



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
PETITION CAUSE NO. 25 OF 2014

MARY MWAKI MASINDE PETITIONER

VERSUS

COUNTY GOVERNMENT OF VIHIGA)

VIHIGA COUNTY ASSEMBLY) RESPONDENTS

AND

THE NATIONAL LAND COMMISSION INTERESTED PARTY

JUDGMENT

INTRODUCTION:

1. This Petition is a cry for justice by **MARY MWAKI MASINDE** on allegations of discrimination on grounds of her marital status. **MARY**, hereinafter referred to as “**the Petitioner**”, was born 35 years ago or thereabout in Emuhaya District within Vihiga County and is currently pursuing her Masters in Business Administration (MBA) at Masinde Muriro University. She is the Funds Account Manager for Butula Constituency and is happily married in Mumias within the neighbouring Kakamega County.
2. In the Petition the Petitioner enjoined the County Government of Vihiga and the Vihiga County Assembly as Respondents and the National Lands Commission as an interested party.

THE PETITION:

3. On 02/12/2014, the Petitioner moved to this Court and simultaneous with filing of the Petition filed a Notice of Motion seeking conservatory orders. This Court certified the matter as urgent, issued some preservative orders and directed service for directions on 10/12/2014. The parties herein then opted to instead pursue the main Petition and as such the interlocutory application was abandoned. Parties filed affidavits and submissions on the main Petition. The Respondents however tendered oral submissions instead. The *status quo* pursuant to the conservatory orders was agreed to be maintained accordingly.
4. The Petition was brought under **Articles 22, 27, 28, 47 and 252 of the Constitution of Kenya**

alongside the **Constitution of Kenya (Protection of Rights and Fundamental Freedoms and Enforcement of the Constitution) Practice and Freedom Rules, 2013.**

5. By the Affidavit in support of the Petition, the Petitioner deposed that she became aware of the advertisement for the positions of Members of the County Management Boards by the National Land Commission (hereinafter referred to as “**the Commission**”) as carried out in the internet and print media. Being interested and qualified, the Petitioner applied for such in respect to Vihiga County Land Management Board (hereinafter referred to as “**the Board**”). She was shortlisted with about 20 other people and eventually interviewed by a panel comprised of members of the Commission and the Vihiga County Service Board. The Petitioner passed the interview and was picked among 6 other candidates for the final approval by the Vihiga County Assembly (hereinafter referred to as “**the Assembly**”). The Assembly delegated the vetting process to one of its committees the **Committee on Land, Housing and Urban Planning**, hereinafter referred to as “**the Committee**”).
6. The Petitioner appeared before the Committee on 31/10/2014 and despite the Committee noting that she was properly vested with the knowledge and expertise for the position it instead recommended against her appointment on grounds that though born in Emuhaya, she was married and stays in Mumias and as such she was not able to represent the interests of the people of Emuhaya. The Assembly eventually adopted the Committee’s recommendation and further directed that the position for a representative of Emuhaya sub-County be accordingly re-advertised.
7. The Petitioner then ran into the corridors of justice alleging that the recommendation by the Committee and the subsequent adoption thereof by the Assembly was discriminatory as the only reason given for her not being recommended for appointment despite being a suitable candidate was that she was married in Mumias within the neighbouring Kakamega County. That, she argued, is discriminatory based on her marital status *moreso* given that the proximity of where she lives and Vihiga County cannot inhibit her to discharge her duties as a member of the Vihiga County Land Management Board. She indicated that if that was the only hitch, then given an opportunity, she would have relocated back to Emuhaya. The Petitioner further contended that she was the only one whose marital status became an issue whereas several others were also married and not resident within the County. She cited the example of the nominee who was married and lived in Nairobi over 350 km away from the Vihiga County among others. It is further contended that the Petitioner was the only woman candidate and the Committee raised the issue of her marriage to her disadvantage and to the advantage of her male counterparts whose vetting did not touch on their such status or at all.
8. It was the Petitioner’s further contention that the Assembly further contravened the Constitution in directing the County Government of Vihiga to re-advertise for the position as the duty to appoint such members was only vested on the Commission by dint of Article 252 of the Constitution.
9. The Petitioner held that the decisions of the Assembly were *ultra-vires* and unlawful as they infringed her constitutional right to equal treatment before the law and freedom from discrimination and that she is entitled to a fair affirmative action that is lawful and reasonable in the circumstances as envisaged under Article 47 of the Constitution further to the fact her right to dignity was equally infringed. She also filed a List of Documents and a Reply to the Answer to the Petition.
10. On remedies, the Petitioner prayed for a declaration that the Committee and the Assembly in rejecting to approve her to the membership of the Vihiga Land Management Board on grounds of marital status is discriminatory and against the Bill of Rights and a further declaration that the Respondents’ actions in conducting an interview instead of vetting her is in contravention of Article 252 of the Constitution hence *ultra vires* and void. She prayed for a further order that the Assembly do approve her name to be forwarded to the Commission for gazettelement as a Member of the Board. An order that the Assembly acted *ultra vires* the Constitution in rejecting the Petition and ordering a fresh advertisement was also sought and a further declaration that she is entitled to

affirmative action and that the Assembly acted ultra-vires the Constitution by abrogating the powers of the Commission. The Petitioner also sought for costs and any other order that the Court shall deem fit to meet the ends of justice. The Petitioner filed written submissions in buttressing of the foregone.

THE RESPONSE:

11. The Respondents opposed the Petition and filed a joint Answer to Petition and an Affidavit by the Clerk to the Assembly. In supporting the deliberation and approval by the Assembly, the Respondents contend that the deliberation were conducted in accordance with the law and in particular in respect to the Natural Land Commission Act, the Public Appointments (Parliamentary Approval) Act No. 33 of 2011 and the Constitution and took all considerations into account hence the decision was based in law and not discriminatory at all. Indeed the Respondents explained that the rejection by the Assembly of the Petitioner was not that she was married but rather that she failed to persuade the Committee that her marital commitments away from the County would not affect her performance as a Board Member. It is further contended that the Petitioner failed to name the alleged candidates who worked outside the County and as such those averments remained bare allegations.

Further, it was contended that the Petitioner never protested that she was not being vetted but being examined and that the Assembly discharged the duty in the approval of the nominees as required in law and that the composition of the Board with regard to gender equality was the responsibility of the Commission which was instead brought in as an interested party and not a substantive party. The allegation that she was the only woman could not therefore hold if she never passed the approval of the Assembly and that they are still other positions to be filled and hence the issue of gender is not concluded.

12. The Respondents further contended that they never acted outside the Commission in law in the approval proceedings and that grant of any of the orders sought would infringe upon the independence of the Assembly and the doctrine of separation of powers under Article 1 (3) of the Constitution. The Respondents also availed the communication for the Assembly on the approval proceedings in support of its position that the Petition lacked in merit and is for dismissal with costs. Counsel for the Respondents also tendered oral submissions in support of this position.

ANALYSIS AND DETERMINATION:

13. Having carefully looked at the Petition, the Answer to the Petition, the Reply to the Answer to the Petition, the Affidavits on record and the parties' submissions, I hereby tailor the following main issues for consideration and determination.

- i. ***The Role of the Assembly in approval proceedings;***
- ii. ***Whether the Petitioner's rights were infringed either as alleged or otherwise?***
- iii. ***Remedies; if any.***

14. Before embarking on an analysis of the matters raised in this Petition in regard to the issues set out above, this Court do believe that it is necessary to first determine the issue of joinder and misjoinder of parties which has been raised by the Respondents in this matter.

Preliminary issue: Joinder and Misjoinder of parties.

15. It is the Respondents' position that the County Government of Vihiga is wrongly enjoined as a party in the Petition since it did not take part in the vetting process as that is the preserve of the Assembly. It was also urged that the Petitioner ought to have enjoined the Commission as a Respondent and not as an Interested Party since some of the prayers sought are only within the mandate of the Commission including the appointment of a Board Member and the interview process and by bringing the Commission as a mere interested party, the Petition has no legal leg to

stand on and is for rejection.

16. **Rule 2** of the Constitution (Protection of Fundamental Rights and Freedoms) Practise and Procedure Rules, 2013 (hereinafter referred to as “*the Rules*”) defines the name ‘*respondent*’ to mean:-

“a person who is alleged to have denied, violated or infringed, or threatened to deny, violate or infringe a right to fundamental freedoms.”

Rule 5 (a) states that:

“Where a petitioner is in doubt as to the person from whom redress should be sought, the petitioner may join two or more respondents in order that the question as to which of the respondent is liable, and to what, extent, may be determined as between all parties.

It is clearly stated under **Rule 5 (b)** that:-

“A petition shall not be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every proceeding deal with the matter in dispute.”

17. Under Rule 5 (d) the Court at any stage of the proceedings (either upon or without the application of either party) may order the name of a party improperly joined be struck out and that the name of any person who ought to have been joined or whose presence before the Court may be necessary be added to enable the Court adjudicate upon and settle the matter at hand.

From the definition of the term “Respondent” set out above, it is clear that any person can be joined as a respondent as long as there is an allegation that the person has infringed or threatens to infringe the Petitioner’s rights and/or fundamental freedoms.

Section 18 (1) of the National Land Commission Act (hereinafter referred to as the ‘*Commission Act*’) states as follows:-

“The Commission shall, in consultation and co-operation with the national and county governments, establish county land management boards for purposes of managing public land.”

18. The law therefore places that duty squarely upon the Commission, the national as well as the county governments for purposes of establishing the Boards. The Petitioner on the other hand contends that her rights in respect to the appointment into the Board were violated by the Respondents. The County Government of Vihiga cannot therefore be divorced from such proceedings in this clear calling of the law. It then becomes the duty of the Court to make a determination as to whether or not such party is liable for the alleged violations. The contention that the County Government of Vihiga has been wrongly enjoined as a Respondent is therefore rejected. I do find that it is properly before Court as a party against whom claims are made regarding infringement of the Petitioner’s fundamental rights since the County government is under a clear duty in constituting and co-operating with both the Commission and the National government in establishing the Boards. For now it matters not whether the said allegations will stand the test of interrogation.

19. On the issue of the interested party, **Rule 2** defines such as follows:-

“A person or entity that has an identifiable stake or legal interest or duty in the proceedings before the court but is not a party to the proceedings or may not be directly involved in the litigation.”

It can be deduced that an interested party as opposed to an *amicus curiae* or a friend of the Court may not be wholly indifferent to the outcome of the proceedings in question. It is a party with an

identifiable stake or legal interest in the proceedings and as such might be wholly non-partisan. As opposed to a Respondent, an interested party may move the Court on its own volition to be made a party to the proceedings upon demonstration of a stake or legal interest.

A Respondent is however sued on allegations of violation or threats thereof of the Petitioner's rights. The Court, as aforesaid, reserves the right to bring in a party at anytime as a Respondent, an interested party or even an *amicus curiae*.

20. In the Petition, the Petitioner has not made any specific allegations that the Commission 'denied, violated, infringed, or threatened to deny, violate or infringe' any of her rights or fundamental freedoms. Instead the Petitioner contends it is the Assembly which usurped the powers of the Commission by taking out the mandate of recruiting Board Members. Be that as it may, Section 18 (6) of the Commission Act gives the Assembly a specific role in the recruitment process, which role we will deal with hereinbelow. Having not tendered any allegation against the Commission, the Petitioner was within her rights to bring in the Commission as an interested party since the duty to establish the land boards is jointly vested upon the Commission and other entities. I do believe that the Petitioner so wanted to bring the Commission as an interested party in the proceedings in full glare of her claim at hand and that position ought to be respected. Likewise, that contention equally fails.

The role of the Assembly in the approval proceedings.

21. **Section 18** of the Commission Act deals with the establishment and composition of County Land Management Boards. For purposes of clarity, I will reproduce the entire section as follows:-

1. ***The Commission shall, in consultation and co-operation with the national and county governments, establish county land management boards for purposes of managing public land.***

(2) A county land management board shall comprise—

(a) not less than three and not more than seven members appointed by the Commission; and

(b) a physical planner or a surveyor who shall be nominated by the county executive member and appointed by the governor.

3. ***A member of the board, unless ex officio, shall be appointed for a single term of five years and shall not be eligible for re-appointment.***

4. ***The chairperson of the board shall be elected by the members in their first sitting.***

5. ***The secretary to the board shall be appointed by the Commission.***

6. ***The appointment of the members shall be approved by the county assembly and shall take into account the national values referred to in Article 10 and Article 232 of the Constitution and shall reflect gender equity and ethnic diversity within that county.***

(7) The chairperson, members and the secretary of the board shall, before assuming office, make and subscribe, before a judge, to the oath or affirmation set out in the Third Schedule.

(8) In the discharge of their functions, the boards shall comply with the regulations made by the Commission under this Act.

(9) The boards shall—

(a) subject to the physical planning and survey requirements, process applications for allocation of land, change and extension of user, subdivision of public land and renewal of leases; and

(b) perform any other functions assigned by the Commission or by any other written law.

22. Under **sub-section (6)**, the role of the Assembly is clearly given as ‘**to approve the appointment of the Board members**’. And, in doing so, the Assembly is to take into account the national values under **Articles 10 and 232** of the Constitution and shall also endeavour to reflect gender equity and ethnic diversity within that County. It is hence clear that the Assembly is not interested in the process towards the nomination of the Board Members for only comes in during the approval proceedings and with a clear mandate towards the finalisation of the appointment process. The Assembly, in the absence of its own statute guiding the process of approval of the nominee rightly and pursuant to **Section 8(2) of the County Governments Act** relied on the Public Appointments (Parliamentary Approval) Act, Chapter 136 of the Laws of Kenya (hereinafter referred to as ‘**the Approval Act**’). Whereas **Section 6** of the Approval Act provides for the process of approval or vetting, **Section 7** thereof provides for the issues for consideration by the Assembly in relation to any nomination. It is worth reproducing the said twin sections of the Approval Act and I do so as under:-

“6. Approval hearing:

1. *Upon receipt of a notification of appointment, the Clerk shall invite the Committee to hold an approval hearing.*
2. *The Committee shall determine the time and place for the holding of the approval hearing and shall inform the Clerk.*
3. *The Clerk shall notify a candidate of the time and place for the holding of an approval hearing.*
4. *The Committee shall notify the public of the time and place for holding an approval hearing at least seven day prior to the hearing.*
5. *Subject to this Act, all Committee proceedings on public appointments shall be open and transparent.*
6. *Despite subsection (5), a Committee may, on its own motion or on the application of a candidate or any other concerned person, determine that the whole or part of its sittings shall be held in camera.*
7. *An approval hearing shall focus on a candidate’s academic credentials, professional training and experience, personal integrity and background.*
8. *The criteria specified in the Schedule shall be used by a Committee during an approval hearing for the purposes of vetting a candidate.*
9. *Any person may, prior to the approval hearing, and by written statement on oath, provide the Clerk with evidence contesting the suitability of a candidate to hold the office to which the candidate has been nominated.*
10. *A candidate may, at any time, by notice in writing addressed to the Clerk, withdraw from the approval process and the candidate’s nomination shall thereupon lapse.*

7. Issues for consideration.

The issues for consideration by the relevant House of Parliament in relation to any nomination shall be—

- a. *the procedure used to arrive at the nominee;*
- 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 abilities, experience and qualities meet the needs of the body to which nomination is being made.”*

23. Pursuant to **Section 6 (4)** of the Approval Act, the Assembly informed the members of the public through the print media and scheduled the hearing in respect of the Petitioner on 31/10/2014 at Emuhaya Church of God. It also called all the members to avail several original documents during

the hearing. I have perused the Petitioner's List of Documents and seen the Report of the Committee on Lands, Housing and Urban Planning on the vetting of the nominees to the Land Board of Vihiga County. Though the same is not signed, it is not controverted in anyway by the Respondents and its contents are corroborated by the Hamsard. The Report gives the background of the matter and sets out under **3.0** how the vetting process was undertaken. The Committee relied on the provisions of the Approval Act aforesaid and carried out the process from 30th October, 2014 to 3rd November, 2014. I have also seen how each of the nominees was vetted and the considerations taken into account.

24. When the report was eventually presented to the Assembly, the same was subjected to intense debate and eventually put to a vote and effectively adopted with amendments by deleting the Vihiga County Government and replacing it with the National Lands Commission.

25. I have carefully addressed my mind to the requirements of the Approval Act and the Commission Act in respect to the approval proceedings and noted that the Assembly is required to comply with all the requirements in Section 7 of the Approval Act which includes a consideration of the procedure used to arrive at the nominee, the suitability of the nominee for the appointment and further to relooking at any constitutional or statutory requirements relating to the office. The effect thereof is that a nominee being vetted is effectively taken through the entire process which led to the nomination. This is buttressed by the Questionnaire in the Schedule of the Approval Act. That explains why the Petitioner contends that when she appeared before the Committee of the Assembly she was instead re-interviewed and not vetted as required in law. I am therefore unable to find that the Assembly conducted an interview upon the Petitioner but that it carried out its mandate under the law. It carried out the approval proceedings which its constitutionality shall be analysed later in this judgment. I have also noted that when the report was adopted by the Assembly, it was amended with the mandate to appoint the other Board members being rightly bestowed upon the Commission and not on the County Government of Vihiga.

Whether the Petitioner's rights were violated as alleged or otherwise.

26. The main contention by the Petitioner is that though she had done well in the interview and the proceedings before the Committee, she was not approved for appointment on grounds that that she was married in Mumias even though she came from Emuhaya and as she would not effectively represent the interests of the people of Emuhaya.

She sees this as discriminatory on account of her marital status and given that the other nominees were not subjected to such a standard as indeed their marital status did not come up at all during the approval proceedings and that others do work and stay away from the Vihiga County just like the Petitioner.

27. **Article 27** of the Constitution enshrines the right to equality and freedom from discrimination in the following terms:-

"27 (1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.

(3) Women and men have the right to equal treatment, Including the right to equal opportunities in political, economic, cultural and social spheres.

(4) The State shall not discriminate directly or indirectly Against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

(5) A person shall not discriminate directly or indirectly Against another person on any of the grounds specified or contemplated in clause (4).

(6) To give full effect to the realisation of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.

(7) Any measure taken under clause (6) shall adequately Provide for any benefits to be on the basis of genuine need.

(8) In addition to the measures contemplated in clause (6), the State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender.”

28.The Supreme Court in its majority opinion in Advisory Opinion No. 2 of 2012 had the following to say on gender representation.

“47. This court is fully cognisant of the distinct social imperfection which led to the adoption of Articles 27 (8) and 81 (b) of the Constitution; that in elective or other public

bodies, the participation of women has, for decades, been held at bare nominal levels, on account of practises, or gender indifferent laws, policies and regulations. This presents itself as a manifestation of historically unequal point relations between men and women in Kenyan SocietyThus, the Constitution sets out to redress such abberations, not just throughff affirmative action provisions such as those in Articles

27 and 81 but also by way of a detailed and robust Bill of Rights, as well as a set of ‘National values and principles of governance (Article 10).”

29.**But what is discrimination?**

A three-judge bench **in Rose Wangui Mambo & 2 others vs. Limuru County Club & 17 others (2014) e KLR** addressed itself to this aspect and in borrowing from the case of **Peter K. Waweru vs. Republic (2006) e KLR** defined discrimination as follows:-

““...Discrimination means affording different treatment to different personsattributable wholly or mainly to their descriptions by...sex whereby persons of one such description are subjected to...restrictions to which persons of another description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description...Discrimination also means unfair treatment or denial of normal privileges to persons because of their race, age, sex...a failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured”

30.The Court went ahead and considered Article 1 of the **Convention on the Elimination of All Forms of Discrimination Against Women, 1979 (CEDAW)** which defines discriminationb against women in the following terms:-

"discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.”

31.The Court went further to express itself on the following manner on the subject:-

93. *In Willis v The United Kingdom, No. 36042/97, ECHR 2002 – IV and Okpisz v Germany, No. 59140/00, 25th October 2005*, the European Court of Human Rights observed that discrimination means treating differently, without any objective and reasonable justification, persons in relevantly similar situations.

94. The principle of equality and non-discrimination has its underpinnings in various International conventions which now form part of our laws by dint of **Article 2(5) and (2(6))**. The **United Nations Universal Declaration on Human Rights (UDHR)** provides at **Article 1** that **“All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.”** Article 7 of the UDHR further states that, **“All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.”**

95. The preamble to the **Convention on Elimination of All Forms of Discrimination Against Women, 1979 (CEDAW)** captures the effect of discriminatory practices against women in the following terms;

“[D]iscrimination against women violates the principles of equality of rights and respect for human dignity, is an obstacle to the participation of women, on equal terms with men, in the political, social, economic and cultural life of their countries, hampers the growth of the prosperity of society and the family and makes more difficult the full development of the potentialities of women in the service of their countries and of humanity.”

96. Under **Article 2** of CEDAW, States parties bind themselves to condemn discrimination against women in all its forms, and to pursue by all appropriate means a policy of eliminating discrimination against women. To this end, they bind themselves to among other things; **‘take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise’** and to **‘take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.’**

97. In **CEDAW General Recommendations Nos. 19 and 20**, adopted at the Eleventh Session, 1992 (contained in Document A/47/38) at No. 9;

“It is emphasized, however, that discrimination under the Convention is not restricted to action by or on behalf of Governments (see articles 2 (e), 2 (f) and 5). For example, under article 2 (e) the Convention calls on States parties to take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise. Under general international law and specific human rights covenants, States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation.”

98. **Article 2** of the **African Charter on Human and Peoples’ Rights** stipulates that every individual is entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the Charter without distinction of any kind such as race, ethnic group, colour, or sex. **Article 28** goes further to state that; **“Every individual shall have the duty to respect and consider his fellow beings without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance.”**

99. It is thus evident that both under the Constitution of Kenya and international and regional treaties to which Kenya is a party, the principle of equality of the sexes is recognized, and discrimination

on any basis prohibited.”

32. Anyara Emukule, J in **John Muraya Mwangi & 495 others & 6 others vs. Minister for State for Provincial Administration and Internal Security & 4 others (2014) e KLR** also addressed himself on the issue of discrimination as follows:-

40. In the American case of **RIGNER v STATE OF TEXAS (1940) 310 US 141**, the court held -

“The Fourteenth Amendment enjoins equal protection of the laws, and laws are not abstract propositions. They do not relate to abstract units, A,B, and C, but are expressions of policy arising out of specific difficulties addressed to the attainment of specific ends by use of specific remedies. The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same.”

41. In the South African Case of **PRINSLOO Vs. VAN DER LINDE**

[1998] 1 LRC 173-

“If each and every differentiation made in terms of the law amounted to unequal treatment that had to be justified by means of resort to s 33, or else constituted discrimination which had to be shown not to be unfair, the courts would be called upon to review the justifiability or fairness of just about the whole legislative program and almost all executive conduct..... the courts would be compelled to review the reasonableness or the fairness of every classification of rights, duties, privileges, immunities, benefits or disadvantages flowing from any law. Accordingly, it is necessary to identify the criteria that separate legitimate differentiation from differentiation that has crossed the border of constitutional impermissibility and is unequal or discriminatory “in the constitutional sense” Taking as comprehensive a view as possible of the way equality is treated in s8, we would suggest that it deals with differentiation in basically two ways: differentiation which does not involve unfair discrimination and differentiation which does not involve unfair discrimination.”

42. The court then proceeded to describe what amounts to unfair discrimination as follows-

“It must be accepted that, in order to govern a modern country efficiently and to harmonise the interests of all its peoples for the common good, it is essential to regulate the affairs of its inhabitants extensively. It is impossible to do so without differentiation and without classifications which treat people differently and which impact on people differently..... Differentiation which falls into this category very rarely constitutes unfair discrimination in respect of persons subject to such regulation, without the addition of a further element.... It is convenient, for descriptive purposes, to refer to the differentiation presently under discussion as “mere differentiation”. In regard to mere differentiation, the constitutional state is expected to act in a rational manner. It should not regulate in an arbitrary manner or manifest “naked preferences” that serve no legitimate governmental purpose, for that would be inconsistent with the rule of law and the fundamental premises of the constitutional state. For the purpose of this aspect of equality is, therefore, to ensure that the state is bound to function in a rational manner....Accordingly, before it can be said that mere differentiation infringes s8, it must be established that there is no rational relationship between the differentiation in question and the governmental purpose which is proffered to validate it. In the absence of such rational relationship, the differentiation would infringe s 8. But while the existence of such a rational relationship is a necessary condition for the differentiation not to

infringe s 8, it is not a sufficient condition; for the differentiation might still constitute unfair discrimination if that further element.... is present.”

43. In the Kenya case of **FEDERATION OF WOMEN LAWYERS KENYA (FIDA-K) & 5 others v ATTORNEY GENERAL & ANOTHER [2011] eKLR**, the Court of Appeal stated-

“On the other hand, the requirement of equal protection of the law does not mean that all laws passed by a legislature must apply universally to all persons and that the law so passed cannot create differences as to the persons to whom they apply and the territorial limit within which they are enforced. We are aware that individuals in any society differ in many respects such as age, ability, education, height, size, colour, wealth, occupation, race and religion. In our view any law made, must of necessity be clear as to the making of the choice and difference as regards its application in terms of persons, time and territory. Since the constitution can create differences, the question is whether these differences are constitutional. If the basis of the difference has a reasonable connection with the object intended to be achieved therefore the law which contains such a provision is constitutional and valid. On the other hand, if there is no such relationship, the difference is stigmatized as discriminatory and the provision can be rightly said to be repugnant to justice and therefore invalid.

The purpose of the Constitution may be either the elimination of a public mischief or the achievement of some positive public good. It can therefore be stated that discrimination is the essence of classification and that equality is violated if it rests on unreasonable basis. The concept of equality has an inherent limitation arising from the very nature of the constitutional guarantee. Equality is among equals and classification is therefore to be founded on substantial differences which distinguish persons grouped together from those left out of the group and such differential attributes must bear a just and rational relation to the object sought to be achieved. There is also no denial of equality of opportunity unless the person who complains of discrimination is equally suited with the person or persons who allege to have been favoured.”

44. Thus the law on equality does not mean that everyone should be treated the same way, that is, the substantive law should be the same for all persons, or that the law should be applied to all persons equally without discrimination as this would not only be unreasonable but unjust.

45. The provision is therefore violated by a difference in treatment between persons who are in comparable situations which is neither objective nor reasonable. Where such differential treatment is on account of factual differences with a legitimate aim taking into account the principles of legality proportionality and democratic practice, then the derogation from the right is deemed legitimate.”

33.I have carefully perused the report by the Committee on the vetting exercise of the nominees. It is worth-noting that the Committee identified the ages and marital status of the nominees who appeared before it. It also identified their diverse experiences and in some cases where they resided. For instance Evans Asena who hailed from Sabatia sub-county was the serving Deputy Director of Agriculture in Kakamega County; Erick Madete from Hamisi sub-county was a contractor in Nairobi and resided thereat; the Petitioner was from Emuhaya sub-county and the Funds Account Manager in Butula Constituency married and residing in Mumias within Kakamega County. In some instances, the Committee did not identify where the nominee resided. This was the case with Hilary Keverenge who hailed from Sabatia sub-county and was working with Intrahead which was an organisation dealing with reproductive health as well as Francis Ndooli from Vihiga sub-county who had previously worked with various government ministries.

34. I have equally noted that none of the nominees recommended by the Committee for appointment and eventually approved by the Assembly were so recommended and approved on the considerations of their marital status and their places of residence except the Petitioner herein who on those considerations was not approved for the appointment. Whereas the Committee had the mandate to consider various issues as so required in law, it was incumbent upon it to treat all the nominee equally especially on the issues of marital status, residences and their ability to discharge their duties for those who were not residing within the County; if those issues were to form the basis of the approval of the nominees. It is therefore open that the Petitioner was treated differently from the other nominees who were all in comparable situations and without any reasonableness or objectivity. When the report was laid before the Assembly, the same was debated and eventually approved in line with the Committee's recommendations. This was after the Assembly put the report to a vote. On the recommendation on the part of the Petitioner, out of the 31 honourable members present 3 abstained from voting, 12 opposed the recommendation and 16 stood for the recommendation. The debate in the Assembly provided an opportunity which the Assembly was to revisit the relevant constitutional provisions vis-a-vis the recommendations made on the part of the Petitioner. The Hansard is quiet that the Assembly directed any efforts on the Constitution of Kenya which the people of Kenya overwhelmingly gave unto themselves.

35. The recommendation by the Committee and the subsequent adoption thereof by the Assembly which is the subject of this Petition before Court therefore has a discriminatory effect as it tends to exclude the appointment of women who though competent and were born within the Vihiga County but married outside of the County from serving in any public appointment within the Vihiga County. That is clearly antithetical to the provisions of **clauses (3) and (5) of Article 27** which stipulates that:-

“(3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.

(5) A person shall not discriminate directly or indirectly Against another person on any of the grounds specified or contemplated in clause (4).

36. I therefore find and hold that the recommendation of the Committee and the subsequent adoption of the said recommendation by the Assembly in rejecting the approval of the Petitioner herein to the appointment as a Member of the Board on grounds of her marital status as discriminatory and offends Articles 27 and 28 of the Constitution.

Remedies:-

37. The next issue for consideration relates to the appropriate reliefs to be granted to the Petitioner herein in light of the Court's findings hereinabove. **Article 23** mandates this Court to grant appropriate reliefs in redressing violations under **Article 22** to include declaration of rights, injunctions, conservatory orders, compensation, judicial review orders or a declaration of invalidity of any law that denies, violates, infringes or threatens a right or fundamental freedom.

38. Whereas the Petitioner has prayed for an order that the Assembly approves her name and forwards the same to the interested party for gazettelement as a member of the Board, the Court learnt during the hearing of the Petition that the Respondents though ordered not to take any action towards re-advertising or recruiting any other person to fill in the position which the Petitioner was to fill, the Commission had on 08/01/2015 carried out a re-advertisement to fill the position among others. It remains not clear if the Commission was served with the orders of the Court made on 02/12/2014 and the Court equally remains in the dark as to how far that process has gone.

Further, the Petitioner did not pursue the aspect of any alleged disobedience of the orders of the Court. Going by the proposals on the time-lines by the Assembly that the Board be fully constituted by 30/01/2015 and that the re-advertisement was carried out on 8/01/2015, it is highly probable that the position is filled by now. It would therefore not serve any meaningful purpose to grant the

relief as sought by the Petitioner and in the circumstances of this case.

39. As already found out by the Court, the Petitioner's rights were violated. It remains conspicuously clear that the purpose of the right against discrimination on grounds of *inter alia* marital status or sex is to preserve human dignity which in itself is a right recognised under **Article 28** of the Constitution. Courts have so far taken the trend of compensating the victims of such violations. In the case of **Samura Engineering Limited & 10 Others vs. Kenya Revenue Authority (2012) eKLR** the Court upon finding that the Petitioner's right to privacy had been violated proceeded to award Kshs. 1.2 million as compensation. In the case of **VMK VS. CUEA (2013) eKLR**, the Court made an award of Ksh. 5,000,000/= being exemplary damages for the discrimination of a Petitioner on the basis of her HIV/AIDS status and for gross violation of her human dignity.

40. In **Rookes vs. Benard (1964) AC 1129**, Lord Derlin, CJ discussing exemplary damages stated as follows:-

“that first it is awarded against tortious intrusions or trespasses that are profit motivated i.e. wrongful landlords evictors of their tenants or secondly where there is oppressive conduct by government organs and thirdly where the act of the defendants has caused distress and intolerable anxiety and to be awarded as a punishment.”

In the case of **David Musinga t/a Musinga & Co. Advocates vs. Nation Newspapers Limited (2006) eKLR**, the Court in awarding the Plaintiff Kshs. 10,000,000/= damages for defamation stated that:-

“The court has to look at the whole conduct of the parties before action, after action and in compensatory damages such sum, as will compensate him for the wrong he has suffered.

An award of damages must cover injured feelings, the anxiety undergone during the court trial.”

41. In this case, the Petitioner was duly interviewed and was successful. She was later on subjected to approval proceedings and again the Committee found nothing to disapprove her except on considerations which have been found to be unconstitutional. The matter was debated in the Assembly and thereafter the Petitioner who thought that justice would be done had no option but to come to Court. Orders were issued but again the process went on and now the Petitioner appears to be utterly helpless. In view of the foregone and given that the grounds for her disapproval were purely discriminatory on her marital status, her feelings were truly hurt, humiliated and ultimately portrayed as a lesser being who no longer has any meaningful purpose and worth within Vihiga County. She so missed the opportunity to serve her people and build her career further. All that was on the sole reason that she was married in the neighbouring Kakamega County. On the other hand, the Respondents ought to remain clear of the provisions of **Article 3 (1)** of the Constitution to the effect that:-

“Every person has an obligation to respect, uphold and defend this constitution.”

42. Further, the Respondents ought to remain alive to the provision of **Article 2 (1)** thus:-

“This Constitution is the supreme law of the Republic and binds all persons and all state organs at both levels of government.”

43. On the above considerations and the failure by the Assembly to confront its despicable conduct in deliberately avoiding to abide by the Constitution, this Court is of the considered view that this is a perfect case for an award of damages for the breach of the Petitioner's rights aforesaid.

44. Consequently, this Court now makes the following orders:-

- a. *A declaration is hereby issued that the recommendation of the Committee on Land, Housing and Urban Planning which was eventually approved by the Vihiga County Assembly in not approving the Petitioner herein, MARY MWAKI MASINDE, for the appointment as a Member of the Vihiga County Land Management Board on the grounds that though she was born in Emuhaya sub-county, she is married, works and stays in Mumias and thus cannot represent the interests of the people of Emuhaya on the Board adequately; is contrary to Articles 27 and 28 of the Constitution hence unconstitutional null and void and is hereby quashed.*
- b. *An award of Kshs. 3,000,000/= is hereby made as compensation in respect to the discrimination of the Petitioner on the basis of her marital status and violation of her human dignity. This award shall be borne by the Vihiga County Assembly, the second Respondent herein;*
- c. *Costs shall also be borne by the second Respondent herein.*

Orders accordingly.

DELIVERED, DATED and SIGNED this 9th day of July, 2015

A. C. MRIMA

JUDGE