values and principles of governance as enshrined in Article 10 of the Constitution 2010 binds all state organs, state officers, public officers and all persons whenever any of them makes or implements public policy decisions, and these include the rule of law, democracy and participation of the people, good governance, integrity transparency and accountability.

10. According to the Petitioner, this Court is vested with the jurisdiction to determine the constitutionality of the nominee vetting process by the 2nd and 3rd Respondent, as well as the constitutionality of making such appointments by the 1st Respondent and that the scope of the Court's jurisdiction extends to the procedural improprieties, as well as the legality of the appointment. It was further averred that whereas the 1st Respondent is vested with powers under Article 179(2)(b) of the Constitution and Section 30(2)(b) of the **County Governments Act** (hereinafter referred to as "the Act"), to appoint county executive committee members, this process has to be on the basis of mutual consultation.

11. According to the Petitioner, the 1st Respondent in disregard of the provisions of the Constitution and statutory provisions failed to advertise the positions in any public dailies for the members of the public to apply for the various positions before he could exercise his right to nominate and forward the names to the 4th Respondent for vetting interview. It was disclosed that the only advertisement that the public were accorded was inviting the nominees to an interview vetting by the 3rd and 4th Respondents. As a result it emerged that most of the potential interested contestants were locked out of this process.

12. Based on legal advice, the Petitioner averred that the actions of the 1st Respondent violated the constitution by failing to advertise the positions for members of the public to apply for the various positions before he could exercise his right to nominate and forward the names to the 4th Respondent for vetting and that failure to fulfil this requirement would render the purported interview vetting process void right from the outset.

13. The Petitioner therefore sought the following orders:

1. An order and a declaration that it is against national values and principles of the County Government for the 1st Respondent to forward names of the nominees of the county executive committee members to the 2nd and 3rd Respondents to the exclusion of the public participation in a competitive process.

2. An order and a declaration that pending the hearing and determination of the petition, the court do issue a conservatory order directing and restraining the 2nd and 3rd Respondents from vetting the list of nominees forwarded to them by the 1st Respondent.

3. An order and declaration compelling the 1st Respondent to advertise in a public newspaper an invitation of Members of Machakos County to apply for the position of the Executive Committee Members before nomination to allow public participation in a competitive, transparent and accountable process.

4. Costs of this petition.

5. Further relief or orders that this honourable court may deem just and fit to grant.

14. It was submitted that through the Petitioner's learned counsel, **Ms Machuki**, that under Articles 22 and 258 of the Constitution 2010, every person has a right to institute a suit in person, on behalf of another person or members of a group, or in public interest, *claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed, or threatened. In this case, it was submitted that the Petitioner has sworn on oath that he has a genuine interest in the appointments of members of the County Executive Committee, whose*

functions under Article 183 of the Constitution and section 36 of the **County Government Act**, not only impact on him as a member of the Machakos County but also other residents of the county and further that that the orders sought are for the benefit of all members of the county. The petition, it was therefore submitted, is not for personal gain or private profit or out of political motivation or other oblique consideration but for public interest.

15. According to the Petitioner, under Article 165 of the Constitution 2010, the High court has unlimited original jurisdiction in all matters including; to determine the question whether a right or fundamental freedom in the bill of rights has been denied, violated, infringed or threatened. The High Court is thus vested with the jurisdiction to determine the process, the constitutionality, procedure as well the legality of the nomination of the interested parties by the 1st Respondent.

16. By implementing these constitutional mandates, it was submitted that the High Court cannot be said to have interfered with the separation of power as alluded to by the 2nd, 3rd and 4th Respondents. In this respect reference was made to the case of **Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 Others [2013] eKLR.**

17. According to the Petitioner, this petition seeks Court's interpretative powers of the 1st Respondent in Article 179(2)(b) and Section 30(2) (d) of the **County Government Act** as read with provisions of Article 10(1)(2), Article 73(d), Articles and 174(a)(c) of the Constitution which is well within the jurisdiction confine of the High Court.

18. It was submitted on behalf of the Petitioner that whereas the powers granted to the 1st Respondent under Article 179(2) of the Constitution and section 30(2)(d) of the **County Government Act**, to nominate persons to be vetted by the 2nd, 3rd and 4th Respondent as members of the Executive County Committee may sound discretionary, in construing the spirit of the constitution governing state organs, state officers and public officers, these powers have limitations. In this respect the Petitioner referred to Article 10(1) of the Constitution 2010, which binds all state organs, state officers, public officers and all persons to observe the national values and principles of governance, when applying or interpreting the Constitution, enacting, applying or interpreting any law; or implementing public policy decisions. Article 10(2) of the Constitution on the other hand sets out the national values and principles of governance to include good governance, integrity, transparency and accountability while Article 73(2) (d) of the Constitution provides the guiding principles of leadership and integrity to include accountability to the public for decisions and actions. The Petitioner also cited Article 174 of the Constitution which provides for the objects of the devolution government to include promoting democratic and accountable exercise of power; and to give powers of self-governance to the people and enhance the participation of the people in the exercise of the powers of the state and in making decisions affecting them. In this respect the Petitioner relied on **Benson Riitho Mureithi vs. J. W. Wakhungu & 2 Others [2014] eKLR** and **David Kariuki Muigua vs. Attorney General & Another Petition No. 161 of 2011.**

19. The Petitioner's position was that his petition seeks to challenge the process, constitutionality and legality of nominations of the interested parties by the 1st Respondent, for failure to conform to the above stated constitutional provisions. To him, the Governor in nominating the interested parties did not involve the people of Machakos County to allow their participation. The process was therefore neither transparent nor democratic. Further, the 1st Respondent's actions did not amount to good governance and hence, could not be said to be accountable to the people of Machakos.

20. It was submitted that the nominations of the interested parties were done in gross contravention of the aforesaid constitutional provisions since the 1st Respondent acted in an opaque manner, discriminatively, without transparency, openness and accountability to the public, as he did not advertise the process of the nominations, thereby locking out eligible members of the public from applying to be nominated by him for the various positions in the County Executive Committee.

1st Respondent's Case

21. The 1st Respondent opposed the Petition.

22. According to him, the petition is incompetent because:

- i) The pleadings do not disclose the particulars in support of the alleged cause of action;
- ii) The petitioner has not stated what violations of the constitution or any other law were committed by the 1st respondent;
- iii) The petitioner makes general accusations of violation of the constitution which are anticipatory, speculative and unspecified.
- iv) The petitioner does not appreciate the separate functions of the 1st to 4th respondents with respect to nomination, vetting and appointment of the committee members and thus the cause of this ill-advised petition.

23. According to the 1st Respondent, the petition seek to stop the functions of constitutional office holders which is in itself unconstitutional and thus should be dismissed with costs for being an abuse of the court process. It was deposed that Article 179 of the Constitution as well as the section 35 of the **County Governments Act** gives the governor exclusive powers to nominate county executive committee members and there is no requirement that he should consult or invite members of the public to advise him on who to nominate. According to the Governor, in nominating the county executive committee members, he is exclusively exercising delegated powers under the constitution which again is not subject to discussion by members of the public at this stage since the nominees are then subject to vetting by members of the national (sic) assembly and such vetting include invitation of the members of the public to give their views as well as contribution on the suitability of such nominees through adverts in newspapers of nationwide circulation, the local radio stations as well as through the local administration and *barazas* to ensure maximum participation.

24. It was averred that it is at the vetting stage where the Petitioner and other members of the public are given an opportunity to present their support or objections to the nominees being approved for appointment and either way the decision to approve or reject them lies with the County Assembly and on the governor. It was therefore averred that the application and the petition are thus misinformed and in the wrong forum because the petitioner should present his allegations before the County Assembly during the vetting process for consideration since it is the County Assembly which does the vetting and not this Court.

25. It was therefore the 1st Respondent's position that it is a lie when the petitioner alleges that the whole process of nomination and vetting is opaque when he already has a chance to present his grievances before the vetting panel but he chose not to follow the laid down procedures.

26. It was disclosed that in this case the Governor forwarded the names of the nominees to the County Assembly of Machakos on 21st May, 2018 together with their testimonials for purposes of vetting and that the advertisement was done in the daily nation on 25th May, 2018 inviting the members of the public to submit to the office of the clerk of the County Assembly in writing and under oath any relevant information concerning the nominees opposing their suitability to hold the relevant offices. However in spite of such a clear roadmap given and facilitated the petitioner for unknown reasons chose to abandon the procedures as laid down by the law to come to court and stop a legal and constitutional process from taking place.

27. It was contended that the Petitioner had not informed the Court whether he presented his grievances through the laid down procedure or that he was prevented by the any of the respondents from presenting them and as it is, the petitioner is out to abuse the court process and frustrate the constitutional bodies from doing their work.

28. The 1st Respondent deposed that after the vetting process is over, the County Assembly in tandem with sections 35(3) of *County Governments Act* no. 17 of 2012 as well as sections 7, 8,9,10 and 11 of the *Public Appointments (County Assemblies Approval Act) 2017* will cause to be forwarded the report made by the committee to the 1st respondents office approving or rejecting the nominees. It is therefore out of the control of the 1st respondent whether the nominees are approved or rejected. However, in view of the fact no such report has been presented, the application and the petition are merely speculative and the Court cannot exercise its jurisdiction over hypothetical creations of the petitioner and which do not have any legal underpinning.

29. According to the 1st Respondent, the vetting of the nominees were conducted in accordance with the law and members of the public were invited to present their views and consequently the Court's jurisdiction cannot be invoked to supervise or direct a constitutional body on how to discharge its mandate or conduct its business.

30. The 1st Respondent therefore averred that the petition offends the obvious *doctrine of separation* of powers because he is asking the court to direct the County Assembly which is the legislative body of the county government on how it ought to conduct their business, a power which the Court does not have.

31. On behalf of the 1st Respondent it was submitted by **Mr Muumbi**, his learned counsel that the nomination of County Executive Members is not subject to public participation and that it is only after the names are forwarded to the Assembly that public views are invited. In this case the public had already been invited to present their views to the Assembly as regards the said nominees.

32. It was submitted that in naming the said members, the 1st Respondent exercises delegated power under Article 1 of the Constitution. In this respect the 1st Respondent relied on the definition of the term nomination by *Black's Law Dictionary* as a mere suggestion which is not binding. It was further submitted that the said members being political appointees, it is the 1st Respondent to decide who to nominate. The 1st Respondent further relied on section 2 of the *County Governments Act* which defines who public officers are which definition excludes the said members. As for the procedure for approval the 1st Respondent relied on sections 7, 8, 9, 10 and 11 of the *Approvals Act*.

33. It was submitted that the vetting process was already over though no report on the said nominees' suitability had been made.

2nd, 3rd and 4th Respondents' Case.

34. On their part the 2nd, 3rd and 4th Respondents filed the following objections:

1. That the Petitioner's pleadings are general, speculative and do not disclose a real controversy/dispute capable of resolution by this honourable court. The petition and application thereof are predicted on unspecified anticipated actions by the Respondents who are separate and distinct legal entities. This honourable court cannot grant omnibus orders based on non-existent and or alleged threats of violation of rights.

2. The Petitioner's pleadings do not adequate in support of their alleged cause of action/claim relating to the alleged violations of the Constitution against the Respondents to enable this honourable court grant the reliefs sought herein.

3. The Petition and the Application thereof seek to impede the functions of the constitutional office holders and as such, it is frivolous, vexatious and an abuse of the judicial process. One cannot stop a person or an organ of state or any other constitutional body from carrying out their constitutional mandate.

4. The jurisdiction to interpret the Constitution conferred by Article 165 (3) does not exist in a vacuum and this honourable court can only invoke its mandate to interpret any provisions of the Constitution under the said Article if there is a real issue in controversy and not in hypothetical or academic situation.

5. In the premises, this honourable court has no jurisdiction to supervise constitutional bodies carrying out their mandate within the confines of the Constitution and both the Petition and the Application herein are made in bad faith. The same has been overtaken by events.

6. That the Petitioner's pleadings offend the *Doctrine of Separation of powers* as the same invite this honourable court to direct Parliament and County Assemblies which are Legislative branches of the government, on their procedures and how they ought to run their affairs.

7. That the issues raised in the application and the petition are directed against parties who have not infringed any right or rights of the petitioners or any member of the public and are intended to protect speculative interest of the petitioners.

8. The said application is bad in law and an abuse of court process.

9. Other grounds to be argued at the hearing thereof.

35. Apart from the said objections the said Respondents filed a replying affidavit in which they averred that this Court has no jurisdiction to supervise constitutional bodies carrying out their mandate within the confines of the Constitution. It was contended that the Petitioner's pleadings offend the doctrine of separation of powers by inviting this Court to direct Parliament and County Assemblies which are legislative branches of government on their procedures and how to run their affairs.

36. According to the said Respondents after the said nominations, the nominees are to be vetted by the Assembly in accordance with the legislation which process is already underway in accordance with the law. Further, the orders being sought are against parties who have not been accused of any wrongdoing. It was the said Respondents' case that they complied with the law. Since the public have been invited to present their views on the nominees it was contended that this Court has no power to grant the orders sought.

The Interested Parties' Case

37. On their side, the interested parties contended that the Petitioner's Petition in its entirety is misconceived, misguided, bad in law and should be dismissed with costs to the Interested Parties as the said Petition is made in bad faith, misrepresent the true position, and does not raise constitutional issues that can be determined by this Honourable court.

38. It was the interested parties' case that the Petition raise general, vague and speculative disputes camouflaged as constitutional disputes and as such the petition is flawed and incompetent for want of compliance with the law and precedents on pleadings relating to Constitutional Petitions seeking redress for alleged Constitutional violations.

39. In their view, the petition seeks the court to issue orders against presumed and anticipated speculative actions of the Respondents herein thus rendering the same a candidate for dismissal by this honourable court as no violation has been specified and pointed out that is capable of redress by this honourable court at this stage. Furthermore, the said Petition is meant to impede and interfere with statutory and constitutional functions of independent arms of the County Government and as such a clear case of gross abuse of court process. According to the interested parties, the entire Petition does not with specificity point to the actual Constitutional provision that has been violated or a constitutional wrong that has been committed by either the Respondents or the Interested Parties herein and as such, ought to be dismissed forthwith with costs.

40. The interested parties averred that pursuant to the powers conferred upon the 1st Respondent herein under the provisions of section 30(2) (d) of the **County Government Act** as read together with Article 179(2)(b), the 1st Respondent herein is empowered to appoint the County Executive Committee in compliance with the said statutory and Constitutional provisions. Further to the foregoing, section 35 of the **County Governments Act** gives the Governor the powers to nominate for appointment any person who meets the criteria set down therein and on the considerations therein enumerated and then forward the said persons to the County Assembly for vetting and subsequent approval or rejection as the case may be. Pursuant to the provisions of Article 179(2)(b) of the Constitution of Kenya 2010, section 30(2)(d), (e) and section 35 of the **County Governments Act**, the 1st Respondent did nominate the Interested Parties herein and consequently forwarded the names of the Interested Parties to the Speaker of the County Assembly, the 3rd Respondent herein vide a letter dated 17th May 2018.

41. It was deposed that in compliance with the provisions of Articles 179 and 196 of the Constitution as well as the provisions of section 5 and 7 of the **Public Appointments (County Assemblies Approval) Act, 2017**, the Speaker of the County Assembly, the 3rd Respondent herein did issue notice to all members of the Public vide a newspaper of national circulation on 25th May 2018 that he had received the list of nominees from the 1st Respondent and as such, invited the public to submit to the office of the Clerk, the 2nd Respondent herein any relevant information concerning the Interested Parties herein opposing their suitability to hold the offices to which they had been nominated to hold by the 1st Respondent. Subsequently, all the Interested Parties herein including the Petitioner received the notification letters dated 31st May 2018 from the Clerk of the County Assembly notifying them of their nomination to the various positions and also inviting them for a vetting session with the Assembly on various dates as communicated in the said letters and also requiring them to collect and submit the vetting forms from the office of the Clerk and further requiring them to submit the documents enumerated therein before the 11th of June 2018.

42. The interested parties averred that pursuant to the foregoing, the interested parties did comply with the requirements therein and submitted the documents required and further attended the vetting session on various days as from 11th June 2018 to the 21st of June 2018 when the last vetting session was carried out. It was therefore averred that as things stand now, all the interested parties herein have been vetted as required under the **Public Appointments (County Assembly Approvals) Act, 2017**. In any event, it was contended that the newspaper notice gave the Petitioner herein ample time to object to the nomination of the interested parties herein and he even had an opportunity to present a petition/grounds to the Assembly against all the Interested Parties herein and also to appear during the vetting sessions to raise his objection but instead chose to sleep on is right all the way from the 25th May 2018 to the 14th of June 2018, mid-way

through the vetting session when he approached this Court.

43. It was contended that the act of failing to raise his objection to the Clerk of the Assembly as required and clearly communicated and the assembly in general even after being given notice to do so; and subsequently coming to this court to stop the process is clearly malicious, an afterthought and a confirmation that the Petitioner is actuated by ill will and motive and not the protection of the constitution as being alleged. Since no petition or report was filed or received from the petitioner, the interested parties averred that this application and the entire petition incompetent.

44. To the interested parties, the elaborate procedure provided for in law and specifically under the **Public Appointments (County Assembly Approvals) Act, 2017** is meant to ensure that the 1st Respondent does not abuse his powers and further to ensure that the public is able to participate in the process of vetting suitable and qualified officers to the various position in the County Government including the County Executive Committee as the case herein.

45. It was averred that the County Assembly is made up of the members of the County Assembly who are the representatives of all the people in the entire County, including the Petitioner herein and as such, the issue of public participation is seriously undertaken and observed before the nominees can be appointed to the various positions. In the circumstance, it is clear that the process of appointment is still in motion and as such, there can be no violation of the Constitution even before the act is finalised. The interested parties herein remain nominees until they are appointed to their substantive positions after the whole process of approval of nominees is finalised as provided for in law. As such no law or constitutional right of the Petitioner has been broken by the Interested Parties herein by availing themselves for scrutiny and vetting by the County Assembly, which also represents the Petitioner herein.

46. It was contended that since the names of the Interested Parties have been in public domain, the Petitioner cannot allege that the processes were being conducted in secrecy. In view of the foregoing, it was contended that the Petitioner's petition is in bad faith and ought to be dismissed forthwith. Further, it is clear that no constitutional right of the Petitioner has been infringed or is threatened to be infringed and as such, the Application and the Petition ought to be disallowed.

Determinations

47. I have considered the issues raised in this Petition.

48. Since the Respondents raised the issues revolving around this Court's jurisdiction to grant the orders sought herein, it is important that the said issue be resolved *in limine*. This was the position adopted by Nyarangi JA in **The Owners of Motor Vessel "Lillian S" vs. Caltex Oil Kenya Limited (1989) KLR 1** where he stated that:

"Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction".

49. Similarly in **Owners and Masters of The Motor Vessel "Joey" vs. Owners and Masters of The Motor Tugs "Barbara" and "Steve B" [2008] 1 EA 367** the same Court expressed itself as follows:

"The question of jurisdiction is a threshold issue and must be determined by a judge at the threshold stage, using such evidence as may be placed before him by the parties. It is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything and without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. It is for that reason that a question of jurisdiction once raised by a party or by a court on its own motion must be decided forthwith on the evidence before the court. It is immaterial whether the evidence is scanty or limited. Scanty or limited facts constitute the evidence before the court. A party who fails to question the jurisdiction of a court may not be heard to raise the issue after the matter is heard and determined. There is no reason why a question of jurisdiction could not be raised during the proceedings. As soon as that is done, the court should hear and dispose of that issue without further ado."

50. Lastly, on the same issue, the Supreme Court in the case of **Samuel Kamau Macharia vs. Kenya Commercial Bank & 2 Others, Civil Appl. No. 2 of 2011**, observed that:

"A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings... Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation."

51. However as appreciated in **Bollinger vs. Costa Brava Wine Co. Ltd [1960] 1 Ch. 262 at 238**, the law is a living thing and a court would be shirking its responsibility were it to say, assuming that there be no existing recognised remedy covering the facts of a particular case, "Why then, this must be an end to it". The law may be thought to have failed if it can offer no remedy for the deliberate acts of one person which causes damage to the property of another. In that event the rule of law will give way to anarchy and impunity.

52. It has been appreciated that the law must, of necessity, adapt itself; it cannot lay still. It must adapt to the changing social conditions. The court in the modern society in which we live cannot deny a party with a genuine grievance a remedy. Our Constitution under Article 1 obliges every person to respect, uphold and defend the Constitution while Article 258 of the Constitution provides as follows:

(1) Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.

(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—

(a) a person acting on behalf of another person who cannot act in their own name;

(b) a person acting as a member of, or in the interest of, a group or class of persons;

(c) a person acting in the public interest; or

(d) an association acting in the interest of one or more of its members.

53. The courts have recognised that unlawful interference with a citizen's rights give rise to a right to claim redress and if the petitioners have a right they must of necessity have the means to vindicate it and a remedy if they are injured in the enjoyment or exercise of it: and indeed, it is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal. Whether or not the Petitioner will be able to prove that his rights have been contravened or infringed is another matter altogether. It is however contended by the Petitioner that he had a right, just like other members of the public, to participate in the decision by the 1st Respondent Governor to nominate the interested parties herein to the position of County Executive Member. See **Rookes vs. Barnard [1964] AC 1129** and **Ashby vs. White [1703] 2 Ld Raym.938; 92 ER 126.**

54. In **Republic vs. Returning Officer of Kamkunji Constituency & The Electoral Commission of Kenya HCMCA No. 13 of 2008** it was held that just as nature abhors a vacuum, even the enforcement of the rule of law abhors a vacuum or a gap in its enforcement and proceeded to uphold the jurisprudence that helps to:

“illuminate the dark spots and shadows in all circumstances, so that justice as a beacon of light and democratic ideals are practiced and hailed at all times over the hills, valleys, towns and homes in this beautiful land of Kenya. The mantle of justice and the rule of law must cover all corners of Kenya in all stations. Courts have a continuing obligation to be the foremost protectors of the rule of law”.

55. I fully agree and only wish to add that to allow the preliminary objections based on jurisdiction is likely to render the Petitioner and the people of Machakos County remediless and would lead to a situation where in order to avoid transparency in the appointment processes the Chief Executive of County Government would simply undertake the process of appointments clandestinely and when challenged claim that the Court has no jurisdiction. That possibility cannot be permitted to take root in the current constitutional dispensation.

56. Taking into account the issues canvassed herein, this Court when invited to investigate the constitutionality of the decisions of the Executive whether at national level or at county level must do so and ought not to down its tools based on the doctrine of separation of powers without conducting full investigations into the allegations particularly when the same touch on the constitutionality of the decision in question.

57. As regards separation of powers, it is trite that the principle broadly incorporates the scheme of “checks and balances”; but the principle is not to be applied in theoretical purity for its ultimate object is good governance, which involves phases of co-operation and collaboration, in a proper case.

58. As regards precision in the pleadings, it is my view that where it is apparent to the Court that the Bill of Rights has been or is threatened with contravention, to avoid to enforce the Bill of Rights on the ground that the supplicant for the orders has not set out with reasonable degree of precision that of which he complains has been infringed, and the manner in which they are alleged to be infringed where the Court can glean from the pleadings the substance of what is complained of would amount to this Court shirking from its constitutional duty of granting relief to deserving persons and to sacrifice the constitutional principles and the dictates of the rule of law at the altar of procedural issues. Where there is a conflict between procedural dictates and constitutional principles especially with respect to the provisions relating to the Bill of Rights it is my view and I so hold that the latter ought to prevail over the former.

59. In the foregoing premises the preliminary objections which were raised by the Respondents herein are disallowed and I will now proceed to consider the merits of the Petition.

60. In my view the issue for determination before this Court is the process that the Governor is required under the Constitution and the relevant statutes to follow in nominating the members of the County Executive Committee and whether in so doing Article 10 of the Constitution in so far as it requires public participation applies.

61. The said Article provides as follows:

(1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them—

(a) *applies or interprets this Constitution;*

(b) *enacts, applies or interprets any law; or*

(c) *makes or implements public policy decisions.*

(2) *The national values and principles of governance include—*

(a) *patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;*

(b) *human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;*

(c) *good governance, integrity, transparency and accountability; and*

(d) *sustainable development.*

62. There is no doubt at all that the appointment of the members of the County Executive Committee is an act that requires the application of the Constitution and the law. Clearly therefore there can be no doubt that before the said persons are appointment, the process of their appointment must be subject to public participation. In this regard I agree with the decision of **Mumbi Ngugi, J** in **Benson Riitho Mureithi vs. J. W. Wakhungu & 2 others [2014] eKLR** where the learned Judge expressed herself as follows:

“It would appear from the material before the Court that the question of the Interested Party’s suitability for public office was not addressed in accordance with the requirements of the Constitution. The Cabinet Secretary, the 1st respondent, had power of appointment under section 51 of the Water Act... At section 2 of the First Schedule to the Act, it is provided that those proposed for appointment as Board members of Water Services Boards must be appointed on the basis of educational qualifications, experience, character and integrity of potential candidates for membership. Similar provisions are contained in section 22 of the Public Officers Ethics Act...The 1st respondent, however, had a duty, imposed on her by the people of Kenya, to consider the Interested Party’s suitability under the Constitution, and to make the appointment to the Board in accordance with the dictates of the Constitution...What does the Constitution require with regard to appointments to public office? As already observed, public officers must be appointed on the basis of the criteria set out in Chapter 6. They must also, in addition, be appointed in accordance with the national values and principles set out in Article 10... It has been conceded by Counsel for the respondents, however, that no-one knew or had any inkling that the Interested Party was going to be appointed as Chairman of the Water Services Board; and consequently, there was no opportunity for the petitioner or any other person to seek information about the appointment, or raise objections to the appointment, which objections would be expected to be considered by the Minister, and if found to be valid and sufficient to bar the appointment, the intended appointment ought not to be made...It seems to me therefore that the primary responsibility lay on the 1st respondent, and indeed on any other state officer making a similar appointment, to put in place a mechanism for recruitment or appointment of members of Boards of state corporations that would allow for public participation and consideration of the suitability and integrity of potential appointees as the Constitution now demands... It may seem that the Constitution has imposed an irksome and onerous burden on those responsible for making public appointments by requiring that they make the appointments on the basis of clear constitutional criteria; that they allow for public participation; and that those they appoint meet certain integrity and competence standards. This burden, however, is justified by our history and experience, which led the people of Kenya to include an entire chapter on leadership and integrity in the Constitution... In the present case, as the respondents tacitly concede, there are serious unresolved questions with regard to the integrity of the Interested Party which do not appear to have been considered by the 1st respondent in making the appointment to the Chairmanship of the Athi Water Services Board. It is the duty of the 1st respondent to consider the issues and, in exercise of the powers vested in her office under section 51 of the Water Act, applied in accordance with the Constitution, make a determination of the suitability of the Interested Party under Chapter 6 of the Constitution...In the premises, this petition succeeds to the extent that the Court finds that the 1st respondent failed to act in accordance with the Constitution, and her appointment of the Interested Party as Chairman of the Athi Water Services Board fell below the standard set by the Constitution... In the present case, the Court has found that no inquiry was made with regard to the suitability of the Interested Party under the Constitution, a responsibility that fell on the 1st respondent under the provisions of the Water Act as read with section 7 of the 6th Schedule to the Constitution. The responsibility still remains to make that inquiry. It is a responsibility that the Court does not deem proper to assume, but should require its proper exercise by the office vested with the authority to exercise it—the 1st respondent.”

63. The learned Judge relied on **International Centre for Policy and Conflict & 4 Others -vs- Hon. Uhuru Kenyatta and Others, Petition No. 552 of 2012** where it was held:

“On the issue canvassed by the parties on the threshold of integrity required to be met, we note that the purpose of Chapter Six is to set higher standards of integrity for persons seeking to serve as State officers. Integrity is the firm adherence to moral and ethical values in one’s behaviour. Integrity is therefore not only about an individual’s own perception about the correctness or appropriateness of their conduct, but also has a fundamental social and public quality to it. It is our view that as the society also expects certain values to be upheld, the integrity provisions of the Constitution demand that those aspiring to State office be like Caesar’s wife: they must be beyond reproach.”

64. I also agree with the decision in **David Kariuki Muigua vs. Attorney General & Another Petition No. 161 of 2011**, which dealt with

an appointment by the Minister for Industrialisation of the Chairman of the Standards Tribunal, and in which the Court observed at Paragraph 13 and 15 as follows:

13. “However, it would be expected that the Minister, in making the appointments to the Tribunal, would be guided by the national values and principles set out in Article 10 of the Constitution, in particular participation of the people, equity, good governance, integrity, transparency and accountability. Section 7(1) of Schedule 6 provides that

‘All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.’

Any appointments under the Standards Act should have been done in conformity with the provisions of the constitution and should have observed the national values and principles.

15. There is no evidence that there was a competitive process that would enable public participation in the process and show the transparency and accountability required under the Constitution, thereby giving legitimacy to the appointment of the petitioner. Like his successor, the petitioner was appointed on the basis of a Gazette Notice; the basis of the appointment, the criteria followed in appointing him and the other members of the Tribunal was, from all appearances and regrettably so, more in keeping with the old order that preceded and indeed gave impetus to the clamour for the new Constitution when public officers were appointed at the whim of the Minister or President. To uphold the appointment of the petitioner would be to give a seal of approval to the old order. It is imperative that all public appointments are made in accordance with constitutional values and principles.”

65. It is therefore clear that any process of appointment pursuant to constitutional or statutory provisions that does not comply with the provisions of Article 10 of the Constitution cannot be upheld as being lawful.

66. However, it must be appreciated that appointment is in most cases a process rather than an event and therefore the Court in considering whether or not the national values and principles of governance in Article 10 have been adhered to must take into consideration the purposive approach to the interpretation of the said Article as was appreciated in Njoya & 6 Others vs. Attorney General & Others (No. 2) [2004] 1 KLR 261; [2004] 1 EA 194; [2008] 2 KLR, where a majority of the Court held that quite unlike an Act of Parliament, which is subordinate, the Constitution should be given a broad, liberal and purposive interpretation to give effect to its fundamental values and principles.

67. Similarly in Institute of Social Accountability & Another vs National Assembly & 4 Others High Court Petition No. 71 of 2014 [2015] eKLR, the Court stated as follows:

[57] “[T]his Court is enjoined under Article 259 of the Constitution to interpret the Constitution in a manner that promotes its purposes, values and principles, advances the rule of law, human rights and fundamental freedoms in the Bill of Rights and that contributes to good governance. In exercising its judicial authority, this Court is obliged under Article 159(2)(e) of the Constitution to protect and promote the purpose and principles of the Constitution.”

.....

[59] Fourth, the Constitution should be given a purposive, liberal interpretation...Lastly and fundamentally, it is the principle that the provisions of the Constitution must be read as an integrated whole, without any one particular provision destroying the other but each sustaining the other (see *Tinyefuza v Attorney General of Uganda Constitutional Petition No. 1 of 1997 (1997 UGCC 3)*). We are duly guided by the principles we have outlined and we accept that while interpreting the impugned legislation alongside the Constitution, we must bear in mind our peculiar circumstances. Ours must be a liberal approach that promotes the rule of law and has jurisprudential value that must take into account the spirit of the Constitution.”

68. The same view is expressed in Matter of the Kenya National Human Rights Commission, Advisory Opinion No. 1 of 2012; [2014] eKLR, at paragraph 26 where the Supreme Court opined that:

“...But what is meant by a holistic interpretation of the Constitution? It must mean interpreting the Constitution in context. It is the contextual analysis of a constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what the Constitution must be taken to mean in light of its history, of the issues in dispute, and of the prevailing circumstances. Such scheme of interpretation does not mean an unbridled extrapolation of discrete constitutional provisions into each other, so as to arrive at a desired result.”

69. The same Court in the Matter of the Interim Independent Electoral Commission - Constitutional Application No. 2 of 2011 [2011] eKLR paragraph 86, stated:

“The rules of constitutional interpretation do not favour formalistic or positivistic approach (Article 20(4) and 259(1)). The Constitution has incorporated non legal considerations which we must take into account in exercising our jurisdiction. The Constitution has a most modern Bill of Rights, that envisions a human rights based and social justice oriented state and society. The values and principles articulated in the preamble, in article 10, in chapter 6 and in various provisions, reflect historical, economic, social, cultural and political realities and aspirations that are critical in building a robust patriotic and indigenous jurisprudence for Kenya. Article 159(1) states that judicial authority is derived from the people. That authority must be reflected in the decisions made by the court”.

70. It is therefore my view that the Court must look for the spirit of the constitutional national values and principles of governance rather than

just to be formalistic. That the process of appointment of the members of the County Executive Committee is a process appears in Article 179 of the Constitution as read with section 35 of the *County Governments Act*. Article 179 of the Constitution provides as follows:

179. (1) The executive authority of the county is vested in, and exercised by, a county executive committee.

(2) The county executive committee consists of—

(a) the county governor and the deputy county governor; and

(b) members appointed by the county governor, with the approval of the assembly, from among persons who are not members of the assembly.

71. Section 35(1) and (2) of the *County Governments Act* on the other hand provides that:

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 communities; and

(c) community and cultural diversity within the county.

72. Section 51(2) of the *Interpretation and General Provisions Act*, Cap 2 Laws of Kenya provides as follows:

Where the power or duty of a person under this section [power to appoint] is exercisable only upon the recommendation, or is subject to the approval or consent of another person, then the power shall, unless a contrary intention appears be exercisable only upon that recommendation or subject to that approval or consent.

73. It therefore follows that the Governor cannot exercise the power of appointment of the members of the County Executive Committee without the approval of the Members of the County Assembly. In this case there is no doubt that the County Assembly in approving the said nominees is required to conduct public participation process before arriving at its decision.

74. In my view the appointment of the County Executive Committee members being a process, it cannot be that every stage of that process must be subjected to public participation. **In Legal Advice Centre aka Kituo Cha Sheria vs. Attorney General & 3 others [2015] eKLR, Lenaola, J** (as he then was) expressed himself as follows:

“In the Petition, the further argument made was that the 2nd Respondent did not allow persons who were eligible for appointment to put forth their names and qualifications for consideration. No other submission was made on the point save Mr. Ongoya’s abstract question as to “whether the Cabinet Secretary facilitated a participatory State” in the appointments. In the above context, Section 67 of the [Public Private Partnerships] Act grants the 2nd Respondent the discretion to appoint members of the Committee but no specific mechanism for doing so is given. In fact the Section provides that as to the qualifications of the nominees, he shall consult the Unit Director in doing so...As can be seen from a plain reading of Section 67 aforesaid, no specific requirement is made that the 2nd Respondent ought to advertise for the said position and it would be an expensive and tedious exercise if every such appointment is subjected to public scrutiny. Section 67 obligates the 2nd Respondent to “consult” with the relevant unit on the appointments as opposed to “advertise” the existence of vacancies in the Committee. All evidence points to the fact that he did so and in addition, I have seen a copy of a memo dated 4th October 2013 in which the 2nd Respondent was advised by the Director of the Unit aforesaid that “Section 67 of the Act does not require competitive recruitment as a procedure for appointing members of the committee.” I have no reason to fault the soundness of that advise despite the submissions by Kituo to the contrary.”

75. In this case similarly there is no requirement that the Governor should advertise the positions for nomination for the member of the County Executive Committee. As defined by *Black’s Law Dictionary*, the word nomination merely denotes a suggestion which is not binding. In my view the process of nominating people for appointment as contemplated under Article 179 of the Constitution as read with section 35 of the *County Governments Act*, amount to mere recommendation. As stated in *Black’s Henry Campbell, 1968. Black’s Law Dictionary, Definition of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern*, (4th ed) West Publishing Co., St Paul, MINN. the words ‘recommend’ means “to advise or counsel” as opposed to ‘direct’ which means “to point to; guide; order; command; instruct.”

1. In my view to subject such mere recommendation which is not in itself an appointment to public participation and at the same time subject

the process of approval by the County Assembly to the process of public participation would be an unnecessarily expensive and tedious exercise if every stage of the appointment process is subjected to public scrutiny. As was pointed out in **Merafong Demarcation Forum and Others vs. President of the Republic of South Africa and Others (CCT 41/07) [2008] ZACC 10; 2008 (5) SA 171 (CC); 2008 (10) BCLR 968 (CC)**:

“Parliament and the provincial legislatures must be given a significant measure of discretion in determining how best to fulfil their duty to facilitate public involvement. This discretion will apply both in relation to the standard rules promulgated for public participation and the particular modalities appropriate for specific legislative programmes. Yet however great the leeway given to the legislature, the courts can, and in appropriate cases will, determine whether there has been the degree of public involvement that is required by the Constitution. What is required by section 72(1)(a) will no doubt vary from case to case. In all events, however, the NCOP must act reasonably in carrying out its duty to facilitate public involvement in its processes. Indeed, as Sachs J observed in his minority judgment in *New Clicks*:

“The forms of facilitating an appropriate degree of participation in the law-making process are indeed capable of infinite variation. What matters is that at the end of the day a reasonable opportunity is offered to members of the public and all interested parties to know about the issues and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case.”

76. What is required is that in the process of appointment of the members of the County Executive Committee, the views of the public must be taken and taken into consideration in arriving at the ultimate decision. It does not require that public participation must be availed at all stages of the appointment whether preliminary or not, unless there is a prescribed procedure that mandates the same.

77. I am therefore not convinced that by not advertising the positions for the member of County Executive Committee before nominating the interested parties, the Governor contravened the law and the Constitution.

78. In the premises, this petition fails and is dismissed but being a public interests litigation there will be no order as to costs.

79. It is so ordered

Read, signed and delivered in open Court at Machakos this 17th day of September, 2018.

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Nthiwa for the 1st Respondent and holds brief for Ms Kamende for the 2nd to 4th Respondents

Mr Kilonzo for Mr Mutua for the Interested Parties

CA Geoffrey