



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MARSABIT**

**CONSTITUTIONAL PETITION NO. 7 OF 2018**

**IN THE MATTER OF ENFORCEMENT OF FUNDAMENTAL RIGHTS AND FREEDOMS**

**AND ARTICLES 1, 2, 20, 22, 23, 27, 35, 48, 73, 75, 76, 165, 174,**

**176 (1), 177, 178, 179(2)(B),195(1)(2), 201, 232, 258,**

**259 AND 260 OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF THE EXERCISE OF CONSTITUTIONAL POWERS BY THE COUNTY GOVERNOR**

**AND**

**IN THE MATTER OF THE COUNTY GOVERNMENT ACT 2012**

**AND IN THE MATTER OF THE PUBLIC APPOINTMENT (COUNTY ASSEMBLIES APPROVAL) ACT, 2017**

**AND**

**THE LEADERSHIP AND INTEGRITY ACT, 2012**

**BETWEEN**

**SIMBA HASHEEM GEDOW.....PETITIONER**

**VERSUS**

**THE HONOURABLE GOVERNOR OF THE COUNTY GOVERNMENT OF MANDERA**

**(HON. ALI IBRAHIM ROBA).....1<sup>ST</sup>RESPONDENT**

**THE COUNTY GOVERNMENT OF MANDERA.....2<sup>ND</sup>RESPONDENT**

**THE COUNTY ASSEMBLY OF MANDERA COUNTY.....3<sup>RD</sup>RESPONDENT**

**JUDGMENT**

The petition herein was initially dated 4<sup>th</sup> July, 2018 and was subsequently amended on 20<sup>th</sup> August 2018. It seeks the following orders:

1. An order and declaration does issue to the effect that once the County Assembly has resolved to reject the nominees for the County Executive Committee members and given the reason for the said refusal, it is not open for the 1<sup>st</sup> & 2<sup>nd</sup> Respondents, the Governor and the County Government of Mandera herein, to resubmit the same names for approval to the 3<sup>rd</sup> Respondent, the County Assembly of Mandera herein which rejected them.

2. An Order and declaration that it is against the principles of separation of powers and the principles of checks and balances for Executive arm of the County Government and the County Assembly (Legislative arm of the County) to strike a deal to approve names of nominees for the positions of County Executive Committee members which they rejected.

3. An Order and Declaration that it is against national values and principles of the County Government for the 1<sup>st</sup> & 2 Respondents (Governor & County Government of Mandera to strike a deal with the 3<sup>rd</sup> Respondent, the County Assembly of Mandera herein to the exclusion of the public, without vetting or after they have been vetted and rejected to overturn their own decision and purport to approve the same nominees.

4. A Declaration that the report adopted by 3<sup>rd</sup> Respondent's committee on appointments on 17<sup>th</sup> July, 2018 and subsequently adopted/passed by the County Assembly is null and void for having been passed by the County Assembly in contravention of Articles 3(a), 10, 73, 75, 174, 175, 176, 185, 196 of the Constitution of Kenya 2010; Section 8, 14 of the County Government Act and Section 8 and 10 of the Public Appointments (County Assemblies) Approval Act.

5. A declaration that members of the 3<sup>rd</sup> Respondent violated constitutional and statutory considerations in the procedure prescribed for the vetting process under the Constitution, the County Government Act, and the Public Appointments (Parliamentary Approval) Act.

6. That the Honourable Court be pleased to issue an order of certiorari to remove to the High Court and quash the report adopted by 3<sup>rd</sup> Respondent's committee on Appointments on 17<sup>th</sup> July, 2018 and subsequently adopted/passed by the County Assembly.

7. That the Honourable Court be pleased to issue an order of certiorari to remove to the High Court and quash the Appointments of the following individuals as Members of Mandera County Executive Committee, the individuals and their dockets being:-

No.	Appointees	Department/Ministry
1.	Mr. Izzudin Abdullahi Abdi	Education, Sports and Culture
2.	Mr. Mohamed Ali Omar	Water, energy, Environment and Natural Resources
3.	Mrs. Suleikha Harun	Roads, Public Works and Transport
4.	Dr. Mohamed Adan Mohamed	Trade, Investment, Industrialization
5.	Mr. Ahmed Sheikh Mohamed	Health Science
6.	Mr. Abdiaziz Sheikh Maad	Public Services, Conflict Management, cohesion, Intergration and Devolved Units
7.	Mrs. Johora Mohamed Abdi	Agriculture, Livestock and Fisheries
8.	Ibrahim Barrow Hassan	Finance and Economic Planning
9.	Adan Hussein Hassan	Lands, Housing and Physical Planning
10.	Shamsa Mohamed Haji	Gender and Social Services

8. An order of certiorari do issue to bring forth into this Court for purposes of being quashed the decision of the 1<sup>st</sup> Respondent to appoint Mr. Ahmed Sheikh to Public Service, Conflict Management and Devolved Units Ministry, Mr. Abdiaziz Maad to Trade, Investment and Industrialization Ministry; Mr. Ibrahim Barrow to Finance and Economic Planning Ministry; Mr. Adan Hussein to Lands, Housing and Physical Planning Ministry, Mrs. Shamsa Mohamed Haji to Gender and Social Services Ministry, Mrs. Johora Mohamed to Agriculture and Livestock Ministry; Mr. Izzudin Abdi to Education, sports and Culture Ministry, Mr. Mohamed Ali Omar to Water, Energy, Environment and Natural Resources Ministry and Mrs. Sulekha Harun to roads and Transport Ministry as the same contravenes Articles 3(1), 10, 174, 175, 176, 179, 183, 235 of the Constitution, Sections 30, 35, 36, of the County government Act and Section 10 of the Public Appointments (County Assemblies) Approval Act.

9. A declaration that the 1<sup>st</sup> Respondent acted in contravention of Articles 3(1), 10, 174, 175, 176, 179, 183, 235 of the Constitution, sections 30, 35, 36 of the County Government Act, Section 10 of the Public Appointments (County Assemblies) Approval Act.

10. An order awarding costs of the Petition to the Petitioner.

**11. Any other or further orders, writs and direction this Honourable Court considers appropriate and just to grant of the purpose of the enforcement of the petitioners fundamental rights and freedoms.**

The Petition is supported by the Petitioner's affidavit sworn on 20<sup>th</sup> August, 2018. The respondents filed a replying affidavit sworn by **ANZAL RASHID YARROW** on 10<sup>th</sup> September, 2018. The 3<sup>rd</sup> respondent filed grounds of objection to the Petition.

Mr. Bake Hassan appeared for the petitioners. Counsel submit that the 1<sup>st</sup> respondent forwarded names of nominees for the positions of County Executive Committee. On 3<sup>rd</sup> October, 2017. The Honourable Speaker of the 3<sup>rd</sup> respondent on 4<sup>th</sup> October, 2017 referred the list of the appointees to the 3<sup>rd</sup> respondent's committee on Appointments. On 8<sup>th</sup> November, 2017 the Committee on Appointments rejected the entire list of nominees and gave reasons for the objection. The Committee further recommended that the 1<sup>st</sup> respondent to submit the names of other persons for consideration in accordance with Section 10(1) of the Public Appointments (County Assemblies Approval) Act No.5 of 2017 within thirty days.

It is the Petitioner's case and submissions that instead of forwarding other names, the first respondent submitted the same list to the 3<sup>rd</sup> respondent. On 29<sup>th</sup> June, 2018 the list was published in the standard newspaper. Vetting of the nominees was done on 5<sup>th</sup> July 2018 by the committee on Appointments. The nominees were appointed on 25<sup>th</sup> July, 2018.

Counsel for the Petitioner submit that Article 176(1) of the Constitution establishes the County Assembly and County Executive. Section 8(1) of the County Governments Act empowers the County Assembly to vet and approve nominees for appointment to County Public Offices. A committee of the County Assembly has to consider the appointments first as provided under section 14 (3) of the County Government Acts. The report of the Committee is to be tabled before the entire County Assembly for approval. The members of Executive committee are appointed by the Governor under Section 30(2) of the County Governments Act. Section 35 of the same Act gives guidelines to the Governor on appointment of Executive Committee members. The Petitioner submit that the nominees were sworn into office on 7<sup>th</sup> September, 2017.

Counsel for the petitioner submit that the process of nomination by the 1<sup>st</sup> respondent and approval by way of vetting by the 3<sup>rd</sup> respondent did not meet both the Constitutional and Statutory threshold. It is contended that the 1<sup>st</sup> respondent failed to submit the names of the nominees for the position of County Executive Committee members within twenty one (21) days as required by the law. Section 42 of the County Government Act states as follows:

***(1) When a general election is held for a county government, the outgoing county executive committee shall remain in office until a new county executive committee is constituted after the election.***

***(2) The constitution of a new executive committee after an election under subsection (1) shall be finalized within twenty-one days of the swearing in of the members of the county assembly.***

Counsel relies on the case of **KARAINI INVESTMENTS V- NATIONAL LAND COMMISSION ANOTHER (2018)eKLR** where the Court held as follows:-

***“The word “shall” when used in a statutory provision imports a form of command or mandate. It is not permissive, it is mandatory. The word shall in its ordinary meaning is a word of command which is normally given a compulsory meaning as it is intended to denote obligation. The Longman Dictionary of the English Language states that “shall” is used to express a command or exhortation or what is legally mandatory. Ordinarily the words “shall” and “must” are mandatory and the word “may” is directory. The word “shall” used in the provision under consideration is mandatory.”***

The petitioner submit that the 1<sup>st</sup> respondent did not subject the nominees to a rigorous interview process. He simply handpicked them and forwarded their names to the 3<sup>rd</sup> respondent for vetting and subsequent appointments. That process does not meet the statutory requirement under Section 35 of the County Governments Act. It is submitted that the conduct of the 1<sup>st</sup> respondent contravenes Articles 10,73,75 and 179(2)(b) of the Constitution, Sections 30 (2) (d) and 35 of the County Government Act and sections 6 and 8 of Act number 5 of 2017. Failure by the 1<sup>st</sup> respondent to advertise the positions for County Executive Committee Members denied qualified, competent and professional members of the public with integrity an opportunity to apply and to be considered for the positions and is Contrary to Article 232 of the Constitution.

It is submitted that the vetting process of the nominees was not properly conducted. Counsel relies on the Supreme Court decision in **JUDGES & MAGISTRATES VETTING BOARD & 2 OTHERS -V- CENTRE FOR HUMAN RIGHTS & DEMOCRACY & 11 OTHERS (2014) eKLR** where the Supreme Court observed as follows :-

***“Vetting is defined in the Webster's Ninth New Collegiate Dictionary (p 1312) as***

***“1. a. to provide veterinary care for (an animal) or medical care for (person)***

***b.to subject (a person or animal to a physical examination) or***

***2. to subject to expert appraisal or correction, evaluate”. The Kenyan model of vetting is defined in The Judges and Magistrates Vetting board, Interim Report, September, 2011- February 2013 (page 4) as follows:***

**“Vetting was a term originally used by veterinarians when checking on the physical health to find soundness of horses before they participated in a race. In our context, vetting means a thorough examination to determine suitability for a particular office or function.”**

It is submitted for the petitioner that the County Assembly Committee on Appointments vetted the nominees and rejected them. The committee’s report was adopted by the County Assembly on 10<sup>th</sup> November, 2017. The committee accepted memoranda from members of the public, interviewed and examined the candidates on their academic qualifications, employment record – professional affiliations, potential conflict of interest, knowledge of the relevant field, overall suitability for the position, tax compliance, leadership and integrity. The initial rejection of the nominees was based on cogent reasons. Counsel relies on the case of **SIMON WACHIRA KAGIRI -V- COUNTY ASSEMBLY of NYERI & 2 OTHERS (2013) eKLR** where NELSON ABUODHA J held as follows:-

***The Committee had the opportunity to interview the petitioner and in the absence of any material to show they acted in excess of their jurisdiction or took into account issues that they ought not to have taken into account cannot be faulted. In conducting the process, the Committee and the 1<sup>st</sup> respondent were agents of the County Government hence had the duty and responsibility to recommend for appointment not only the best person for the job but also comply with the constitution and enabling statutes with regard to national values, gender balance and capacity in public appointments. Nothing has been shown by way of evidence or affidavit that they acted contrary to the constitution or any law. The petitioner has merely made broad allegations of violations by the 1<sup>st</sup> and 2<sup>nd</sup> respondent without getting to the specifics of law and in what way the Committee violated these rights or failed to comply with the law”***

Mr. Hassan submit that when the nominees were rejected the 1<sup>st</sup> respondent was barred from resubmitting the names of the rejected nominee. The 3<sup>rd</sup> respondent’s report did not indicate that the rejection of the nominees was based on politics. Therefore the 1<sup>st</sup> and 2<sup>nd</sup> respondents are estopped from citing unfounded and wild grounds for the rejection of the nominees such as politics. If the nominees felt that their names were rejected on political grounds, they ought to have moved to the High Court for redress. It is further contended that the impugned list of the nominees for the positions of County Executive Committee Members does not inspire confidence for the reason that the rejection was based on serious grounds including issues touching on integrity and chapter 6 of the Constitution. Counsel relies on the case of **AGNES CHEPKORIR NDEGE -V- IEBC & CLERK OF THE WEST POKOT COUNTY ASSEMBLY (2017) eKLR** where the Court held:-

***“Section 9(1) of Fair Administrative Action Act is clear that a person who’s aggrieved by an administrative action may, without unreasonable delay apply for judicial review of any administrative action to the High Court or to a subordinate Court upon which original jurisdiction is conferred pursuant to Article 22(3) of the Constitution.”***

It is submitted that the rejected list of nominees was resubmitted to the 3<sup>rd</sup> respondent subsequent to the holding of meetings between the respondents where a deal was struck to approve rejected members without changes of circumstances that had led to the rejection of the nominees save for two of them. This is against the national values and principles of governance, transparency, integrity, accountability, rule of law and sovereignty of the people. It is in breach of chapter 6 of the Constitution and Contrary to Section 10 of Act No.5 of 2017.

Mr. Hassan contend that the resubmission contravenes Articles 176(1), 179(1), 73 and 10 of the Constitution. It also contravenes Section 10 of Act number 5 of 2017. Those who have been appointed have no experience, no relevant academic credentials. No integrity and have no relevance to the departments to which they were appointed. Section 8 of Act no.5 of 2017 was not complied with. The resubmission of the list also contravenes Section 35 of the County Governments Acts. Those appointed do not satisfy the requirements of Chapter 6 of the Constitution.

The Petitioner is urging this Court to reject the resubmitted list. Counsel for the petitioner also relies on the case of **JOHN MINING TEMOI & ANOTHER -V- GOVERNOR OF BUNGOMA & 17 OTHERS (2014) eKLR**. In that case Mabeya J stated as follows:-

***“A Court of law cannot condone or uphold a process that undermines the Constitution and the law. The days when public servants acted and made decisions without regard to the citizens are long gone. Article 73 of the Constitution declares that public positions are held in trust for the citizenry. There has to be transparency and accountability for each action and decision made by state organs as well as officers. As costly and unfortunate as it might be, the process of selections, nomination, approval and appointment of the nominees of the posts of the Chief Officers for the County of Bungoma has to be reversed.”***

Miss Mugo from the firm of Issa & Co Advocates appeared for the 1<sup>st</sup> and 2<sup>nd</sup> respondents. Counsel submit that the initial list of nominees for the positions of County Executive Committee Members was rejected by the County Assembly on 8<sup>th</sup> November 2017. The Committee rejected all the ten (10) nominees and disregarded their qualifications, experience and performance as provided for in the Constitution, County Governments Act and Act No.5 of 2015. The recommendation to reject all the nominees was without any basis and was not premised on the vetting process. The old Executive Committee members who were in office before the August 8<sup>th</sup> elections continued to be in office.

It is submitted that on 26<sup>th</sup> June, 2018 the 1<sup>st</sup> respondent forwarded a list of nominees for the same positions. On 29<sup>th</sup> June, 2018 the list was advertised to enable members of the Public know the approval hearing dates. The committee on Appointments met on 17<sup>th</sup> July, 2018 and recommended the appointment of the nominees. The 3<sup>rd</sup> respondent debated the list on 18<sup>th</sup> July, 2018 and unanimously adopted the report. The nominees were sworn into office on 25<sup>th</sup> July, 2018.

Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> respondents contend that the circumstances that had led to the earlier rejection of the list changed. Members of the Economic Freedom Party (hereinafter EFP) are the majority in the Mandera County Assembly while those of Jubilee are the minority. EFP members stormed out of the Assembly during the first opening meeting of the Assembly and vowed to frustrate and paralyse the operations of the County Government. Therefore the first list of nominees was rejected on partisan political considerations. The nominees

challenged their rejection through a **Judicial Review No.8 of 2017, Republic V Mandera County Assembly & others in Garissa High Court**. The circumstances also changed when on 28<sup>th</sup> February, 2018 the election Petition filed against the 1<sup>st</sup> respondent by the EFP gubernatorial candidate, Hassan Noor was dismissed. Thereafter the EFP party adopted a reconciliatory approach. The poisoned atmosphere that had affected the first vetting process no longer existed and this led to the resubmission of the same list and the subsequent approval. The suit before the Garissa High Court was withdrawn to allow the parties to explore an amicable out of Court settlement in light of the reconciliatory atmosphere. The issue of mismatch of the departments in relation to the nominees was addressed. Dr. Mohamed Adan Mohamed, a Medical Doctor was nominated for the department of Health services from Trade, Investment, Industrialization and Co-Operative development. Mr. Ahmed Sheikh Mohamed was re-located from Health Services to Public service, Conflict Management, Cohesion, Integration and Devolved Units while Mr. Abdiaziz Sheikh was relocated from the Public Service department to Trade and Investment.

It is further submitted that Under Article 179(b) of the Constitution, members of the County Executive Committee are accountable to the Governor in the performance of their functions. The 1<sup>st</sup> and 2<sup>nd</sup> respondents complied with Article 179 of the Constitution, Section 35 (2) of the County Governments Act and the Provisions of Act No.5 of 2015. Counsel maintain that the initial rejection was done without any lawful basis. Counsel relies on the case of **JOHN KIPNG'ENO KOECH & 2 OTHERS V NAKURU COUNTY ASSEMBLY & 5 OTHERS (2015) eKLR** where the High Court issued an order of certiorari to quash the report of the County Assembly of Nakuru as it had taken into account irrelevant grounds in rejecting nominees for the County Executive Committee during the vetting process. The Court in that case held as follows:-

*It is thus clear to this Court that a County Assembly exercising its administrative function of approval of nominees, has a statutory duty to exercise that function to the fullest extent with the requirement of the enabling law, and failure to do so, may render its findings, determinations and decisions and recommendations ultra vires the Act, and in particular Sections 35(2) & (3) and 58(2) & (3) thereof and I grant prayers 1 and 2 in Petition No.23 of 2013.*

Counsel also relies on the case of **MOSES KIPROTICH LANGAT V KERICHO COUNTY ASSEMBLY COMMITTEE ON APPOINTMENTS & 3 OTHERS (2018) eKLR** where it was held as follows-

*“From the foregoing, it is obvious and clear that the respondents vetting process was fallacious and did not meet the threshold necessary of its upholding. This is because, as is ably and abundantly submitted by the petitioner, the respondents went on a fishing expedition thereby coming out with a comical rationale for rejection of the petitioner’s nomination to the county executive committee. These are frolics that should be identified, discouraged and altogether curtailed in such serious assignments of governance.*

Miss Mugo submit that the petitioner has not laid any basis for this Court to grant the orders being sought. The County Executive Committee members have not been heard. They were not joined in the Petition yet they are interested parties contrary to order 53 Rule (3) (2) and (3) of the Civil Procedure Rules.

M/S Otieno Ogola & Co. Advocates appeared for the 3<sup>rd</sup> respondent. Counsels submit that the Petition has not met the threshold required for the granting of the orders being sought. The Petitioner claims to be filing the Petition in public interest. This makes the petition to fall under Article 258 of the Constitution. Counsels rely on the Court of Appeal decision in the case of **MUMO MATEMU V TRUSTED SOCIETY OF HUMAN RIGHTS ALLIANCE & 5 OTHERS (2013)eKLR**. The Court of Appeal observed as follows:-

*However, we must hasten to make it clear that the person who moves the court for judicial redress in cases of this kind must be acting bona fide with a view to vindicating the cause of justice. Where a person acts for personal gain or private profit or out of political motivation or other oblique consideration, the Court should not allow itself to be seized at the instance of such person and must reject their application at the threshold.*

It is submitted that the petitioner has filed several petitions seeking to derail the processes of the County Government of Mandera in its bid to enhance the principles of devolution. The petitioner is not advancing public interest but rather other interests not envisioned in the Constitution or any other law. It is further submitted that the Petition does not sufficiently specify the rights that have been violated and the nature of the violation as held in the case of **ANARITA KARIMI NJERU V REPUBLIC [1980] eKLR**. The Petitioner only enumerated the rights that have been allegedly violated without stating with any specificity the nature of the violations.

Counsels further maintain that the Petitioner has failed to lay a basis for an intervention by this Court. The Petition essentially seeks that the action of the Mandera County

Assembly in conjunction with the executive arm be rendered illegal by the Court. This will contravene the principle of separation of powers. Each arm of government must carry out its functions without the interference of other arms of government. Section 10(2) of Act No.5 of 2015 allows the Governor to re-submit the names of rejected nominees. The restriction under Section 10 (2) is not a blanket one as some exception have been enumerated. The exception is that the circumstances relied on for the rejection did not exist or ceased to exist at the time of rejecting the candidates. The respondents acted lawfully.

The petition raises only one fundamental issue namely:-

**Whether the appointment of the Mandera County Executive Committee members by the respondents was done in violation of the Constitution, the County Governments Act and the Public Appointment (County Assemblies Approval) Act No.5 of 2015.**

The above issue covers all the aspects of the appointment from advertisement, vetting by the committee on Appointments, adoption of the Committee’s report by the entire Assembly to the swearing into office of the nominees. The Petitioner’s complaint is that the appointments

were done in contravention of the law. On their part, the respondents maintain that there was no violation of the constitution or contravention of the law in the process of appointment of the County Executive Committee members. The main core of the dispute is that the initial process was conducted properly by the County Assembly and all the nominees were rejected. The 1<sup>st</sup> respondent presented the same names to the speaker of the County Assembly instead of submitting fresh ones. According to the petitioner, there was no change of circumstances which had led to the initial rejection of the nominees that could have led to the about turn by the County Assembly and subsequent approval of the same nominees the same Assembly had earlier rejected. It is the petitioner's contention that the second approval of the nominees must have been as a result of meetings and underhand deals between the respondents contrary to the legal requirements.

Although the Constitution is the main fulcrum of devolution, I will start with the relevant provisions of the County Governments Act in relation to the dispute. Section 30(1) (d) of this Act (hereinafter referred to as CGA) provides for the appointment of the functions of the Governor, Section 30(2)(a) and(e) states as follows:

**30(2) Subject to the Constitution, the governor shall-**

**(a) Diligently execute the functions and exercise the authority provided for in the Constitutions and legislation:**

**(e) constitute the county executive committee portfolio structure to respond to the function and competencies assigned to and transferred to each county.**

Section 35 of the same Act states as follows:-

**35(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**

**(3) A person may be appointed as a member of the county executive committee if that person-**

**(a) is Kenyan citizen**

**(b) is holder of at least a first degree from a university recognized in Kenya**

**(c) satisfies the requirements of Chapter Six of the Constitution; and**

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

**(4) A member of the county executive committee shall not hold any other State or public office.**

Section 39 of the County Government Act stipulate as follows:-

**39(1) The members of the county executive committee are individually and collectively accountable to the governor in the exercise of their powers and performance of their duties and responsibilities.**

**(2) A committee of the county assembly may require a member of the executive committee to –**

**(a) attend or appear before the committee; and**

**(b) answer any question relating to the member's responsibilities.**

The other Legislation is the Public Appointment (County Assemblies Approval) Act number 5 of 2017. This Act defines “**appointing authority**” under section 2 as **any person who, under the Constitution or any other law, is required to make an appointment for which the approval of a County assembly is required.**

Section 3 of the Act provides for the Objects and purposes: It states as follows-

The objects and purposes of this Act are to -

- (a) provide for the procedure for the approval of public appointments by County Assemblies and**
- (b) provide clarity and guidance to the county Assemblies as they exercise their functions of approving public appointments.**

Section 8 of the Act provided for issues for consideration by the Assemblies. It states as follows:-

**The issues for consideration by the relevant County Assembly in relation to any nomination shall be-**

- (a) the procedure 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 being made.**

Section 10 of the same Act states as follows:-

**(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.** (emphasis added)

**(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)

The respondents maintain that while the process of appointing new County Executive Committee members was on-going those in office were still working in their respective dockets. Section 42 of the County Government Act requires the Constitution of a new executive Committee to be finalized within 21 days after the members of the County Assembly are sworn in. Section 42(1) and (2) have to be interpreted in co-relation to each other and not distinctively. It may not be possible to constitute a new executive committee within the 21 days provided under section 42(2) of the County Government Act. The executive committee members are normally appointed for a given period. Ordinarily they are on contract of not more than five years. The contract period may fall beyond the twenty one (21) days period. Similarly, other factors may make it difficult for the Governor or the Assembly to comply with section 42(2). For instance, where the list of nominees is untimely rejected by the County Assembly as was the case in Mandera, a repeat process may spillover the 21 days periods. Another predicament can be caused by litigation. If members of public file court cases before the twenty one days period is over, the process can be disrupted and the timelines under section 42 (2) may not be achieved. Further, those in office may seek Court intervention in the event that their contractual period is terminated by way of new appointments before the end of the agreed employment period. As a result of such interventions the term "SHALL" under both Sections 42(1) and (2) is clawed back and in my view does not necessarily mean that the word "SHALL" under that section means "MUST" or gives mandatory directions to the County Governments to ensure that the members of the Executive Committee are in place within 21 days after the swearing of the Members of County Assembly.

In the current situation, the process could not be completed within the twenty one days period. The list of the nominees was forwarded to the speaker on 3<sup>rd</sup> October 2017. The list was rejected on 8<sup>th</sup> November, 2017. Section 10(1) of Act No.5 of 2017 does not give time limitations to the appointing authority, in this case, the Governor, during which period another name is to be presented to the County Assembly. The appointing Authority cannot be forced to revert to Section 42 of the County Government Act and start another twenty one days period afresh. In any case the County Assembly would have already been in office for more than 21 days. The appointing authority may have travelled out of the County or even been indisposed and admitted in hospital.

The 1<sup>st</sup> and 2<sup>nd</sup> respondents maintain that the nominees who were initially rejected filed their own suit before the Garissa High Court, vide Judicial Review number 8 of 2017, Republic V Mandera County Assembly and others. It is not indicated whether interim orders were granted or when the suit was filed. I presume it was filed soon after the list was rejected on 8<sup>th</sup> November, 2017.

Section 30(d) of the County Governments Act requires the County Assembly to approve the nominees for County Executive Committee. Act number 5 of 2015 gives more guidelines to the County Assemblies in relation to public appointments to the County Governments. There is the requirement under Section 35 of the County Government Act that calls upon the Governors to take into account the local community, cultural diversity and affirmative action. Given the limited number of members of the executive committee, it is quite difficult to satisfy the expectations of the local community as well as fully quench the demands of cultural diversity. Under Article 179(3) the members of the Executive Committee should not exceed ten if the County Assembly has thirty (30) or more members or should not be more than one third if the County Assembly has less than thirty members. In essence therefore the maximum number of executive committee members is ten even for the large County Assemblies.

The petitioner submit that the 1<sup>st</sup> respondent submitted the initial list after 26 days from the date of swearing in members of the County Assembly. As explained hereinabove, it may not be possible to constitute the County executive committee within 21 days. I do find that there is no contravention of the provisions of the County Government Act by the respondents. The process of Constitution the County Executive committee faced several huddles and could not be done within the provided time frame. I do equally hold that the word "shall" under section 42 of the County Government Act does not impose an obligation upon the governors to the effect that where the executive Committee is constituted after the expiry of twenty one (21) days, it should then be nullified. That is not the intention of the County Government Act.

Counsel for the Petitioner reiterate that the names of the rejected nominees could not have been resubmitted to the County Assembly for approval. It is contended that the 1<sup>st</sup> and 2<sup>nd</sup> respondents are estopped from submitting the names again. Counsel heavily relies on Section 10 of Act number 5 of 2015. It is submitted that Political consideration should not be considered as “*change of circumstances*” as provided under section 10 of the Act. On their part, the respondents maintain that the initial rejection of the nominee was politically motivated. The poisoned atmosphere changed and the list was subsequently approved. The initial rejection was erroneous and that is why the nominees filed the suit in Court. The change in the atmosphere led to the withdrawal of the suit.

The dispute revolves around the issue as to whether the circumstances that had led to the rejection of the list of nominees had changed. Section 10(2) of Act number 5 of 2015 puts emphasis on the fact that the nominating authority should not resubmit the name of a rejected candidate to the County Assembly unless the circumstances relied on for rejection does not exist or ceased to exist. The issue is whether there was change of circumstances. The qualifications of each of the nominees have been clearly stated. In terms of academic qualifications, all the nominees fulfilled that requirement. The report by the committee on Appointments of the County Assembly did not raise any issue concerning the academic qualifications.

**The Black’s Law Dictionary define the word “Circumstance” as follows:-**

**An accompanying or accessory fact, event, or condition, such as a piece of evidence that indicates the probability of an event**

The Petitioner annexed the 1<sup>st</sup> report on the vetting of the nominees to the Executive Committee. The report indicate that all the nominees had complied with chapter 6 of the Constitution. They provided Kenya Revenue authority (KRA) compliance certificates. They cleared with the Higher Education loans Board (HELB), they were cleared by the Ethics and Anti Corruption Commission (EACC) and all relevant bodies.

On 26<sup>th</sup> June, 2018 the first respondent forwarded the same list of nominees to the speaker of the County Assembly. There were adjustments in three dockets whereby the nominees were swapped. The Committee on appointment for the second time vetted the nominees and unanimously approved all the nominees.

The report of the Committee on appointments was adopted by the entire County Assembly. The nominees have been sworn into their respective offices. The question is, what could have led to the drastic change of decision from rejection to unanimous approval of the same nominees. The second vetting was done after a period of about eight months. Going back to the requirement under Section 10(2) of Act number 5 of 2015 that the circumstances which led to the rejection must have changed, it is my view that political consideration is part of the circumstances or conditions to be considered. Section 10(2) does not call for the acquisition of extra qualifications by the nominees so as to change the circumstances. All what led to the initial rejection of the nominees including political confrontation fall within the circumstances to be considered for the resubmitting of the same candidate or nominee. Section 10(2) does not prohibit the resubmission of the name of a rejected candidate perse. Resubmission of the same name is permitted so long as the circumstances which led to the rejection ceased to exist or would have changed.

Taking all the circumstances of this case into account, it is my finding that the initial rejection of the list of nominees to the position of members of executive committee was based on politics and not lack of merit on the part of the nominees. It is inconceivable that all the ten (10) nominees without any exception did not qualify for the positions they were nominated for. The Committee on Appointments did appreciate that the nominees had academic qualifications and had fulfilled the requirements of Chapter six of the Constitution. Their subsequent rejection *en mass* was nothing but political backstabbing. The rejection of the nominees was not guided by the law but was purely based on political considerations.

I do agree with the respondents that the circumstance which led to the rejection ceased to exist. The circumstances include the dismissal of the election Petition against the 1<sup>st</sup> respondent as well as the withdrawal of the Judicial Review suit filed by the rejected nominees. The working relationship between the Executive and the Assembly became cordial. This change of working relationship cannot be held to be a “deal” between the two arms of the County Government as alleged by the Petitioner. The nomination of the candidates by the Executive and their subsequent vetting to office by the Assembly is a political process. Apart from the academic qualifications, other Socio-political factors such as regional balancing, gender minority interest among others come into play. The whole process involves politics. The nominees were not being appointed into academic posts but into positions which involve the fulfillment of the appointing authority’s political agenda. The process was conducted soon after the election process was over. I do entirely agree with the decisions in the case of **JOHN KIPNG’ENO KOECH & 2 OTHERS -V- NAKURU COUNTY ASSEMBLY & 5 OTHERS (Supra)** as well as that of **MOSES KIPROTICH LANGAT -V- KERICHO COUNTY ASSEMBLY COMMITTEE ON APPOINTMENTS & 3 OTHERS (Supra)**. Where it is established that the rejection of nominees to some County positions by the Assembly is not based on the law, the Court should readily overturn such decisions. This has nothing to do with separation of powers but is in line with the usual checks and balances.

The last issue for consideration is whether the appointment of the Mandera County Executive Committee members is constitutional. The petitioner submit that the is apprehensive that the people of Mandera County will be denied he opportunity to be served by persons with competence, integrity and leadership that inspires confidence. It is reiterated that the second report of the Committee on Appointment clearly shows that the nominees are not eligible to hold the positions they were nominated for.

The second report of the Committee on Appointment dated July at page 49 states as follows:-

## **6. COMMITTEE’S OBSERVATIONS**

### **GENERAL OBSERVATION**

**The committee observed that the appointing authority;**

(i) Complied with the principle of affirmative action as provided for in the CoK 2010 and section 35 (2) (a-c) of CG Act 2012.

(ii) Considered the provision section 35(2) (a) of the CG Act 2012 on cultural diversity of the County in promoting social-economic development.

(iii) Whereas some nominees have complied on the provision of section 35(3)(d) others did not and the committee noted that the previous report adopted by the Assembly in totality where the nominees were rejected among other reasons but majorly based on section 35(3)(d) of CG Act 2012, perceived lack of integrity based on petitions from the public and mismatch. In re-submitting the names afresh the Governor addressed some of the issues including the nomination of Dr. Mohamud for health Services. However, based on the Governor's appeal the committee was of the considered view that the requirement of section 35(3)(d) as read together with second schedule assessment form) to the Public Appointment (County assemblies Approval) Act No.5 of 2017 be applied cumulatively in arriving at the nominees' suitability.

The report then analyses each nominee and recommends that they all qualify. At page 56 of the report, the Committee observes as follows:-

## **7. COMMITTEE'S RECOMMENDATIONS**

At the end of the vetting process, the Committee made the following recommendation that, having considered the:

**(i) Academic qualifications**

**(ii) Work Experience (as it relates to the Position)**

**(iii) Compliance with Chapter Six of Gok 2010**

**(iv) Interest and knowledge relating to specific position**

**(v) Overall suitability for the position**

**(vi) Communication skills**

**(vii) Decision making/Problem solving skills of the nominees and pursuant to Article 179(2)(b) of the Constitution and Section 35 of the CG Act and sections 7, 8 and first and second schedules to the Committee recommends that the County Assembly approves the nomination of the following**

<b>S/No.</b>	<b>NOMINEE'S NAMES</b>	<b>DEPARTMENTS</b>
<b>1.</b>	<b>Mr. Izzudin Abdullahi Abdi</b>	<b>Education, Sports and Culture</b>
<b>2.</b>	<b>Mr. Mohamed Ali Omar</b>	<b>Water, Energy, Environment and Natural Resources</b>
<b>3.</b>	<b>Mr. Adan Hussein Hassan</b>	<b>Lands, Housing and Physical Planning</b>
<b>4.</b>	<b>Dr.Mohamed Adan Mohamed</b>	<b>Health Services</b>
<b>5.</b>	<b>Mr. Ahmed Sheikh Mohamed</b>	<b>Public Service, Conflict Management, Cohesion, Integration and Devolved Units</b>
<b>6.</b>	<b>Mr. Abdiaziz Sheikh Maad</b>	<b>Trade, Investment, Industrialization and Cooperative development</b>
<b>7.</b>	<b>Mrs. Johora Mohamed Abdi</b>	<b>Agriculture, Livestock and Fisheries</b>
<b>8.</b>	<b>Ibrahim Barrow Hassan</b>	<b>Finance and Economic Planning</b>
<b>9.</b>	<b>Mrs. Suleikha Hulbale Harun</b>	<b>Roads, Public Works and Transport</b>
<b>10.</b>	<b>Mrs. Shamsa Mohamed Haji</b>	<b>Gender and Social Services</b>

It is clear from the committee's report that in the second vetting process the committee members considered all the relevant requirements for one to qualify as a member of the executive committee. It should not be lost that the Assembly was undertaking an administrative duty. Where the appointing authority complains that the initial vetting was improper and would like the Assembly to vet the nominees afresh and the assembly members agree with the sentiments expressed by the appointing authority, the objective presumption would be that the initial vetting was not properly conducted. The Committee on Appointment initially took into account extraneous matters. It cannot be true that out of ten nominees non of them qualified. This is the only logical conclusion one can make.

The Petition is brought under several constitutional Provisions. I do not find that the second vetting violated any constitutional provision. Article 179(1)(b) of the constitution requires the approval of the County Assembly on the appointment of the members of the executive committee. There is no constitutional provision which bars members of the County Assembly from vetting the names of a nominee by the Governor whom the Assembly has already rejected. The petitioner contends that the respondents struck a deal and approved nominees who do not qualify. It is also submitted that the rejected nominees had a right to seek fair administrative action but they did not. The record shows that the nominees filed a Judicial Review suit before the Garissa High Court. The case was compromised and their names were taken back to the County Assembly. The County Assembly is composed of politicians who represent their respective wards as well as nominated members. Most of the decisions by the Assembly are made with political considerations. That is the nature of the work of the Assembly members. The Court cannot declare the Assembly's decision to vet the nominees afresh and return a finding contrary to its initial resolution as unconstitutional. The court cannot force a County Assembly to reach a resolution pre-conceived by a member of the public as the best resolution. The assembly can make a resolution today and decide to rescind the same resolution tomorrow. Under Article 185(3), the County assembly is endowed with oversight powers over the County executive Committee. It is the County Assembly that will be in a position to evaluate the performance of the nominees after having approved them. Where the assembly is of the considered view that a certain member of the Executive Committee is not performing his duties as expected, the Assembly has powers under Section 40(2) of the County Governments Act to initiate the process of removal of the member of the Executive Committee.

It is my finding that the County Assembly is not estopped from approving the name of a nominee to the County Executive Committee after having initially rejected that specific nominee. The County Assembly is lawfully entitled to recall its initial rejection and approve the nominee. The Court cannot force the County assembly to stand by its first report which rejected the nominees. Even the laws made by the Assemblies are subsequently amended or totally reviewed, repealed and replaced by a set of new laws. A County Assembly should not be permanently bound by its decision when it feels that the decision was erroneous. A County Assembly should exercise its Constitutional powers freely as it deems fit so long as it complies with the law. The nominees fulfilled the academic requirements as well as the requirements of Chapter Six (6) of the Constitution. The first allegations that they did not qualify was a political decision. The County Assembly realized its mistake and vetted the nominees afresh.

It is therefore my finding that the orders being sought by the Petitioner cannot be granted. The respondents complied with both Constitutional and statutory provisions during the process of constituting the Mandera County Executive Committee. The Petition in its entirety fails and is hereby dismissed. Since the Petitioner was of the view that the process violated the constitution, I do find that condemning the petitioner to pay costs will be unjust. Parties shall meet their respective costs.

**Dated, Signed and Delivered at Marsabit this 17<sup>th</sup> of December, 2018**

**S. CHITEMBWE**

**JUDGE**