REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CONSTITUTIONAL REFERENCE NO. 40 OF 2014

(Consolidated with HC.JR. 59 of 2014)

(Republic Vs Isiolo County Assembly Service Board & 3 others)

IN THE MATTER OF : BREACH OF FUNDAMENTAL RIGHTS AND FREEDOMS ESPECIALY ARTICLE1(1)(B),(1(4) (B),2,3,10,19,20,21,22,23,27,28,47,50,73,75,77,174,175 & 185 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: SECTION 12 & 13 OF THE COUNTY GOVERNMENT ACT

AND

IN THE MATTER OF: ARTICLE 2, 3,4,7,13 & 19 OF THE AFRICAN CHARTER ON HUMAN AND PEOPLES RIGHTS AND OTHER PROVISIONS THEREOF.

AND

IN THE MATTER OF: THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES 2013, SECTION 4.

BETWEEN

1. HUSSEIN TENE DABASSO ……..….....……. 1ST PETITIONER

2. FRANCIS LEAKEY LOLKINYATI …….....……..…… 2ND PETITIONER

3. ALI BORU GALGALO ……..…….....……. 3RD PETITIONER

4. GUYO JOHN DUBA ……...…….....……... 4TH PETITIONER

-VERSUS-

SPEAKER OF THE COUNTY ASSEMBLY OF ISIOLO

MOHAMED TUBI ……...….....……..... 1ST RESPONDENT/APPLICANT

COUNTY ASSEMBLY SERVICE BOARD OF ISIOLO…… 2ND RESPONDENT/APPLICANT

COUNTY ASSEMBLY OF ISIOLO ……..... 3RD RESPONDENT/APPLICANT

AND

SALAD BORU GURACHA …….....…… INTERESTED PARTY/APPLICANT

ABDULLAHI MOOHAMUD SHUFIGI ….....….. INTERESTED PARTY/APPLICANT

RULING

1. The three petitioners herein Hussein Tene Dabassso, 1st petitioner; Francis Leakey Lolkinyati, the 2nd petitioner and Ali Boru Galgalo, the 3rd petitioner through a Constitutional Reference brought pursuant to article 1(1((b), 1(4),(b), 2,3,10,19,20,21,22,23,27,28,47,50,73,75,77,174,175 and 185 of the Constitutional of Kenya 2010 sought a declaration; that the fundamental rights and freedoms guaranteed to the interviewees of the position advertised by the 2nd respondent in the Daily Nation newspaper on 15th January, 2014, 23rd May, 2014 and 21st July, 2014 had been contravened by the respondents; that the court be pleased to invoke its power under Chapter 10 of the Constitution and Article 22 and 23 of the Constitution to revoke or set aside and declare the impugned appointments hereof; the position of Clerk of the County Assembly, the Deputy Clerk of the County Assembly and the rest of the appointments in the position set out in the Daily Nation Newspapers and advertisements of 15th January, 2014, 23rd May, 2014 and 21st July 2014 and quash the said appointments or any decisions towards effecting such appointments; that the court do order the police, Isiolo County Commander and County Commissioner to ensure compliance of the order as may issue and to ensure peace; that an order do issue to set aside the proceedings of Isiolo County Assembly of the 20th November 2014 appointing the 1st and 2nd interested parties to their respective positions and such related business and the proceedings of 21st November, 2014 purportedly to swear in the said persons in their purported positions; and to quash the attendant decisions or resolutions accordingly.

2. The petitioners further in their reference sought temporary order to issue staying the effect of the decisions and resolution of the respondents in the proceedings of 20th November 2014 until the hearing and determination of the application or such period as the court may deem fit; that the honourable court do issue an order compelling or an order of mandamus compelling the respondents to repeat the recruitment exercise of the positions set out in the Daily Nation Newspapers advertisements of 15th January 2014, 23rd May 2014 and 21st July 2014 in tandem and in accordance with the Constitution and the law; that an order do issue requiring the Kenya National Audit Office (KENAO) and the Ethics and Anti-corruption Commission (EACC) to carry out an audit of the financial affairs surrounding the exercises such that those found to have misused public funds and/or corruptly and illegally exercised public power in their respective positions to be held accountable and surcharged accordingly under the relevant provisions of law and costs of the petition be provided for.

3. The petitioners simultaneously filed a Notice of Motion dated 24th November 2014 seeking temporary injunction and orders of prohibition restraining or prohibiting any person whatsoever assuming and/or filling any of the positions advertised by the 2nd respondent as set out in the advertisements of Daily Nation Newspaper of 15th January,2014, 23rd May, 2014 and 21st July 2014 amongst many other prayers as set out under prayers nos. 2 to 19 which prayers are similar to prayers in the main petition dated 24th November 2014 and which application is supported by separate supporting affidavits sworn by the petitioners/applicants.

4. That on 25th November 2014 the court granted the petitioners application on interim basis by granting temporary injunction orders; and orders of prohibition restraining or prohibiting any person from howsoever assuming and filling any of the positions advertised by the 2nd respondent as set out in the advertisements in the Daily Nation Newspapers of 15th January, 2014, 23rd May, 2014 and 21st July,2014 pending determination of the application interpartes and prohibiting the interested parties as well as other persons purported to have been recruited by the respondents, from assuming, carrying out or holding themselves as holders of the office of the Clerk of the Isiolo County Assembly, Deputy Clerk of the Isiolo County Assembly and any of the positions set out in the Daily Nation Newspapers advertisement of 15th January, 2014; 23rd May, 2014 and 21st July, 2014 pending interpartes hearing and that the application was to be heard interpartes on 9th December, 2014.

5. On 9th December 2014 the interim orders granted by court on 25th November, 2014 were not extended, however on 17th December, 2014 Meru High Court Judicial Review Application No. 59 of 2014 was consolidated with High Court Constitutional Reference No. 40 of 2014 and which file was made the lead file and the ex parte applicant in HC. Judicial Review Appl. No. 59 of 2014 was made the 4th petitioner. He was granted leave to file further affidavit.

6. The Court had meanwhile in the High Court Judicial Review Appl. No. 59 of 2014 granted leave on 2nd December 2014 and ordered that the leave so granted to operate as stay of the decision reached by the respondents in appointing several officers in the month of November 2014. The orders granted were based on affidavit of the exparte applicant **Guyo John Duba**, now the 4th petitioner after consolidation of the two matters.

7. On 16th January, 2015 all pending applications were withdrawn by counsel on record and this matter was directed, to be determined by way of written submissions and counsel took a date for highlighting on their submissions. That before counsel could proceed with highlighting on their submissions; the 2nd petitioner filed a Notice of change of advocate and withdrawal of his petition which application was allowed by the court on 17th May, 2015.

8. That on 7th July 2015 Mr.M.Kariuki learned advocate for the 3rd petitioner and holding brief for M/s. Kiome, learned advocate for the 4th petitioner submitted that there is a notice of withdrawal of the suit by the 3rd petitioner and 4th petitioner dated 11th June 2014 and 6th July 2015 respectively namely Ali Boru Galgalo and Guyo John Duba. Mr.M.Kariuki, learned advocate prayed that the application for withdrawal be allowed in terms of Rule 27 (1) (a) of Mutunga Rules as the said petitioners had given notice. He further prayed that the orders issued by this court which the 2nd and 3rd petitioner had participated in and were granted in their favour and which had stopped the recruitment of staff at Isiolo County government be vacated in light of the withdrawal of suit by the 3rd petitioner. He urged that the application should be allowed by virtue of Rule 25 of Mutunga rules and that such orders should be discharged. In this petition it is worth noting that the 2nd petitioner withdrew his petition with leave of the court on 17th May 2015 leaving only the 1st, the 3rd and the 4th petitioners pursuing this matter.

9. Mr. Munene; learned advocate, for the 1st petitioner strongly opposed the withdrawal of the orders issued in the suit urging that orders were sought by the 1st, the 2nd and the 3rd petitioners; that the 1st petitioner is still participating in the petition and that there had been no application to set aside those orders urging that if the 2nd and the 3rd petitioners have withdrawn from this suit that means they lack *locus standi* to participate in this petition and that the first application having been allowed, they have no *locus standi* to move the court for second orders.

10. Mr. Muriuki learned advocate for the respondents and interested parties supported the application for withdrawal of suit and vacating of the orders citing Rule 25 of Mutunga rules which he stated stipulated that the court can vary on its own motion, discharge the orders and as such an application can be made orally. He urged that the orders were made based on an affidavit of the 4th Petitioner; who has withdrawn the suit against the respondents and as such there is no basis of maintaining such orders as there is no

affidavit in support.

11. Mr. M. Kariuki; learned advocate in response to the 1st petitioner's counsel submissions urged that under Rule 25 of Mutunga Rules, the court can discharge the orders without any formal application having been filed by any party but on its own motion. He urged that it has not been shown that the discharge of the orders shall prejudice the 1st petitioner or what prejudice he will suffer or what interest will be served by the pendency of the orders. He urged that the two limbs he sought in the application were made simultaneously and that the petitioners are no longer interested in the orders they had sought and obtained.

12. I have carefully and painfully analyzed the history of this matter and pointed out the orders issued by the court. I have also considered the 3rd and 4th petitioners application to withdraw the suit and to have orders issued in their favour discharged. I have considered the counsel rival submissions and the issue for consideration from the submissions in my view is whether the 3rd and the 4th respondents can be allowed to withdraw the suit on their part and whether orders issued in their favour with the 1st petitioner can be discharged?

13. In this matter the 1st, the 2nd and the 3rd petitioners were on 25th November, 2014 issued with interim orders pending inter partes hearing on 9th December, 2014; which orders were not extended on 9th December, 2014 or reinstated on 16th January, 2015 when all pending applications were marked withdrawn. That meant the orders issued on 25th November 2014 lapsed on 9th December 2014 when they were not extended. That even if it can be argued that was not the case then when all pending applications were withdrawn without any consent being recorded as regards maintaining status quo or otherwise as of the time of the withdrawal of the application, that means no orders were granted in favour of the petitioner in the Constitutional reference or in this matter.

14. The court further had granted orders of injunction when it granted leave and directed that the leave so granted in J.R. No. 59 of 2014 do operate as stay of the decision of the Respondents. The orders were granted on strength of the affidavit of the 4th petitioner in Judicial Review application and who was the only ex parte applicant. The exparte applicant now sees no purpose of the suit and the orders issued in his favour, he therefore wants both the suit withdrawn and orders discharged. The order was not issued in favour of any of the 1st, the 2nd and the 3rd respondents and as such I find that they have no business in objecting or making arguments about the 4th petitioner's prayer for discharging of the orders issued in favour of him in the Judicial Review and especially the 1st petitioner who is objecting to the discharge of the said orders.

15. Under **Rule 27 (1) (a) (b) and (2) of the Constitution of Kenya** (**Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013** it is provided as follows:-

> ***"27. (1) The petitioner may-***
>
> ***(a) On notice to the court and to the respondent, apply to withdraw the petition; or***
>
> ***(b) with the leave of the court, discontinue the proceedings.***
>
> ***2. The court shall, after hearing the parties to the proceedings, decide on the matter and determine the juridical effects of that decision."***

16. The 3rd and the 4th petitioners issued notice to the court and the respondents dated 11th June 2015 and 6th July 2015 respectively applying to withdraw the petition on their part. The court heard parties' counsel to the proceedings and in view of the submissions by counsel for the 3rd and the 4th petitioners, of the petitioners being not interested in persuing their petition as it no longer serves any purpose on their part, the application for withdrawal from that petition is considered, it is found to be merited and is

accordingly allowed; consequently the 3rd and the 4th petitioners names are struck out from the petition and the petitioner in this reference shall only be the first petitioner one HUSSEIN TENE DABASSO.

17. Under **Section 25 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013** it is provided:-

> ***"25. An order issued under rule 22 may be discharged, varied or set aside by the court either on its own motion or on application by a party dissatisfied with the order."***

18. The orders issued in this petition were sought and issued under Article 22 and 23 of the Constitution of Kenya 2010 and the court by virtue of Rule 25 stated herein above can on its own motion discharge, or vary or set aside the order on an application by party dissatisfied with the order. The application need not be formal as an oral application can suffice. The 4th petitioner who got the orders in his favour is not interested in the same. The 3rd petitioner also wants the orders discharged. The orders issued were not in favour of the 1st petitioner. That if the orders are discharged the 1st petitioner who never sought them would not in my view be prejudiced in any way. He has not shown what prejudice he would suffer if the orders are discharged or what interest will be served by maintaining of the said orders. The 4th petitioner having withdrawn from the matter I find no basis or good reasons why the orders issued in his favour and not in favour of the 1st petitioner should continue to be maintained. In actual fact the Judicial Review Application the basis of the orders having been withdrawn by the 4th petitioner, I find sufficient reasons for discharging and/or varying the orders sought. The personal interest of the 1st petitioner does not and should not be allowed to override the public interest in the matter of public interest. I therefore find that the application by the 3rd and the 4th petitioners to have the orders issued against the respondents and interested parties should in the interest of justice and public interest be discharged and I accordingly discharge the orders staying the decision reached by the respondents in appointing several officers in the month of November 2014 pending hearing and determination of the 1st petitioner's petition.

19. The upshot is that the 3rd and the 4th petitioners application is merited and I proceed to make the following orders:-

(a) The 3rd and the 4th petitioners are allowed to withdraw their suit hereof.

(b) The orders issued by the court on 25th November 2014 and 2nd December 2014 against the respondents and interested parties are hereby discharged.

(c) Costs shall be in the cause.

DATED at Meru this 9th day of July 2015.

J.A. MAKAU

JUDGE

9.7.2015

Delivered in open court in the presence of:

Mr. Munene for 1st petitioner - absent

Mr. M.Kariuki for 3rd petitioner - absent

Mr. Muriuki for respondent/interested parties - present

M/s. Kiome for 4th petitioner –absent

Court clerk – Penina/Mwenda

J.A. MAKAU

JUDGE

9.7.2015