



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**JUDICIAL REVIEW APPLICATION NO. 271 OF 2014**

**IN THE MATTER OF: AN APPLICATION SEEKING LEAVE TO INSTITUTE JUDICIAL  
REVIEW PROCEEDINGS THE NATURE OF ORDERS OF CERTIORARI AND  
PROHIBITION**

**AND**

**IN THE MATTER OF: THE COUNTY GOVERNMENT OF WAJIR STATUTE**

**AND**

**IN THE MATTER OF: THE LAW REFORM ACT, CHAPTER 26 LAWS OF KENYA**

**AND**

**THE COUNTY GOVERNMENT ACT NO. 17 OF 2012**

**AND**

**IN THE MATTER OF THE COUNTY PUBLIC SERVICE BOARD OF WAJIR**

**AND**

**THE MATTER OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF:**

**REPUBLIC.....APPLICANT**

**EX-PARTE (HULBAI GEDI ABDILLE)**

**-VERSUS-**

**THE SECRETARY COUNTY PUBLIC BOARD.....1<sup>ST</sup> RESPONDENT**

**THE SECRETARY,**

**JUDGEMENT**

**Introduction**

1. By a Notice of Motion dated 16<sup>th</sup> July, 2014 the *ex parte* applicant herein, **Hulbai Gedi Abdille**, seeks the following orders:

1. **AN ORDER OF CERTIORARI To remove to the High Court for purposes of quashing the decision to appoint sub county administrators deputy sub county administrators and the non advertised positions of deputy director sub county admin units and assistant director sub county admin units pursuant to a list of the officers appointed on 9<sup>th</sup> June 2014 and published on 12<sup>th</sup> June 2014.**

2. **AN ORDER OF PROHIBITION o prohibit the 2<sup>nd</sup> respondent from implementing and or gazetting the decision of recruitment/appointment of 9<sup>th</sup> June 2014 and subsequently carrying out such unlawful and unprocedural recruitment exercises in future without any legal justification.**

3. **Any other order that the Honourable court may deem fit and just to grant.**

4. **The costs of this application are provided for.**

**Applicant's Case**

2. The application was based on the following grounds:

a. **THAT the respondents arrived at their decision they did not comply with the qualification requirements highlighted in the vacancy advertisement and ended up recruiting an individual with inferior qualifications compared to that of the applicant.**

b. **THAT the respondents failed to declare and advertise all the positions available and ended recruiting staff for the other positions which were listed and other positions carried out in the advertisement.**

c. **THAT the respondents have further recruited persons who were not publicly shortlisted in the dailies and never attended the interview because of high level connection with the public service board Wajir.**

d. **The applicant have a constitutional right to an expeditious, efficient, lawful, reasonable administrative action that adheres to the principles procedural fairness, including a right to be given reasons for an act that is likely to affect them adversely.**

e. **The decision was a blatant abridgment of the claimant's constitutional right to fair procedural practices and fair administrative procedure.**

f. **The respondents acted unlawfully in arriving at its decision carried in a list of appointment dated 9<sup>th</sup> June 2014 and circulation on 12<sup>th</sup> June 2014 and a subsequent appointing of sub county administrators deputy sub county administrators and deputy director sub county admin units and assistant directors admin units since the said appointments are irregular unfair and unprocedural.**

g. **The said decision on the part of the respondents was made in transgression of the rules of natural justice in that it never afforded the applicant an opportunity to be conducted in a**

**fair, competitive and orderly manner before the decision was made.**

**h. The said decision is an abuse of the power granted to the respondent by the enabling statute as it was not made in conformity with the law.**

**i. The said decision was arrived at in a bias way which picked candidate based on their connections and tribal affiliation vis-à-vis merit and qualification.**

3. The application was supported by verifying and supplementary affidavits sworn by the applicant on 10<sup>th</sup> July, 2014 and 1<sup>st</sup> December, 2014 respectively.

4. According to the applicant, she was a professionally trained teacher with a degree in BED/ARTS and the Head Teacher at Township Primary School Wajir County with a teaching career for over 20 years. On the 24<sup>th</sup> July, 2013 she came across an advertisement on the *Daily Nation* newspaper whereby the County Government of Wajir wished to recruit competent and qualified persons to fill vacant positions as per the Constitution of Kenya 2010, Cap 11 section 45, 50 and 51 of the **County Government Act** No. 17 of 2012 (hereinafter referred to as “the Act”).

5. After perusing the said advertisement she got interested in two positions namely sub county administrators and deputy sub-county administrators and decided to apply for the sub county administrators which had 6 vacant posts and avoided the deputy sub county administrators which had only 4 vacant posts since, according to her, she met all the qualifications outlined. On the 29<sup>th</sup> April 2014, she was amongst the candidates shortlisted for the position of sub county administrators and was invited for an interview on the 14<sup>th</sup> day of May 2014 at 10.00 am. She was however surprised from the list of officers appointed to learn that she had not been included in the list and no communication was relayed to her to date. She was however shocked that despite the respondents having declared and advertised only 4 vacant positions for sub county administrators they actually recruited 8 officers to fill in the positions. The Applicant averred that the person picked as a sub county administrator for Wajir East Sub County was junior to her in relation to years of service as a teacher.

6. She disclosed that the respondent in a bid to circumvent the transparent process, went ahead to assign positions that were never advertised and recruited persons who were never interviewed or shortlisted for any positions such as that of Deputy Director sub county one **Shallow Adan Ali**.

7. In the Applicant’s view, the conduct and action of the respondents was a deliberate effort to lock her from the County Government since he come from the minority Somali clan of Wajir hence the action and conduct of the respondents in the recruitment exercise is a blatant contravention of the principles of natural justice and that the same should not be allowed to stand.

8. The Applicant contended based on his counsel’s advice that the issue of gender equality has been abused since out of the 24 shortlisted applicants for the position of the sub county administrators in the entire Wajir County and invited for interviews on the 14<sup>th</sup>, 15<sup>th</sup> & 16<sup>th</sup> May 2014 the only lady, the applicant, was left out of any administrative position in the entire county.

9. It was therefore the Applicant’s case that the said decision relating to the outcome of the recruitment exercise held in Wajir County was made in blatant transgression of the established procedures and should be removed into this honourable court for quashing and that an order of prohibition do issue to stop the respondent from recognizing, gazetting and posting the officer appointed to the sub counties and administrative units Wajir County.

10. The Applicant maintained that the 2<sup>nd</sup> respondent was properly sued on behalf of the Wajir County Government and as he has deposed he was the in charge of the public service of the county government an equivalent of a cabinet secretary to the county government. As the person in charge of the public service of the County Government, the applicant contended that he ought not to have watched an irregularity in the appointment process and received staff who had been unlawfully recruited.

11. It was therefore the applicant's contention that this judicial review application is properly before court and the same should be entertained as nothing stops the court from intervening in the illegal and unconstitutional actions of the respondents.

12. It was her case that the recruitment process was highly discriminative, full of nepotism and that most of the recruits were absorbed on the basis of being related to the officials of the respondents and that this was the key basis for not advertising key positions under challenged herein. To her, the minutes dated June 6<sup>th</sup> 2014 was afterthought created to defeat the intention of the application before court and an effort to cover up an irregularity already committed. Her position was that the respondents failed, avoided and neglected to advertise the positions of a deputy director and assistant deputy directors in a deliberate move to bar her from applying and being considered for the same.

13. Based on legal advice the applicant averred that both the respondents should be held jointly and severally liable for their actions and that the resultant decision should be quashed and her application be allowed with costs to her. It was submitted on behalf of the applicant that since the person appointed to the position of sub county administrator as opposed to the applicant had never held a position of a Head Teacher but was first employed as a P1 Teacher in 2006 and therefore his appointment could only be linked to corruption, tribalism, nepotism and other malpractices in the selection process.

14. It was further submitted that the Respondents having emerged with positions which were never advertised such as Deputy Director Sub County Administrative Units and Assistant Director rendered the recruitment process flawed. In support of this submission the applicant relied on sections 66 and 68 of the **County Governments Act** No. 17 of 2012. It was therefore submitted that the Respondent's action contravened Article 10 of the Constitution which calls for non-discrimination, human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised. According to the applicant the principle of gender equality was not considered since 6 male persons were appointed without a single female. It was the applicant's view that there was no explanation why a person whose performance was ranked below her was appointed and she was left out.

15. Since no communication was given to the applicant, it was the applicant's position that whereas an appeal is available to the applicant, she was compelled to seek the remedy of judicial review since she was challenging the process. The applicant relied on **Republic vs. Chairperson Business Premises Rent Tribunal exp Ibrahim Sheikh Abdulla & 2 Others [2015] eKLR** for the holding that there is no requirement that an applicant for judicial review must exhaust all other available remedies.

16. According to the applicant the respondent's action was contrary to Article 174(e) of the Constitution which provides that the objects of the devolution of government are, inter alia, to protect and promote the interests and rights of minorities, marginalised communities. The same was also contrary to Article 232 thereof which sets out the values and principles of public service which include accountability for administrative acts and representation of Kenya's diverse communities as well as affording adequate and equal opportunities for appointments.

17. The applicant therefore sought an order quashing the decision to appoint Sub County Administrators, Deputy Sub County Administrators and the non advertised positions of Deputy Director Sub County Administrative Units and Assistant Director County Administrative Units as done on 9<sup>th</sup> June 2014. In support of her position the applicant relied on **John Mining Temoi & Another vs. Governor of Bungoma County & 17 Others [2014] eKLR**.

### **1<sup>st</sup> Respondent's Case**

18. In response to the application, the 1<sup>st</sup> Respondent, **Shukri Alasow Mohamed**, filed a replying affidavit sworn on 14<sup>th</sup> August, 2014.

19. According to him, the proceedings were premature and defective as the ex parte Applicant sought to challenge the decisions made by 1<sup>st</sup> Respondent in exercise of its mandate under Section 63 of the

**County Governments Act** and that as the Applicant had not appealed to the Public Service Commission as required under Section 77 of the **County Government Act** before filing proceedings before this Court, these proceedings ought to be struck out with costs to the Respondents.

20. According to the 1<sup>st</sup> Respondent, on 24<sup>th</sup> July, 2013 County Public Service Board of Wajir (hereinafter referred to as “the Board”) placed advertisements in the local dailies advertising the positions for the sub-County Administrators and the Deputy Sub-county Administrators. He explained that the Sub County Administers and Deputy Sub-county Administrators are responsible for the management and supervision of the general administrative functions at the sub-county unit; developing policies and plans, ensuring effective service delivery, co-co-ordinating developmental activities, and exercise of any functions and powers delegated by the County Public Service Board and that their offices are established under Section 50 of the **County Government Act** (hereinafter referred to as “the Act”).

21. He disclosed that by a meeting held by the Board on 13<sup>th</sup> December 2013 it was agreed that the qualification and experience requirements would be adhered to strictly and Applicants who did not attach evidence of or establish their experience would not be considered. During the meeting it was established that there were a total of 142 Applicants for the 6 Sub-county Administrator positions whereafter 33 were short-listed and 47 Applicants who met the qualifications threshold were short listed for the positions of Deputy Sub County Administrators. Thereafter the Board published the short listed candidates for the County Administrators and Deputy Sub County Administrators and the schedule for the interviews and after the interview process, the board held a meeting on 6<sup>th</sup> June, 2014 where the score sheets for the interviews were tabled and discussed and the following resolutions made:

- i. The highest ranked interviewees in each sub-county would be selected for the positions of the sub-county Administrators and Deputy Sub-County Administrators save where other constitutional criteria to cater for the gender, disability, ethnic balancing and minorities were considered.
- ii. Wajir North and Wajir South sub counties would receive two Sub-County Administrators and 2 Deputy Sub County Administrators owing to the vast area of the two sub counties.
- iii. To establish an office at the County Headquarters to co-ordinate the activities of the sub-counties and, in the future, the wards to be manned by a Deputy Director in charge of Sub County Administration Units and 3 Assistant Directors in charge of sub county administration units.
- iv. The Deputy in charge of Sub County Administration Units and 3 Assistant Directors in Charge of Sub County Administration Units would be equivalent in rank to the Sub County Administrators and Deputy Sub County Administrators respectively.
- v. In order to save on time and resources, the Board decided to select the Deputy Director and Assistant Directors from the pool of candidates who had already interviewed for the positions of sub-county administrators and sub county administrators respectively in observance of Section 69 of the Act.

22. The 1<sup>st</sup> Respondent deposed that by letters dated 9<sup>th</sup> June, 2014 the Board forwarded appointment letters to the successful candidates as required by Section 67 of the Act and thereafter issued the appointees with letters of posting dated 17<sup>th</sup> June, 2014. He asserted that the board did not lower the qualification threshold as alleged as the selected candidates were all eminently qualified as confirmed by their testimonials.

23. He therefore believed that the Board complied with the letter and spirit of the Act and the Constitution of Kenya in the discharge of its constitutional mandate in the recruitment and appointment of the sub county administrators and Deputy Sub-county administrators. He denied that Board and the 2<sup>nd</sup> Respondent had discriminated against women as alleged or at all and was, to the contrary, one of the few counties in the region striving for gender equity in the appointment of women to various posts within the Wajir County Government.

## **2<sup>nd</sup> Respondent's Case**

24. The 2<sup>nd</sup> Respondent opposed the application vide a replying affidavit sworn by its secretary and Head of County Civil Service, **Abdirizak Sheikh**, on 8<sup>th</sup> August, 2014.

25. According to the deponent, the 1<sup>st</sup> Respondent is an independent entity free to carry out its mandate autonomously from the 2<sup>nd</sup> Respondent under the provisions of section 63 of the Act.

26. It was therefore contended that the Applicant was non-suited as against the 2<sup>nd</sup> Respondent as it did not play any role in the recruitment process and the subsequent appointment of the Sub-County Administrators and Deputy Sub-County Administrators hence this application should be struck out with costs.

27. To the 2<sup>nd</sup> Respondent, the proceedings herein were premature as the applicant had not appealed to the Public Service Commission as required under section 77 of the Act hence the application ought to be dismissed.

28. It was submitted on behalf of the Respondents that since under section 63 of the Act, the County Public Service Board has the power to make appointments to various offices in the County Public Service, the 1<sup>st</sup> Respondent is an independent entity free to carry out its mandate autonomously from the 2<sup>nd</sup> Respondent; and as the application seeks to challenge the 1<sup>st</sup> Respondent's exercise of statutory power, the applicant has no cause against the 2<sup>nd</sup> Respondent.

29. It was submitted that the Wajir County Public Service in the exercise of its mandate complied with the letter and spirit of the County Governments Act and the Constitution since the successful candidates appointed were highly qualified and competent to serve in the positions appointed. It was submitted that the said County Government adhered to the constitutional demand for gender equity and there was no discrimination.

30. It was submitted that since the complaint raised by the applicant fell within section 77(2) of the Act, as touched on issues of recruitment, selection and appointment and qualification of the sub county Administrators, the applicant should have appealed to the County Public Service Board before instituting these proceedings and relied on **Speaker of the National Assembly vs. Karume [1990-1994] EA 549** and **Nakuru County Human Rights Network vs. Nakuru County Government & Another [2014] eKLR**.

31. Based on **Kenya National Examination Council vs. Republic ex parte Geoffrey Njoroge Gathenji and 9 Others [1997] eKLR**, it was submitted that since the decision to appoint the Sub County and Deputy Sub County Administrators was within its statutory jurisdiction and mandate and was procedural, in so far as the application challenges the merits of the decision, it fell outside the ambit of judicial review and was hence baseless and without merit.

## **Determinations**

32. I have considered the application, the various affidavits filed in support of and in opposition to the application as well as the submissions filed.

33. It was contended that the failure to appoint the Applicant, who was the only female applicant shortlisted for the post of Sub County Administrator in the whole of Wajir County could only be linked to corruption, tribalism, nepotism and other malpractices in the recruitment process. The Respondents however contended that the appointments were based on qualification and experience and that a total of 143 applicants applied for the 6 Sub-County Administrators' positions out of which 17 were female and 126 were male. A total of 33 applicants were shortlisted. On the other hand 47 candidates were short-listed for the position of Deputy Sub-County Administrators and out of these 38 were male while 9 were

female. It was submitted that there were 6 Sub County Administrators' positions to be filled and that the *ex parte* applicant was the second best qualified interviewee in respect of Wajir East Sub County and it was unanimously decided that the top scorers in each sub county would be selected for the position of Sub County Administrator. From exhibit GAM-4, the minutes of the Board meeting held on 6<sup>th</sup> June, 2014, the Applicant scored 85.57 while one **Omar Daud** scored 90.57 and it was resolved that the latter be appointed to the said position. In fact from the applicant's own exhibit, it was this same person who was appointed to the said position. The applicant however contends that he was not as qualified as the applicant and that the decision to appoint him to the position was informed by corruption, tribalism, nepotism and other malpractices in the recruitment process.

34. At this stage it is important to revisit the parameters of judicial review jurisdiction. The said parameters were set out by the Court of Appeal in **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001** in which it was held that:

**“Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters...The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision.”**

35. In **Republic vs. Kenya Revenue Authority Ex parte Yaya Towers Limited [2008] eKLR** it was held that the remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision making process itself. It is important to remember in every case that the purpose of the remedy of judicial review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question. Unless that restriction on the power of the court is observed, the court will, under the guise of preventing abuse of power, be itself, guilty of usurpation of power. See ***Halsbury's Laws of England 4<sup>th</sup> Edition Vol (1)(1) Para 60.***

36. It must be remembered that judicial review is concerned not with private rights or the merits of the decision being challenged but with the decision making process. Its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected. See **R vs. Secretary of State for Education and Science ex parte Avon County Council (1991) 1 All ER 282, at P. 285.**

37. The broad grounds, though not exhaustive, on which the Court exercises its judicial review jurisdiction were restated in the Uganda case of **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300.** In that case the Court cited with approval **Council of Civil Unions vs. Minister for the Civil Service [1985] AC 2** and **An Application by Bukoba Gymkhana Club [1963] EA 478 at 479** and held:

**“In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety...Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality. It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission...Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards...Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or**

**to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision.”**

38. Therefore, in this application we are not concerned with the merits of the decision not to appoint the applicant to the position of Sub County Administrator unless it is shown that the failure to do so was as a result of the Respondents’ abuse of their powers in that they in so doing took into account irrelevant matters or failed to take into account relevant matters. If the Respondents took into account such factors as corruption, tribalism, nepotism and other malpractices in the recruitment process that would amount to considering irrelevant factors and would justify this Court in interfering in the said process. However apart from the bare averments by the applicant there is no evidence that the said appointment was laced by the aforesaid malpractices. The applicant contends that since she was the only female applicant shortlisted for the position, in line with the principles of gender equality she ought to have been handed the position automatically. Whereas, it may well be that this Court had it been the one conducting the said interviews may have considered the applicant’s application more favourably, that does not warrant this Court substituting its discretion for that of the Board unless it is proved to the satisfaction of the Court that in arriving at its decision the Board committed acts of illegality, irrationality and procedural impropriety. In **East African Community vs. Railways African Union (Kenya) And Others (No. 2) Civil Appeal No. 41 of 1974 [1974] EA 425**, it was held by the East African Court of Appeal that the onus lies on a person seeking the grant of a prerogative order to establish that it is essential for it to issue since these are not orders that are lightly made. Judicial review or prerogative writs as they were known in the past, it has been held are orders of serious nature and cannot and should not be granted lightly. They should only be granted where there are concrete grounds for their issuance. It is not enough to simply state that grounds for their issuance exist; there is a need to lay basis for alleging that there exist grounds which justify the grant of the said orders.

39. I associate myself with the holding in **Republic vs. Kenya Power & Lighting Company Limited & Another [2013] eKLR** to the effect that:

**“It is not enough for an applicant in judicial review proceedings to claim that a tribunal has acted illegally, unreasonably or in breach of rules of natural justice. The actual sins of a tribunal must be exhibited for judicial review remedies to be granted.”**

See also **Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69**.

40. I am not satisfied that the applicant’s allegations as to the basis upon which she was not appointed to the position she applied for are valid.

41. It was however the applicant’s case that whereas only 4 posts were advertised in respect of the position of Deputy Sub County Administrators, 8 appointments were in fact made to the said position. I have however reviewed the documents on record and it is apparent that only 7 appointments were actually made to the position though as will become apparent later in this judgement nothing turns on that discrepancy. It is noteworthy that no explanation has been proffered why the Board decided to appoint 7 persons to the said position as opposed to the advertised 4.

42. It was further contended that the Respondents proceeded to appoint persons to the positions of Deputy Director Sub County Administrative Units and Assistant Director County Administrative Units yet the said positions were never advertised and no interviews were conducted in respect thereof. That the said positions were never advertised and no specific interviews were conducted in respect thereof has not been denied. The Respondent’s justification for taking the said course is however based on the need to save on time and resources, in observance of Section 69 of the Act. Section 69 aforesaid which deals with re-designation of officers provides:

***(1) In selecting public officers for re-designation, the criteria for appointment as prescribed under this Part shall apply.***

**(2) A public officer shall not be re-designated to hold or act in a public office if—**

**(a) the office is not vacant;**

**(b) the public officer does not meet all the qualifications, except for experience at a lower grade in the relevant cadre, attached to the public office;**

**(c) the decision to re-designate the officer may disadvantage any public officer already serving in the relevant cadre; or**

**(d) the officer subject to re-designation has not consented to the re-designation.**

**(3) If a public officer is re-designated, the officer shall not in any way suffer reduction in remuneration.**

43. In my view section 69 of the Act only applies to officers of the County Government. It does not apply to applicants who have applied for positions and are yet to be absorbed in the County Government. In this case, it is not contended that those who were appointed to fill the positions of Deputy Director Sub County Administrative Units and Assistant Director County Administrative Units were already officers in the County Government. To the contrary the Board resolved that these positions be filled from the pool of candidates who had already been interviewed for the positions of sub-county administrators and deputy sub county administrators. If the Board intended to fill the said position it ought to have followed section 66 of the Act which provides:

***If a public office is to be filled, the County Public Service Board shall invite applications through advertisement and other modes of communication so as to reach as wide a population of potential applicants as possible and especially persons who for any reason have been or may be disadvantaged.***

44. Article 10 of the Constitution binds all State organs, State officers, public officers and all persons whenever any of them *inter alia* makes or implements public policy decisions. In filling in the positions in the County Government, the Board was making or implementing public policy decisions as is very clearly recognised in section 63 of the Act. Therefore the Board was under a constitutional obligation to adhere to the values and principles of governance enunciated under the said Article including good governance, integrity, transparency and accountability. Similarly, section 65(1) of the Act enjoins Public Service Board, in selecting candidates for appointment, to consider *inter alia* the standards, values and principles set out in Articles 10, 27(4), 56(c) and 232(1) of the Constitution as well as the need for an open and transparent recruitment of public servants.

45. A process which is shrouded in secrecy cannot be said to meet the set criteria under Article 10 and section 65 of the Act. Transparency and accountability demands that public officers make public their intended decisions and thereafter strictly adhere to their publicised intentions. Where they intend to fill certain advertised positions, it is my view that only the advertised positions ought to be filled and if they intend to fill further positions, they ought to advertise the same so that those who may have felt that for any reason they did not stand a chance in the earlier advertised positions may apply for the subsequently advertised positions. To fill new positions with persons who applied for earlier positions but for some reasons were not considered worthy of the same in my view is an anathema to the values and principles of governance in so far as transparency and accountability is concerned. Similarly, there is no justification in advertising fewer posts but when it comes to appointments, more appointments than the advertised ones are made. To do that without any rational basis can only lead to a conclusion that the appointments were opaque and informed by ulterior motives. Such actions cannot find justification in section 69 of the Act since those who fail to be absorbed in the advertised positions cannot by any stretch of imagination be considered as officers for the purposes of re-designation. For one to be re-designated, he or she must have been designated in the first place.

46. I therefore have no hesitation in finding that the appointment of Deputy Sub County Administrators,

Deputy Director Sub County Administrative Units and Assistant Director County Administrative Units contravened the provisions of Article 10 of the Constitutions as well as sections 65 and 66 of the **County Governments Act**. In arriving at this decision I associate myself with the decision of **Mabeya, J in John Mining Temoi & Another vs. Governor of Bungoma County & 17 Others [2014] eKLR**.

47. The Respondents however contended that the applicant ought to have invoked the provisions of section 77 of the Act. The said section provides as follows:

***(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.***

48. It is now trite that where a statute provides a remedy to a party, the Court must exercise restraint and first give an opportunity to the relevant bodies or State organs to deal with the dispute as provided in the relevant statute. This principle was well articulated by the Court of Appeal in **Speaker of National Assembly vs. 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.”**

See also **Kipkalya Kones vs. Republic & Another ex-parte Kimani Wanyoike & 4 Others (2008) 3 KLR (EP) 291** and **Francis Gitau Parsimej & 2 Others vs. National Alliance Party & 4 Others Petition No.356 and 359 of 2012**.

49. I agree that where there exist an alternative remedy through statutory law, then it is desirable that such a statutory remedy should be pursued first.

50. I am however also aware of the principle established by the Court of Appeal of Trinidad and Tobago in the case of **Damian Belfonte vs. The Attorney General of Trinidad and Tobago C.A 84 of 2004** that where there is a means of redress that is inadequate, the Court should not exercise restraint. In that case the Court held:

**“The opinion in Jaroo has recently been considered and clarified by the Board in A.G vs Ramanoop. Their lordships laid stress on the need to examine the purpose for which the application is made in order to determine whether it is an abuse of process where there is an**

**available common law remedy.** In their lordship's words:

**“Where there is a parallel remedy, constitutional relief should not be sought unless the circumstances of which the complaint is made include some feature which makes it appropriate to take that course. As a general rule, there must be some feature, which, at least arguably, indicates that the means of legal redress otherwise available would not be adequate. To seek constitutional relief in the absence of such a feature would be a misuse, or abuse, of the Court's process. Atypical, but by no means exclusive, example of such a feature would be a case where there has been an arbitrary use of state power...Another example of a special feature would be a case where several rights are infringed, some of which are common law rights and some for which protection is available only under the constitution. It would not be fair, convenient or conducive to the proper administration of justice to require an applicant to abandon his constitutional remedy or to file separate actions for the vindication of his rights”.**”

51. I entirely agree and confronted with a question as to which remedy a litigant ought to seek, a Court should examine whether the alternative remedy provides an efficacious and satisfactory answer to the litigant's grievance. Whereas I agree that the Board's decision on qualifications, experience and achievements of the persons who applied for the various positions and their conduct as well as ethnic consideration and individual performance are matters which are more merit oriented, in this case the Applicant contests the Board's decision on the grounds that it contravened the provisions of the Constitution. Whereas the applicant could have appealed against the said decision with respect to qualifications, experience and achievements of the persons who applied for the various positions and their conduct as well as ethnic consideration and individual performance, it must be appreciated that judicial review has become the most powerful enforcer of constitutionalism, one of the greatest promoters of the rule of law and perhaps one of the most powerful tools against abuse of power and arbitrariness. See **Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43.**

52. The right to access this Court should not be impeded or stifled in a manner that frustrates the enforcement of fundamental rights and freedoms except in the circumstances noted in **Belfonte (supra)**. The applicant instituted these proceedings claiming breach of her rights and fundamental freedoms. The mandate and jurisdiction to determine that question lies in this Court under Articles 22, 23(3) and 165(3) (d) of the Constitution. The Board, in my view, does not have the jurisdiction to determine alleged violations of the Constitution -See **Wananchi Group (Kenya) Ltd vs. The Communications Commission of Kenya Petition No.98 of 2012.** Majanja J in **Isaac Ngugi vs. Nairobi Hospital and Another Petition No. 461 of 2012** found on the same lines when he expressed himself as follows:

**“For instance, the Court will be reluctant to apply the Constitution directly to horizontal relationships where specific legislation exists to regulate the private relations in questions. In other cases, the mechanisms provided for enforcement are simply inadequate to effectuate the Constitutional guarantee even though there exists private law regulating a matter within the scope of the Application of the Constitutional right or fundamental freedoms. In such cases, the Court may proceed to apply the provisions of the Constitution directly.”** (Emphasis added).

53. I associate myself with the decision of Nyamu, J (as he then was) in **Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others Nairobi HCMA No. 743 of 2006 [2007] KLR 240** where he held:

**“On the issue of discretion Prof Sir William Wade in his Book *Administrative Law* has summarized the position as follows: The powers of public authorities are...essentially different from those of private persons. A man making his will, may subject to any right of his dependants dispose of his property just as he may wish. He may act out of malice or a spirit of revenge, but in law, this does not affect his exercise of his power. In the same way a private person has an absolute power to allow whom he likes to use his land...regardless of his motives. This is unfettered discretion. But a public authority may do none of these things**

unless it acts reasonably and in good faith and upon lawful and relevant grounds of public interest The whole conception of unfettered discretion, is inappropriate to a public authority which possesses powers solely in order that it may use them for the public good. But for public bodies the rule is opposite and so of another character altogether. It is that any action to be taken must be justified by positive law. A public body has no heritage of legal rights which it enjoys for its own sake, at every turn, all of its dealings constitute the fulfilment of duties which it owes to others; indeed, it exists for no other purpose...But in every such instance and no doubt many others where a public body asserts claims or defences in court, it does so, if it acts in good faith, only to vindicate the better performances of the duties for whose the merit it exists. It is in this sense that it has no rights of its own, no axe to grind beyond its public responsibility; a responsibility which define its purpose and justifies its existence, under our law, that is true of every public body. The rule is necessary in order to protect the people from arbitrary interference by those set in power over them...when litigants come to the courts it is the core business of the courts and the courts role is to define the limits of their power. It is not for the Executive to tell them when to come to court! It is the constitutional separation and balance of power that separates democracies from dictatorships. The courts should never, ever, abandon their role in maintaining the balance...From the above analysis this is a case which has given rise to nearly all the known grounds for intervention in judicial review, that is almost the entire spectrum of existing grounds in judicial review. It seems apt to state that public authorities must constantly be reminded that ours is a limited government – that is a government limited by law – this in turn is the meaning of constitutionalism.

54. I am satisfied therefore that for the above reasons that this application is properly before this Court.

55. Having found that the appointment of the Deputy Sub County Administrators, Deputy Director Sub County Administrative Units and Assistant Director County Administrative Units contravened the provisions of Article 10 of the Constitutions as well as section 66 of the **County Governments Act**, I have no hesitation in finding that the decision by the Public Service Board to make the said appointments was tainted with both illegality and procedural impropriety.

### **Order**

56. In the premises I hereby grant an order of certiorari removing into this court for the purposes of being quashed the decision of Wajir County Public Service Board to appoint Deputy Sub County Administrators, Deputy Director Sub County Administrative Units and Assistant Director County Administrative Units pursuant to the minutes dated 6<sup>th</sup> June, 2014 and published on 12<sup>th</sup> June 2014 which decision is hereby quashed.

57. The costs of the application are awarded to the applicant to be borne by the 1<sup>st</sup> Respondent.

58. It is so ordered

**Dated at Nairobi this day 17<sup>th</sup> day of July, 2015**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

***Mr Mugisha for Ms Odia for the Applicant***

***Miss Mugo for Mr Issa for the Respondents***

**Cc Muruiki**