



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

PETITION NO 14 OF 2014.

IN THE MATTER OF COUNTY GOVERNMENT OF MACHAKOS

AND

**IN THE MATTER OF THE DECISION BY THE COUNTY GOVERNMENT OF
MACHAKOS TO ADVERTISE FOR THE VETTING OF CHIEF OFFICERS**

AND

**IN THE MATTER OF SECTIONS 8(1) (a) & 45 (1) (a) & (b), 57 (a) & (b), 65 (1) (a) & (h)
& (2), 66 & 68 OF THE COUNTY GOVERNMENT ACT, 2012 OF THE LAWS OF KENYA**

AND

**IN THE MATTER OF ARTICLE 3, 10, 23, 27, 35(1) (a) & (b), 73 (1) & (2), 174 (a) & (b), (c) & (d),
175 (a), 179 (2) (b),**

**201 (b) & (d), 201, 210 (1), (2) & (3), 258 & 260 OF THE CONSTITUTION OF THE REPUBLIC
OF KENYA**

AND

**IN THE MATTER OF THE CONSTITUTION OF KENYA PRACTICE AND PROCEDURE
RULES, 2013**

BETWEEN

FRANCIS MAKOLA.....1ST PETITIONER

PAUL MBATHA.....2ND PETITIONER

VERSUS

THE GOVERNOR OF MACHAKOS COUNTY.....1ST RESPONDENT

JACKSON MUSYOKA.....1ST INTERESTED PARTY

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| SHEILA MUENI MUKUNYA..... | 2 ND | INTERESTED PARTY |
| NIMROD MBITHUKA MBAL..... | 3 RD | INTERESTED PARTY |
| PAULINE NDUKU MBONDE..... | 4 TH | INTERESTED PARTY |
| KENNEDY O. AUMA..... | 5 TH | INTERESTED PARTY |
| MORRIS PAUL ALUANGA..... | 6 TH | INTERESTED PARTY |
| COLLINS SIRA KALA..... | 7 TH | INTERESTED PARTY |
| JANE MWIKALI MUTHOKA..... | 8 TH | INTERESTED PARTY |
| GRACE MULI MUTUKU..... | 9 TH | INTERESTED PARTY |
| NICHOLAS MILI MAKAU..... | 10 TH | INTERESTED PARTY |
| JEREMIAH LEMI MUIA..... | 11 TH | INTERESTED PARTY |
| CATHERINE MUNUNE NDILA..... | 12 TH | INTERESTED PARTY |
| SARAH MBITHE MUTUA..... | 13 TH | INTERESTED PARTY |
| URBANUS WAMBUA MUSYOKA..... | 14 TH | INTERESTED PARTY |
| JONAM NGAU KINAMA..... | 15 TH | INTERESTED PARTY |
| JOHN KILONZO MUTHAMA..... | 16 TH | INTERESTED PARTY |
| JAMES MUSANGO KATHILI..... | 17 TH | INTERESTED PARTY |
| JACINTA MWELU MASILA..... | 18 TH | INTERESTED PARTY |
| DAVID MUSEMBI MUTUA..... | 19 TH | INTERESTED PARTY |

RULING

Introduction

The Petitioners are Kenyan citizens resident in Machakos County, and they filed a petition on 30th June 2012 which was amended on 16th July 2014 and further amended on 9th February 2015. The Petitioners alleged therein that the 1st Respondents forwarded to the Machakos County Assembly names of nominees to the position of Chief Officers of the County for vetting, which allegedly took place on the 16th and 18th of June, 2014, and that the County Assembly of Machakos was scheduled to discuss the shortlisted nominees for purposes of appointment on 1st July, 2014. The Petitioner contended that the vetting was conducted in complete violation of the Constitution and the County Government Act, 2012, and without effective public participation.

The Petitioners thus sought the following reliefs which also summarise their position:

1. A declaration that the procedure for advertisement, evaluation, short listing, vetting and or

appointment and subsequent gazette of persons to the chief officers made pursuant to the advertisement carried out in the daily Nation of 5th June, 2014 is in breach of the Constitution and is therefore null and void.

2. A declaration that the Petitioners are entitled to information and documents sought in relation to the vetting and intended appointment of Chief Officers as of right

3. An order nullifying any appointments or advertisement, evaluation, short listing, vetting and or appointment of persons to the chief officers made pursuant to the advertisement carried out in the daily Nation of 5th June, 2014 until such time as the Respondents shall have complied with the provisions of the Constitution

4. An order to stay the appointments of the 1st to 19th Interested Parties to the positions of chief officers presented for vetting by the Machakos County Assembly by a report dated 7th July 2014 and presented to the Assembly and subsequently approved and appointed by the 1st Respondent.

5. A permanent order of injunction restraining the 1st Respondent from conducting or carrying any appointments, advertisement, evaluation, short listing, vetting and or gazetting or making any formal appointment or swearing in by the Speaker of the County Government of Machakos, of persons to the position of chief officers made pursuant to the advertisement carried out in the daily Nation of 5th June, 2014, and subsequent approval for appointment or to nullify such gazette notice making the formal appointment and to stop any other process until such time as it shall have complied with the provisions of the Constitution.

The 1st to 4th Respondents then filed a Notice of Preliminary Objection dated 3rd July 2014 on the following grounds:

a. The Court has no jurisdiction to deal with this matter by virtue of Article 196(3) of the Constitution of Kenya, 2010 as read with Section 17 of the County Government Act, 2012 and the provisions of section 12 and 29 of the National Assembly (Powers & Privileges) Act;

b. The proceedings in this matter offend the doctrine of separation of powers under Article 175 (a) of the Constitution of Kenya, 2010;

c. The power to appoint County Chief Officers is vested by the statute in the County Governor with the approval of the County Assembly;

d. The approval process of the County Assembly is insulated from court interference by the National Assembly (Powers & Privileges) Act as applied to County Assemblies;

The Respondents and 1st to 19th Interested Parties filed another Notice of Preliminary Objection dated 5th January 2016, on the grounds that the Court should not entertain the Petition as it violates the provisions of Section 77(2) of the County Governments Act, 2012 on the prescribed procedure for redressing the matters complained of in the Petition; and that the Petition is incompetent, bad in law, improperly filed and an abuse of this Court's process.

This Court at the hearing of the two Preliminary Objections directed that they be heard together by way of written submissions. The Petitioners however did not file any submissions despite being given adequate opportunity to do so. The Respondents and 1st to 19th Interested Parties' learned counsel, BM Musau & Co. Advocates, filed submissions dated 16th November 2015 on the Notice of Preliminary Objection dated 3rd July 2014, and submissions dated 19th February 2016 on the Notice of Preliminary Objection dated 5th January 2016.

The Submissions

It is the Respondents and 1st to 19th Interested Parties submission that this court does not have jurisdiction to hear the Petitioners' petition because:-

- i. According to section 12 of the National Assembly (Powers & Privileges) Act, the proceedings of the Assembly or the Committee of Privileges acting in accordance with this Act shall not be questioned in any court.
- ii. It is the duty of the County Governor to appoint, with the approval of the County Assembly, the County executive Committee in accordance with article 179(2)(b) of the Constitution as per section 30 of the County Governments Act, 2012.
- iii. According to section 5(2)(f) of the County Governments Act, it's the function of the County Government to establish and staff its public service as contemplated under article 235 of the Constitution of Kenya, 2010.
- iv. According to section 8 of the County Governments Act, 2012, it is the function of the County Assembly to vet and approve nominees for appointment to county public offices as well as to set out roles under Article 185 of the Constitution of Kenya, 2010.
- v. According to section 45 of the County Governments Act, 2012 it is the duty of the Governor to appoint nominees to county executive officials and the County Assembly to approve the nominees.
- vi. Section 66 of the County Governments Act, 2012 which requires advertisements of positions be widely publicised was complied with. All the necessary information was available to the general public and especially the residents of Machakos County.

Further, that the doctrine of separation of powers requires that the three arms of the government work independently, but there be checks and balances to prevent misuse of power by either arm. It was submitted that the Judiciary and the County Government are independent entities and as such should execute their duties independently, and that it is because of this fact that section 12 of the National Assembly (Powers & Privileges) Act, expressly states that no proceedings or decision of the Assembly or the Committee acting in accordance with this Act shall be questioned in any court.

The decisions in the South African case of **State vs Makwanyane & Another, (1995) ZA CC3**, and in the **Advisory Opinion No. 2 of 2013, Nairobi between The Speaker of the Senate & The Senate of the Republic of Kenya and The Hon. Attorney General & 4 Others**, were cited for the position that separation of powers in the arms of the government excludes this Court from interfering with the decisions already made by the County Assembly of the County Government of Machakos.

According to the Respondents and Interested Parties, section 30 of the County Governments Act, 2012 gives the County Governor exclusive power to nominate county chief officials, which power is checked by the County Assembly which approves those nominated by the County Governor. In addition, that section 77 (1) of the County Governments Act provides for the proper channel to address issues pertaining to dissatisfaction, and states that any person dissatisfied or affected by a decision made by the County Public Service Board or a person in exercise or purported exercise of disciplinary control against any county public officer may appeal to the Public Service Commission against the decision. It was submitted that the statutorily prescribed procedure to address the present dispute has not been followed and the Petition should be dismissed. Reference was made to the decision in **Luka Angaiya Lubwayo & Another v Gerald Otieno Kajwang & another [2013] eKLR**.

The Issues and Determination

I have read and carefully considered the pleadings and submissions made herein. The issues to be decided are firstly, whether the Plaintiff's Preliminary Objection raises a pure point of law, and if so, whether it has merit and should be upheld. The law on the circumstances when a preliminary objection may be raised was settled by the Court of Appeal in the case of **Mukisa Biscuit Manufacturing Co. Ltd -vs-**

West End Distributors Ltd (1969) EA 696, as follows:

“a Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

A preliminary objection cannot therefore be raised if any fact requires to be ascertained, and the effect of a preliminary objection if upheld, renders any further proceedings before the court impossible or unnecessary.

The Court in this regard notes that the Plaintiff’s grounds of objection are based on this Court’s lack of jurisdiction on account of the doctrine of separation of powers, and the provisions of the National Assembly (Powers & Privileges) Act that proceedings of the County Assembly shall not be questioned in any court.

The position in law is that jurisdiction is always granted by law or other like instrument as held by the Court of Appeal in **The Owners of the Motor Vessel “Lilian S” –VS- Caltex (Kenya) Ltd [1989] KLR 1**.

“By jurisdiction is meant the authority which a court has to decide matters presented in a formal way for its decision. The limits of this authority are imposed by the stature, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but except where the court or tribunal has been given power to determine conclusively whether exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given”

The Petitioner has in this respect argued that the Constitutional provisions as to public participation were not followed in the appointment of the 1st to 19th Interested Parties. Article 165 (3) (d) of the Constitution in this respect provides that the High Court shall have jurisdiction to hear any question respecting the interpretation of the Constitution including the determination of—

- (i) the question whether any law is inconsistent with or in contravention of the Constitution;
- (ii) 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;
- (iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and
- (iv) a question relating to conflict of laws under Article 191; and

As seen from the holding in **The Owners of the Motor Vessel “Lilian S” –VS- Caltex (Kenya) Ltd [1989] KLR 1**, any limitation as the jurisdiction of a court must also by law be granted. There is nowhere in the cited Articles that the jurisdiction granted thereunder to the High Court is limited as regards the actions of Governors, County Assemblies, County Public Service Board or any other constitutional or statutory bodies. Whether or not the Respondents observed the provisions of the law is a matter of evidence and argument, that cannot be disposed of by way of a preliminary objection.

Likewise, the question of whether the Court in exercising its jurisdiction will be offending the doctrine of

separation of powers is one that can only be decided upon after the parties have canvassed their respective cases, upon which the Court can then make a decision one way or another as to whether the dispute is one that can be resolved by way of judicial processes or by other processes. In other words an objection as to infringement of the doctrine of separation of powers is not a jurisdictional issue, but a substantive and factual issue to be determined upon hearing of evidence and opinion.

The second main objection raised by the Respondents and Interested parties is that the prescribed procedure was not followed pursuant to section 77 of the County Government Act. The said section provides as follows for appeals to the Public Service Commission:

“(1) Any person dissatisfied or affected by a decision made by the County Public Service Board or a person in exercise or purported exercise of disciplinary control against any county public officer may appeal to the Public Service Commission (in this Part referred to as the “Commission”) against the decision.

(2) The Commission shall entertain appeals on any decision relating to employment of a person in a county government including a decision in respect of—

(a) recruitment, selection, appointment and qualifications attached to any office;

(b) remuneration and terms and conditions of service;

(c) disciplinary control;

(d) national values and principles of governance, under Article 10, and values and principles of public service under Article 232 of the Constitution;

(e) retirement and other removal from service;

(f) pension benefits, gratuity and any other terminal benefits; or

(g) any other decision the Commission considers to fall within its constitutional competence to hear and determine on appeal in that regard.”

This section has to be read together with the section 59 of the Act that provides for the powers of the County Public Service Board as follows:

“(1) The functions of the County Public Service Board shall be, on behalf of the county government, to—

(a) establish and abolish offices in the county public service;

(b) appoint persons to hold or act in offices of the county public service including in the Boards of cities and urban areas within the county and to confirm appointments;

(c) exercise disciplinary control over, and remove, persons holding or acting in those offices as provided for under this Part;

(d) prepare regular reports for submission to the county assembly on the execution of the functions of the Board;

(e) promote in the county public service the values and principles referred to in Articles 10 and 232;

(f) evaluate and report to the county assembly on the extent to which the values and principles referred to in Articles 10 and 232 are complied with in the county public service;

- (g) facilitate the development of coherent, integrated human resource planning and budgeting for personnel emoluments in counties;**
- (h) advise the county government on human resource management and development;**
- (i) advise county government on implementation and monitoring of the national performance management system in counties;**
- (j) make recommendations to the Salaries and Remuneration Commission, on behalf of the county government, on the remuneration, pensions and gratuities for county public service employees.”**

Lastly, the chief officers whose appointment is being challenged by the Petitioners were appointed under the process set out in section 45 of the Act which provides as follows:

“1) The governor shall—

- (a) nominate qualified and experienced county chief officers from among persons competitively sourced and recommended by the County Public Service Board; and**
- (b) with the approval of the county assembly, appoint county chief officers.**

(2) The office of a county chief officer shall be an office in the county public service.”

The County Public Service Board therefore had a role in the appointment of the said chief officers and section 77 of the County Government Act is applicable, and the County Public Service Board is also specifically required to ensure observance of the values in Article 10 of the Constitution that includes that of public participation in the performance of its functions. I accordingly agree that if the Petitioners are alleging that there was no such observance then their first port of call should be the appeal to the Public Service Commission before they move this Court. In Luka Angaiya Lubwayo & Another v Gerald Otieno Kajwang & another [2013] eKLR, the Court held as follows:

“I acknowledge this Court’s unlimited jurisdiction under Article 165 (3) (a) of the Constitution. However, I am in agreement with the sentiments expressed by this Court in International Centre for Policy and Conflict & 4 Others v The Hon. Uhuru Kenyatta and Others, Petition No. 552 of 2012 where the Court held that the unlimited original jurisdiction of this Court cannot be invoked where Parliament has specifically and expressly prescribed procedures for handling grievances raised by a Petitioner. The Court of Appeal has also upheld this reasoning in Speaker of National Assembly v Njenga Karume [2008] 1 KLR 425, where it held that:-

“In our view there is considerable merit that where there is clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.”

The Respondent’s Preliminary Objection therefore succeeds only to the extent that the Petitioners ought to have followed the procedure provided by section 77 of the County Government Act with respect to their grievance, before filing their petition in this Court, and their Petition is accordingly struck out. As the Petition involves an issue of constitutional implementation that is of public interest, each party shall bear its own costs of the Petition and Preliminary Objections.

Orders accordingly.

Dated, Signed, and Delivered at Machakos this 6th day of June 2016

P. NYAMWEYA

JUDGE