



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

(CORAM: KIMONDO, THURANIRA & ONYIEGO JJ)

PETITION NO. 24 OF 2017

**IN THE MATTER OF ARTICLES 1, 2, 3, 10, 56, 73, 124, 159, 165, 179, 196, 232 & 259 OF THE CONSTITUTION OF THE
REPUBLIC OF KENYA**

AND

IN THE MATTER OF SECTIONS 3, 4, 7, 8 & 9 OF THE LEADERSHIP AND INTEGRITY ACT (NO.19 OF 2012)

AND

IN THE MATTER OF SECTIONS 30 (2) & (3) & 35 OF THE COUNTY GOVERNMENTS ACT (NO.17 OF 2012)

AND

IN THE MATTER OF SECTIONS 4, 5, & 10 OF THE PUBLIC SERVICE (VALUES AND PRINCIPLES) ACT 2015

AND

IN THE MATTER OF SECTION 7 OF THE NATIONAL COHESION ACT (NO.12 OF 2008)

AND

**IN THE MATTER OF SECTIONS 8, 10 & 11 OF THE PUBLIC APPOINTMENT (COUNTY ASSEMBLY APPROVAL) ACT
(NO.5 OF 2017)**

BETWEEN

BRENDA ACHIENG ONGALO.....1ST PETITIONER

ISAAC OKINYI.....2ND PETITIONER

JAMES ANYIKO.....3RD PETITIONER

AND

GEORGE OKODE, SPEAKER,

COUNTY ASSEMBLY OF SIAYA.....1ST RESPONDENT

THE COUNTY ASSEMBLY OF SIAYA.....2ND RESPONDENT

CORNEL RASANGA, GOVERNOR SIAYA COUNTY....3RD RESPONDENT

COUNTY GOVERNMENT OF SIAYA.....4TH RESPONDENT

JUDGMENT

A. Introduction.

1. This petition revolves around the *power* of the *governor* of Siaya County to *handpick* and forward to the *county assembly* nominees for county committee executives. Concomitant with that issue are the *procedures* and *powers* of the *county assembly* to approve the nominees.
2. **Article 10 (2)** of the **Constitution** enumerates the guiding values and principles of governance which include the rule of law; accountability; democracy; and, participation of the people.
3. **Article 179 (2) (b)** of the **Constitution** empowers the governor to forward the list of nominees to the *Committee of Appointments* and for approval by the *county assembly*.
4. Section 35 of the **County Governments Act (No. 17 of 2012)** requires the governor to ensure “*to the fullest extent possible, the composition of the executive committee reflects the community and cultural diversity of the county*”. Other considerations include gender and affirmative action.
5. Section 8 of the **Public Appointment (County Assembly Approval) Act (No.5 of 2017)** lays down the procedure and criteria for vetting of nominees by the governor. They relate to the education, skills and experience of candidates for the proposed positions.
6. Section 10 of the Act provides that where a candidate is *rejected* by the assembly, the governor shall *not* re-submit the name of the rejected candidate “*unless the circumstances relied on for the rejection of the appointment of the candidate did not exist or ceased to exist at the time of rejecting the nomination of the candidate.*”
7. The petitioners contend that the list of 10 County Committee Executives (hereafter *the nominees or CECs*) submitted to the assembly on 18th September 2017 violated the Constitution and statutes. For example, three of the nominees hailed from the governor’s Alego Usonga sub-county; two were his close relatives or associates from South Gem. The majority of nominees were Luo; and, the list omitted the youth and persons living with disabilities.

B. The reliefs sought.

8. The petitioners therefore pray for three key reliefs. Firstly, for a *declaration* that the names of *Dr. Nicholas Kut Ochogo, Joseph Odhiambo Ogutu, Dr. Elizabeth Achieng Odhiambo, Adrian Ouma, George Rubiik Misore, Dorothy Akinyi Owino, Mary Apiyo Omondi Olute, Dismas Odhiambo Wakla, George Amenity Oyeho* and *Jaoko Oburu Odinga* submitted to the assembly were unconstitutional, null and void.
9. Secondly, for a *conservatory order* to bar the governor from *re-submitting* the list; and, prohibiting the county assembly from receiving such nominees.
10. Thirdly, an order of *prohibition* restraining the clerk or speaker of the assembly from re-submitting the list; or, receiving such nominees “*or any other name other than in compliance with the Constitution*”.
11. There is also a prayer for *costs*.
12. The petition is contested *in toto* by the 3rd and 4th respondents. But the 1st and 2nd respondents have taken *conflicting* positions. We shall revisit the matter shortly.

C. The petition, description of parties and supporting affidavit.

13. The petition is dated 18th October 2017. The substratum of the petition is that the nomination of the CECs was unlawful; that the process was not fair or transparent; and, that public confidence in the governance structures of the county will be eroded.
14. The petition is supported by the deposition of *Brenda Ongalo*, the 1st petitioner. She deposes that the petitioners are *voters* and *residents* of Siaya County.
15. The 1st respondent is the speaker of the county assembly of Siaya. The office is a creature of **Article 178** of the **Constitution**. The County Assembly (2nd respondent) and the County Government (4th respondent) are established under **Article 176** of the **Constitution** as read together with the **County Government Act**. The 3rd respondent is the governor of the county elected under **Article 180** of the **Constitution**.
16. On 18th September 2017, the governor submitted the 10 nominees to the 1st respondent. They were matched to the following dockets-
 - a) Dr. Nicholas Kut Ochogo – Agriculture Food and Fisheries
 - b) Joseph Odhiambo Ogutu – Finance and Economic Planning
 - c) Dr. Elizabeth Achieng Odhiambo – Enterprise, Energy and Planning
 - d) Adrian Ouma - Physical Planning, Land, Housing and Urban Development

- e) George Rubiik Misore - Water, Irrigation, Environment and Natural Resources
- f) Dorothy Akinyi Owino - Health and Sanitation
- g) Mary Apiyo Omondi Olute - Education, Gender, Youth and Social Services
- h) Dismas Odhiambo Wakla – Public Service and Governance
- i) George Amenity Oyeho – Public works, Roads, Transport and Energy
- j) Jaoko Oburu Odinga - Tourism, Culture and Sports.

17. The 1st respondent forwarded the names to the Committee on Appointments. The latter is a standing committee created by *Standing Order 195* of the county assembly.

18. As stated earlier, the deponent avers that three of the nominees hail from the governor's Alego Usonga sub-county while two were his close relatives or associates. The petitioners claimed that majority of the nominees were Luo. The youth and persons living with disabilities were locked out.

19. The petitioners aver that the county is inhabited by other communities including *Suba, Kisii, Luhya, Kikuyu* and *Nubians*. The petitioners contend that the conduct of the governor breached the rights of minorities or marginalized groups enshrined in **Article 56** of the **Constitution**.

20. The vetting committee made its report on 3rd October 2017. The committee rejected 9 of the 10 nominees. It approved the nomination of *Mary Apiyo Omondi Olute* as the CEC for Education, Gender, Youth and Social Services.

21. The report was debated in the assembly the same day which adopted the recommendations of the committee. The report is annexed to the affidavit at pages 69 to 84 of the petition.

22. The governor was not amused by the decision of the assembly and vowed to re-submit the names. It is deposed at paragraph 13 that "*there [was] a scheme to unduly influence, coerce and intimidate*" the members of the county assembly to approve the names.

23. The deponent avers that on 12th October 2017 the governor publicly announced his intention to re-submit the rejected names to the assembly. A newspaper cutting of 13th October 2017 is annexed marked BAO4.

24. As we shall discuss shortly, the governor *re-submitted* to the assembly six of the *rejected* nominees namely, *George Rubiik Misore, Dorothy Akinyi Owino, Dr. Elizabeth Achieng Odhiambo, Adrian Ouma, Dismas Odhiambo Wakla, and Jaoko Oburu Odinga*. They were delivered in two batches on 23rd November 2017 and 5th February 2018. He also switched some nominees to *different* dockets; and, altered the titles of some dockets. Regrettably, the petitioners did *not* amend the petition to plead to those facts.

D. Grounds of opposition and replying affidavits by the 1st and 2nd respondents.

25. As we pointed out earlier, there are two conflicting sets of submissions and affidavits by the 1st and 2nd respondents. Firstly, there is an *undated* replying affidavit sworn by *Felix Olwero* on behalf of the 1st and 2nd respondents. It was filed by counsel of record, *Maxwell O. Ogonda*.

26. The deponent admits that the appointment and submission of the nominees contravened **Article 232** of the **Constitution**. Nevertheless, there is a retort by the county assembly that once it approved or rejected the names, it became "*functus officio*".

27. We must point out that there are conflicting submissions filed on 5th December 2017 by *Francis Rakewa*, the Principal Legal Counsel of the county assembly. He had also lodged a replying affidavit on 17th November 2017 sworn by the same *Felix Olwero*. In that affidavit, the 1st and 2nd respondents assert that the petitioners have no *locus* to obstruct the county assembly from performing its constitutional mandate.

28. The Principal Legal Counsel had also filed grounds of opposition dated 16th November 2017. They are three-pronged: that the petition does not lie; that the petitioners have no right to interfere with the assembly's legislative processes; and, that no fresh list of nominees had been forwarded to the assembly.

29. We shall focus on the replying affidavit sworn by *Felix Olwero* and filed on 11th November 2017. The proceedings of the *Committee on Appointments* of 28th and 29th September 2017 are attached (Pages 1 to 50; and, 1 to 45 respectively of the *Hansard*). Each of the nominees was interviewed by the committee at length on their education, experience and competence to manage the proposed portfolio.

30. The final report of the committee is annexed to the affidavit of the petitioner. The committee resolved that 9 of the appointees did not meet the requirements of section 35 (3) (d) of the **County Government Act** which required "*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*".

31. Only one nominee, *Mary Apiyo Omondi* was approved to head the Department of Education, Gender, Youth and Social Services.

32. In his final submissions before us, we put learned counsel, *Mr. Ogonda*, to task. He *supported* the petition in principle; but he took the view that the speaker and county assembly were free of any blame.

E. Replying affidavits by the 3rd and 4th respondents.

33. There is a deposition sworn on 17th November 2017 by *Dave Kanundu*, the County Secretary. He avers that the petition is vague; and, that it violates the doctrine of *separation of powers* between the county executive and the courts.

34. He deposes that the list of nominees was advertised; and, subjected to public participation. He avers that the county assembly properly exercised its mandate by considering the qualifications of the nominees. Since 9 of the original nominees were rejected by the assembly, the petition is frivolous and should be dismissed.

35. He avers further that there is no evidence to show that the nominees lacked merit; or, that marginalized groups were left out; or, that there was lack of gender inclusivity.

36. The 3rd and 4th respondents deposed that they had not submitted a fresh list to the assembly; and, that there was no bar to the governor re-submitting any name. Accordingly, the petition is premature.

37. In particular, the deponent denies that the 3rd respondent coerced or intimidated members of the assembly to accept his original nominees. Lastly, the deponent stated that if the orders are granted they will occasion great suffering to residents of Siaya who are not parties to the dispute.

F. Submissions by the parties.

38. All the parties filed written submissions. The petitioner submitted that the court has *jurisdiction* to grant the prayers. Reliance was placed on **Article 165** of the *Constitution* and the decision in *John Temoi v Governor of Bungoma County & 17 Others*, Bungoma High Court Petitions 2 & 2A of 2014 [2014] eKLR.

39. Furthermore, the court was entitled to interfere to prevent an illegality. *Community Advocacy & Awareness Trust & Others v AG & Others*, Nairobi High Court Pet 211 of 2011 [2012] eKLR.

40. Regarding *locus standi*, the petitioners relied on **Articles 22** and **258** of the *Constitution*. Learned counsel submitted that the 3rd respondent breached **Chapter Six** and **Articles 10, 56, 176** and **232** of the *Constitution*. His conduct was also impugned for violating sections 30, 35, 45 and 57 of the *County Governments Act (No. 17 of 2012)*.

41. Learned counsel, *Mr. Mwamu*, submitted that once the nominees were rejected by the assembly; section 10 the **Public Appointment (County Assembly Approval) Act (No.5 of 2017)** barred the governor from re-submitting the candidate “*unless the circumstances relied on for the rejection of the appointment of the candidate did not exist or ceased to exist at the time of rejecting the nomination of the candidate*”.

42. Learned counsel for the 1st and 2nd respondents, *Mr. Ogonda*, beseeched us to *dismiss* the petition against *his* clients. He was however of the opinion that the petition should be *allowed* against the 3rd and 4th respondents. He claimed from the bar that the members of the assembly were coerced into accepting the re-submitted list. That matter was not captured in the replying affidavit.

43. Learned counsel submitted that the county assembly strictly followed the criteria of approving nominees set out in section 35 of the *County Governments Act (No. 17 of 2012)*. In the written submissions by the 1st and 2nd respondents filed on 5th December 2017, it was contended that the nominees by the governor contravened **Article 232** of the *Constitution*. In any case, once the assembly approved or rejected the nominees, it became *functus officio*.

44. Learned counsel for the 3rd and 4th respondent did not appear before us. We were satisfied from the affidavit of service that he was served by the court’s process server. We however considered his written submissions filed on 5th December 2017.

45. The 3rd and 4th respondents attacked the petition for being nebulous. Reliance was placed on *Anarita Karimi Njeru v Republic* High Court, Nairobi Misc. Crim. Appl. 4 of 1979 [1979] eKLR. Counsel submitted that the list of nominees was inclusive; that there was public participation; and, that there was full compliance with section 7 of the **Public Appointment (Parliamentary Approval) Act**.

46. We were implored *not* to interfere with the *executive power* of the governor. Counsel referred to the decision in *Martin Nyaga Wambora & Others v Speaker of the Senate & 6 Others* Nyeri, Court of Appeal, Civil Appeal 21 of 2014 [2014] eKLR. Lastly, it was submitted that there was no “blanket” bar to the governor re-submitting any of the rejected nominees.

G. Analysis of the relevant law and principles.

47. The office of the speaker of the county assembly is a creature of **Article 178** of the *Constitution*.

48. The assembly and the County Government are established under **Article 176** of the *Constitution* as read together with the *County Government Act*. The county governor is directly elected under **Article 180** of the *Constitution*. He is a *public* and *state officer* by dint of **Article 260** of the *Constitution*.

49. The guiding values and principles of governance including the rule of law; accountability; democracy; and, participation of the people are enshrined in **Article 10 (2)** of the **Constitution**. It states-

“10(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.”*

50. Relevant to this petition are the rights of marginalized groups, inclusiveness, good governance, integrity, transparency and accountability.

51. The Constitution specifically protects the rights of marginalized people in **Article 56-**

“The State shall put in place affirmative action programmes designed to ensure that minorities and marginalised groups—

- (a) participate and are represented in governance and other spheres of life;*
- (b) are provided special opportunities in educational and economic fields;*
- (c) are provided special opportunities for access to employment;*
- (d) develop their cultural values, languages and practices; and*
- (e) have reasonable access to water, health services and infrastructure.”*

52. A key issue revolves around the powers of the governor; and, specifically the *right* to pick members of the county executive committee. The executive authority of the county vests in; and, is exercised by the governor, his deputy and the county executive committee. The right to nominate the CECs belongs exclusively to the governor.

53. **Article 179** of the **Constitution** states-

- (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.*

54. Section 30 (2) of the **County Governments Act (No. 17 of 2012)** provides further that subject to the **Constitution** the governor shall—

- (a) diligently execute the functions and exercise the authority provided for in the Constitution and legislation;*
- (b) perform such State functions within the county as the President may from time to time assign on the basis of mutual consultations;*
- (c) represent the county in national and international fora and events;*
- (d) appoint, with the approval of the county assembly, the county executive committee in accordance with Article 179(2)(b) of the Constitution. [Empasis added]*

55. But there is a caveat: the selection must accord with the national values; **Chapter Six** of the **Constitution**; and, the provisions of section 35 of the **County Governments Act (No. 17 of 2012)**. For example, regard must be had to affirmative action, the gender equation, rights of minorities; and, reflect the cultural diversity of the county.

56. Section 35 of the **County Governments Act (No. 17 of 2012)** provides as follows-

- (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.

57. Subsection (2) is emphatic that 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.

58. Section 35 (3) of the Act provides that a member of the county executive committee must be a citizen; hold a first degree from a university recognised in Kenya; and satisfy the requirements of **Chapter Six** of the **Constitution**. In particular, the nominee must possess “*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*”.

59. The nominees by the governor would then be forwarded to the speaker of the assembly. He in turn delivers the list for consideration by the vetting committee. The findings of the committee or their report are then placed before the *full assembly* for debate and adoption.

60. Section 8 of the **Public Appointment (County Assembly Approval) Act (No.5 of 2017)** sets out the key issues for consideration by the vetting committee including-

(a) the procedure used to arrive at the nominee including the criteria for the short listing of the nominees;

(b) any constitutional 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 credentials, abilities, experience and qualities meet the needs of the body to which the nomination is being made.

61. A live issue in the petition is the fate of a *rejected nominee*. Can the governor re-submit the name for consideration? The answer is to be found in section 10 of the Act-

“(1) Where the nomination of a candidate is rejected by a County Assembly, the appointing authority shall submit to the County Assembly the name of another candidate, and the procedure for approval specified in this Act shall apply accordingly.

(2) A nominating authority shall not resubmit the name of a candidate whose nomination has been rejected by the County Assembly unless the circumstances relied on for the rejection of the appointment of the candidate did not exist or ceased to exist at the time of rejecting the nomination of the candidate”. [Emphasis added]

H. Analysis of evidence and final determination.

62. From the pleadings and submissions, seven broad issues arise for our determination:

(1) Whether the petitioners have standing.

(2) Whether the constitutional petition has been pleaded with precision.

(3) Whether the court has jurisdiction; or, paraphrased whether the court is overreaching or breaching separation of powers.

(4) Whether the governor violated the Constitution or other laws in nominating the 10 CECs; or, in submitting the names to the county assembly.

(5) Whether the speaker, the county assembly or the county government violated the Constitution.

(6) Whether the governor can re-submit the name of a nominee rejected by the assembly.

(7) Who will bear the costs of the petition?

63. We shall deal first with the question of *locus* of the petitioners. The petitioners aver that they are voters and residents of Siaya County. That fact was not seriously contested by any of the respondents.

64. **Article 258** of the **Constitution** provides that *every person* has the *right* to institute legal proceedings claiming that the Constitution has been contravened or threatened with violation.

65. The backbone of the petition is that the list of nominees submitted by the governor to the assembly is unlawful or *unconstitutional*. We thus readily find that the petitioners have an *undoubted right* to bring these proceedings.

66. Have the petitioners pleaded their case with precision? The principles governing the precision with which a constitutional petition should be pleaded were well stated in *Anarita Karimi Njeru v Republic* High Court, Nairobi Misc. Crim. Appl. 4 of 1979 [1979] eKLR. The petitioner should *specifically* set out the provisions of the Constitution that are alleged to have been violated; provide the *particulars* of the alleged violation; and, how the respondent has *violated* those rights.

67. This position has been reiterated in *Martin Nyaga Wambora & Others v Speaker of the Senate & 6 Others* High Court, Kerugoya Petition 3 of 2014 [2014] eKLR and *Mumo Matemu v. Trusted Society of Human Rights Alliance & 5 Others* Court of Appeal, Nairobi, Civil appeal 290 of 2012 [2013] eKLR.

68. We find that the petitioners have *expressly* cited the provisions of the Constitution that were allegedly violated e.g. **Articles 10, 56**, and **73**. The facts relied on have been sufficiently set out in the affidavit. The extent of the governor's executive powers under **Article 179** is in issue. The petitioners have cited with clarity related statutes for example the **County Governments Act (No. 17 of 2012)** and the **Public Appointment (County Assembly Approval) Act (No.5 of 2017)**. We find that the petition has been pleaded with sufficient precision.

69. Do we have jurisdiction? Paraphrased, is the court overreaching or abusing the doctrine of separation of powers?

70. The issue of *separation of powers* has for long occupied the courts in Kenya. Under **Article 1** of the **Constitution**, all *sovereign power* belongs to the people. **Article 165 (3) (a)** of the **Constitution** grants the High Court unlimited original jurisdiction in criminal and civil matters. **Sub-Article (3) (d) (ii)** specifically grants us jurisdiction to determine-

“*The question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution*”

71. We are thus properly seized of this dispute. See *John Temoi v Governor of Bungoma County & 17 Others*, Bungoma High Court Petitions 2 & 2A of 2014 [2014] eKLR.

72. We shall now turn to the relevant legal regime. The process of nominating the CECs is impugned partly for want of *public participation*.

73. *Public participation* is one of the national values enunciated in **Article 10 (2)** of the **Constitution**. We are satisfied that the list of nominees was *advertised*. The public was *invited* to make memoranda or participate in the vetting. The vetting committee referred to such memoranda. The report of the committee was debated in a *public session* of the assembly. We thus find that there was reasonable and *sufficient* public participation. See generally the decision of the Court of Appeal of South Africa in *King & Others v Attorney Fidelity Fund Board of Control & Another* (561)/2004 [2006].

74. Another central feature of this petition relates to the rights of marginalized groups, inclusiveness, good governance, integrity, transparency and accountability.

75. **Article 56** of the **Constitution** specifically shields the rights of marginalized people. The State is mandated to promote affirmative programmes designed to ensure that *minorities and marginalised groups participate; and, are represented in governance and other spheres of life*.

76. As we observed, the dispute revolves around the *powers* of the governor; and, specifically the *right* to pick members of the county executive committee. The *executive authority* of the county vests in; and, is exercised by the governor, his deputy and the county executive committee. The right to nominate the CECs belongs *exclusively* to the governor. This is explicitly provided by **Article 179** of the **Constitution**.

77. Section 30 (2) (h) of the **County Governments Act (No. 17 of 2012)** provides further that subject to the **Constitution** the governor shall-

“*appoint, with the approval of the county assembly, the county executive committee in accordance with Article 179(2)(b) of the Constitution*”. [Emphasis added]

78. As we observed, the appointment must accord with the national values; **Chapter Six** of the **Constitution**; and, the provisions of section 35 of the **County Governments Act (No. 17 of 2012)**.

79. Subsection (2) is emphatic that the county assembly *shall not* approve nominations for appointment to the executive committee that do not take into account—

(d) *not more than two thirds of either gender;*

(e) *representation of the minorities, marginalized groups and communities; and*

(f) *community and cultural diversity within the county.*

80. Section 35 (3) of the Act provides that a member of the county executive committee must be a citizen; hold a first degree from a

university recognised in Kenya; and satisfy the requirements of **Chapter Six** of the **Constitution**. In particular, the nominee must possess “*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*”.

81. The nominees by the governor should then be forwarded to the speaker of the assembly. He in turn delivers the list for consideration by the vetting committee. The findings of the committee or their report are then placed before the *full assembly* for debate and adoption.

82. Section 8 of the **Public Appointment (County Assembly Approval) Act (No.5 of 2017)** is material. It sets out the *key issues for consideration* by the vetting committee including-

(d) *the procedure used to arrive at the nominee including the criteria for the short listing of the nominees;*

(e) *any constitutional or statutory requirements relating to the office in question; and*

(f) *the suitability of the nominee for the appointment proposed having regard to whether the nominee's credentials, abilities, experience and qualities meet the needs of the body to which the nomination is being made.*

83. A live issue in the petition is the fate of a *rejected nominee*. Can the governor re-submit the name for consideration? The answer is to be found in section 10 of the Act-

(1) *Where the nomination of a candidate is rejected by a County Assembly, the appointing authority shall submit to the County Assembly the name of another candidate, and the procedure for approval specified in this Act shall apply accordingly.*

(2) *A nominating authority shall not resubmit the name of a candidate whose nomination has been rejected by the County Assembly unless the circumstances relied on for the rejection of the appointment of the candidate did not exist or ceased to exist at the time of rejecting the nomination of the candidate. [Emphasis added]*

I. Analysis of evidence and final determination.

84. It would appear that on 23rd November 2017 and 5th February 2018, the governor *re-submitted* to the assembly six of the rejected nominees: *George Rubiik Misore, Dorothy Akinyi Owino, Adrian Ouma, Dismas Odhiambo Wakla, and Jaoko Oburu Odinga.*

85. This became the genesis of the fresh notice of motion filed on 13th February 2018. A *conservatory order* was issued on 15th February 2018 prohibiting the 3rd respondent from re-submitting the original 10 names to the Speaker or the County Assembly.

86. The governor also switched some nominees to different dockets. He also changed the titles of some dockets. For example he heeded to the advice of the assembly and renamed the *Department of Public Service and Governance* to be the *Department of Governance and Administration*. The latter was now to be headed by *Dismas Odhiambo Wakla* whose appointment was earlier rejected for the same portfolio.

87. The CEC for *Physical Planning, Land, Housing and Urban Development* was to remain as *Adrian Ouma*. The names of *George Misore Rubiik* and *Dorothy Akinyi Owino* were also re-submitted for their *original* dockets of *Water, Irrigation, Environment and Natural Resources* and *Health and Sanitation* respectively.

88. On 5th February 2018 *Jaoko Oburu Odinga* was moved from *Tourism, Culture and Sports* to the new docket of *Enterprise and Industry*. The governor had on 23rd November 2017 re-assigned *Tourism, Culture and Sports* to *Dr. Elizabeth Achieng Odhiambo*.

89. Learned counsel for the petitioners, *Mr. Mwamu*, submitted that members of the assembly were bullied to approve the fresh nominees. Allegations of violence were also alluded to by learned counsel for the 1st and 2nd respondents, *Mr. Ogonda*.

90. We must however point out that the petition was *never* amended. At the point when the names were *re-submitted*, the conservatory order had *not* been made. The motion of 13th February 2018 was canvassed inter-parties before *Cherere J.* The learned judge reserved her ruling for 15th March 2018.

91. Surprisingly, the learned judge did *not* deliver the ruling. Instead, on 14th March 2018, the learned judge *certified* the matter to the Chief Justice for constitution of a bench of *uneven* number of judges.

92. As we observed, the petition was *never* amended to plead to the *new* facts of the *re-submitted list*. The petitioners went into slumber after getting the *conservatory order* on 15th February 2018.

93. As parties are *bound* by their pleadings, we shall confine ourselves to the *original* petition. Quite obviously the *re-submission* of CECs nominees on 23rd November 2017 and 5th February 2018 falls *outside* the boundaries of the petition. It could have been easily cured by amending the petition. The petitioner's counsel never moved the court for amendment at the hearing of the petition. The blame must be shouldered fully by the petitioners or their learned counsel.

94. Granted those circumstances, we can only say, *obiter*, that the governor had no power or *authority* to *re-submit* the name of a candidate whose nomination has been *rejected* by the County Assembly *unless the circumstances relied on for the rejection of the appointment of the*

candidate did not exist or ceased to exist at the time of rejecting the nomination of the candidate.

95. We shall now return to the *root* of the petition. As stated, all the original nominees were interviewed in a *public sitting*. A notice of the public hearings is exhibited at page 41 of the petition. The committee also examined memoranda or objections to some candidates by the public. The committee examined the candidates' academic qualifications and experience; and, matched the skills to the proposed dockets. It rejected 9 of the nominees.

96. We are *unable* to fault the committee. The committee's report was then tabled in the full assembly. It was debated and approved on 3rd October 2017. We find that the committee and the assembly properly exercised their mandate under section 35 of the **County Governments Act 2012** and the **Siaya County Public Appointments (Approval) Act 2014**.

97. It is true that three of the nominees hailed from Alego Usonga sub-county. But from the materials before us all the three were from different *wards* namely Township Ward, West Alego and South East Alego. No cogent evidence was led by the petitioners to show the three were relatives or kin to the governor. No tangible evidence was also led to reinforce the allegation that *Adrian Ouma* or *Dorothy Akinyi* was a *close relative* of the governor; or, his associate from South Gem.

98. We cannot also tell from the petition or the proceedings of the vetting committee the *ages* or *tribes* of the applicants. The petitioners did not provide *demographic evidence* to show that Siaya is predominantly *Luo* or that the *Suba, Kisii, Luhya, Kikuyu* and *Nubians* comprise *marginalized* or *minority* groups. It is tempting to presume the fact but it is not a matter for which we can simply take *judicial notice*.

99. In the end we cannot state with confidence that the original list of 10 nominees was *unconstitutional*. The speaker was thus entitled to accept it and forward it to the *Committee on Appointments*. As we have found, by rejecting 9 of the nominees, the vetting committee and the assembly properly exercised their mandate under section 35 of the **County Government Act 2012** and the **Siaya County Public Appointments (Approval) Act 2014**.

100. The final orders that commend themselves to us to grant are thus as follows-

a) Prayer (a) in the petition *partially* succeeds. We declare that the *original* list of 9 nominees, namely, *Dr. Nicholas Kut Ochogo, Joseph Odhiambo Ogutu, Dr. Elizabeth Achieng Odhiambo, Adrian Ouma, George Rubiik Misore, Dorothy Akinyi Owino, Dismas Odhiambo Wakla, George Amanya Oyeho* and *Jaoko Oburu Odinga* presented by the 3rd respondent to the 1st respondent on 18th September 2017 did not meet the requirements of section 35 (3) (d) of the **County Governments Act**.

b) For the avoidance of doubt, we hold that *Mary Apiyo Omondi Olute* was *validly* nominated by the governor on 18th September 2017 and approved by the *Committee on Appointments* and the County Assembly on 3rd October 2017.

c) We find, *obiter*, that the governor (3rd respondent) did *not* have the *power* or *authority* to re-submit the name of a candidate whose nomination had been rejected by the County Assembly unless the circumstances relied on for the rejection of the appointment of the candidate did not exist or ceased to exist at the time of rejecting the nomination of the candidate.

d) Prayers (b), (c), (d), (e), (f) and (g) in the petition are hereby *dismissed*.

e) We are satisfied that the petition was lodged in the *public interest*. In the interests of justice we order that each party shall bear its own costs.

DATED and SIGNED at NAIROBI this 5th day of December 2018.

KANYI KIMONDO

JUDGE

B. THURANIRA JADEN

JUDGE

J. ONYIEGO

JUDGE

DELIVERED at KISUMU this 6th day of December 2018

KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of-

Mr. Mwamu for the petitioner instructed by Mwamu & Company Advocates.

Mr. Ogonda for 1st and 2nd respondents instructed by Maxwell O. Ogonda & Associates Advocates.

Mr. Oruenjo for 3rd and 4th respondents instructed by Oruenjo Kibet & Khalid Advocates.

Mr. Tulel, Court Clerk.