



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CONSTITUTIONAL PETITION NO.34 OF 2013

IN THE MATTER OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF THE COUNTY GOVERNMENT ACT 2012

AND

IN THE MATTER OF THE DEVOLVED GOVERNMENTS ACT

BETWEEN

1. **BENSON OKERA MAGANA**
2. **ABDI R. HUSSEIN**
3. **NATHAN LUGAKA NUNU**
4. **DAVID AGESA**
5. **WYCLIFFE ASUGA**
6. **ABSALOM MUDORA AMBAKA APPLICANTS/PETITIONERS**
7. **KHALAF ABDI HASSAN**
8. **ABDI FATA HASSAN**
9. **FATUMA HOMAMMED HASSAN**
10. **BEATRICE OVOLEZA MKUZI**
11. **GEOFFREY OMAMBIA MOSETI**
12. **DENNIS OMWOYO ONCHIEKU**
13. **SOLOMON ONDEGO SILINGI**

VERSUS

1. **THE COUNTY PUBLIC SERVICE BOARD MIGORI COUNTY**
2. **THE COUNTY ASSEMBLY SERVICE BOARD MIGORI COUNTY**
3. **THE COUNTY GOVERNMENT MIGORI RESPONDENTS**

RULING

The Application

1. The application before court is the Notice of Motion dated 23rd of December 2013 brought pursuant to **Rules 23 and 24** of the **Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013** seeking the following orders:-

1. ***THAT*** this Application be Certified urgent and be heard on priority basis.
 2. ***THAT*** pending the hearing of this Application Inter Parties a conservatory order of temporary injunction do issue restraining or prohibiting the 1st and 2nd Respondents from undertaking or performing their statutory duties prescribed by the County Government Act more particularly employing or appointing persons to fill the vacancies in the offices under their jurisdiction without embracing the prescribed constitutional requirements.
 3. ***THAT*** pending the hearing of this Petition a conservatory order of temporary injunction do issue restraining or prohibiting the 1st and 2nd Respondents from undertaking or performing their statutory duties prescribed by the County Government Act more particularly employing or appointing persons to fill the vacancies in the offices under their jurisdiction without embracing the prescribed Constitutional requirements.
 4. ***THAT*** the costs of this Application be borne by the Respondents.
2. Together with the application, the applicants filed a petition dated 23rd December 2013 praying for the following reliefs:-
- a. A declaration that the appointments of members of the Migori County Assembly Service Board and the County Public Service Board did not follow open and competitive process and that its composition or constitution does not meet the constitutional threshold.
 - b. An order prohibiting the Migori County Assembly Service Board and County Public Service Board from further undertaking their duties and responsibilities under the County Governments Act unconstitutionally or as composed.
 - c. Costs of the Petition.
3. The application is supported by the affidavit sworn by Benson Okera Magana dated 23rd December, 2013 and is also premised on grounds that the Constitution of Kenya 2010 at Articles 10, 174 and 232 provides for a threshold that should be met in constituting legal bodies for the County Government (3rd Respondent). Further that the national values and principles of governance inter alia the participation of the people, social justice, inclusiveness, non-discrimination, protection of the marginalized and minorities transparency and accountability as well as representation of and equal opportunities to all communities were not observed by the Respondents during the recruitment of Senior Officers of the Migori County Government now complained of.
4. It is also averred that the composition of the 1st and 2nd Respondents does not meet the constitutional threshold as the minority tribes within Migori County have not been given an opportunity of representation in the two boards. The minority tribes according to the applicants are the Luhya/Maragoli, Kisii and Somali communities who the applicants say constitute 20% of the Migori County population. The applicants' claim that the said trend of marginalizing the above stated minority tribes was likely to trickle down negatively in employments within the jurisdiction of the 1st and 2nd Respondents as such employments were likely to follow tribal and nepotistic trends. That the makers of the **Constitution of Kenya 2010** drafted the constitution with specific provisions that all communities, the marginalized and the minority included, be represented in the governance of the County. The applicants further claim that the representation of the Migori County Government is dominated by the Luo and Kuria communities to the detriment of the marginalized and/or minority tribes in the following offices:-
- i. Chief Officers for 3rd Respondent;
 - ii. Sub-County Administrators and Directors of Ministries for 3rd Respondents;
 - iii. Members for the 1st Respondent;
 - iv. Members for the 2nd Respondent.
5. It is also contended that the Luhya, Kisii and other communities who are residents of Migori

County have been left out from the Governance issues in the county and that because of the ongoing Migori County Executive development as to which persons should be recruited to fill the offices constituted under the 1st and 2nd Respondents, there is fear and apprehension that the ongoing and future employments may follow similar trends reflective of the composition or constitution of the 1st and 2nd Respondents and be along tribal and/or nepotistic lines. That the constitution of Kenya 2010 being the supreme law of the land should be observed to the letter and any act that contravenes it is illegal, null and void.

6. The applicants further contend that the current County Government being a pioneer government, the County Government in Migori unless checked at this point in time is likely to set bad precedents if its activities and governance structures are not done in accordance with the Constitution, a Constitution that was promulgated so that all communities be represented at all levels of governance. The applicants aver that such groups as the Luhya, Kisii, Somali and other minority communities have been discriminated against and sidelined in the governance of the County because of partiality in the appointments of chief officers of the County Government. The applicants are of the view that such conduct on the part of the County Government may lead to disharmony, discontent, imbalanced development and may inhibit growth and development in the concerned areas as the powers that be in the county will shun any interaction with the communities perceived as not supportive or non-cooperative with the county government.
7. It is also contended by the applicants that the area Member of Parliament for Suna East Constituency hails from the Somali community while the Luhya Community have an elected county representative of East Kanyamkago Ward, arguing that the smaller communities have significant numbers that require representation in county governance, apart from the fact that the smaller communities have contributed immensely to the economic growth of the county through agricultural and business sectors. The applicants also aver that members of the small communities are tax payers too and should be accorded corresponding opportunities in governing the County.
8. Finally the applicants say that the High Court has the power and jurisdiction to enforce and implement the provisions of the Constitution to the letter and that such a move would not result in any prejudice to the Respondents as the government of the county is for the people and by the people of Migori and that the quest by the smaller communities to be represented and heard was what informed the makers of the constitution to enact special provisions for the protection of minorities and the marginalized.
9. In his affidavit in support of the application, Benson Okera Magana a councilor of the former Suna North Ward states that together with the other applicants, they filed the petition following their concern at the manner in which appointments to the offices of the County Government of Migori are being undertaken in total disregard of the constitutionally prescribed threshold for such appointments. He refers to **Article 10, 174 and 232** of the **Constitution** which prescribe the national values and principles of governance and the objects and principles of devolved government which include sharing and devolution of power, democracy and participation of the people, equity social justice, inclusiveness, equality, non-discrimination and protection of the marginalized, transparency and accountability.
10. The deponent avers that executive authority should be exercised in accordance with the Constitution for the benefit of the people, to enhance self governance for communities in the management of development programmes, to protect and promote the interests of minorities and marginalized communities and ensure equitable sharing of available resources.
11. He adds that the County Assembly is duty bound not to approve nominations for appointment to the executive committee or any other public offices if the nomination does not take into account representation of the minorities, marginalized groups and communities with cultural diversity within the county. According to the deponent, Migori County's inhabitants are in the following proportions:-

- a. Luo Community 50%
- b. Kuria Community 30%
- c. Luhya Community 12%
- d. Kisii/Somalia and others 8%

12. On the basis of the above percentages, Mr. Magana avers that the unconstitutional composition of the County Service Boards has had a negative trickledown effect when it comes to the Boards appointing persons to fill the offices constituted by them. He brings out the composition of the appointments as follows:-

- i. *Chief Officers* 10 Luos/2 Kurias
- ii. *Sub County Administrators* 6 Luos/2 Kurias
- iii. *Directors of Ministries* 6 Luos/2 Kurias

13. He contends that though advertisements were put out for various posts, it was not clear to the applicants when short listing was done or when candidates were interviewed. He therefore says that the employments are being undertaken stealthily and without adhering to the set down procedures. Further that the two major ethnic groups being Luo and Kuria have been given dominance while the minority tribes are totally bloated out and not given opportunities. He also says that because of what has already taken place regarding appointments of chief officers by the county service boards there is apprehension that the respondents will entrench their trend of employing persons along ethnic and nepotistic lines. That the orders sought herein will not prejudice anyone but will be for the good of all persons who are interested in good governance in accordance with the values and principles enshrined in the Constitution.

14. The application is opposed. Thomas Kwanga Mboya, the Migori County Chief Legal Advisor has sworn a replying affidavit dated 16th January 2014 in that regard. Patrick Oyugi Wakine the Clerk to the County Assembly and the Secretary of the County Assembly Service Board, Migori County has also sworn a replying affidavit dated 16th January 2014 in response to the Notice of Motion herein.

15. In his Replying Affidavit, Thomas Kwanga Mboya stated that the application is incompetent and fatally defective and should be struck out as it is not properly instituted; that it is an abuse of the process of the court and is brought in bad faith. He maintains that all the requisite procedures and due process of the law were followed by the 1st Respondent in the recruitment of the employees of the 3rd Respondent. He states that the prayers sought by the applicants cannot be granted as they have been overtaken by events and that the applicants herein lack the requisite *locus standi* to institute these proceedings as they are neither officials of their communities nor have they given proof of instructions from their purported communities to act as such. He has annexed “TKM 1” being a copy of the affidavits sworn by the leaders/or representatives of the Luhya, Kisii and Somali communities living within Migori County disowning the Petition.

16. Mr. Kwanga further states that all the communities in Migori County are entitled to competitive employment based on merit and thus no community can seek any preferential treatment from the 1st Respondent. That there is no evidence tendered to prove that any member of the complainant communities applied for any of the said advertised jobs and was neither shortlisted nor interviewed or having passed the interview was not hired. Further that there is no proof that all those who applied for the advertised jobs, interviewed and appointed to various positions were only Luos and Kurias as the figures given are in themselves not proof of the allegations in the absence of any documentary evidence by the applicants. That all jobs were advertised and subsequently the qualified candidates were shortlisted and notified through daily nation newspapers on 13th and 14th September 2013 respectively hence it is not true that the short listing and the subsequent interviews were doused with secrecy. There is annexed and marked “TKM1A” a list of short listed candidates for the various offices within the Migori County Government.

17. It is further contended that the interviews were properly conducted in accordance with the provisions of the **Constitution** and the **County Government Act 2012** thereby meeting the constitutional threshold. That the 1st and 3rd Respondents have always acted diligently in good faith and within their statutory mandates in dealing with the issues of employment. He adds that Nathan Lugaka Nunu and Beatrice Ovoleza Mkuzi have disowned the petition and denied having sworn any authority to commence these proceedings. He avers that the applicants have failed to establish a *prima facie* case with a probability of success as they have not demonstrated any

- irreparable loss likely to be suffered by them in the event the reliefs sought are not granted.
18. Mr. Kwanga also claims that the facts pleaded in the instant application cannot be proved by way of affidavit evidence hence the need to call viva voce evidence. He prays that the orders sought in the said application ought, in the interest of justice and fairness, to be refused and the application be dismissed with costs to the respondents.
 19. Mr. Patrick Oyugi Wakine in his replying affidavit states that the applicants' application on the face of it is totally mischievous, misguided and is meant to paralyze the operations of Migori County Assembly.
 20. He states that the only area where the County Assembly has an option to nominate or appoint is under **Section 12 Sub Section (3) (d)** of the **County Government Act** and that the available vacancy was advertised in the daily nation on the 15th of April 2013 where all Kenyans from all walks of life were allowed to apply as per annexure marked **PW2**. He says a total of 21 applicants applied as per the annexure marked **PW3**. That there was no complaint made to the County Assembly about impropriety or otherwise of the employment process. That after going through the 21 applications with utmost due diligence and competence the board arrived at five (5) names which were shortlisted and the said names advertised in the Daily Nation on the 23rd of May 2013 where members of the public were allowed to and called upon to attend the interviews and submit any information/ memorandum/petition that may have a bearing on the selection of the candidates not later than 29th May 2013. (Refer to evidence marked **PW5**). That no complaints/memorandum/petition or negative information was received by the County Assembly about the impropriety or otherwise of the process of the persons to be interviewed.
 21. Mr. Wakine further depones that on 29th May 2013 the committee on appointments sat, interviewed and vetted the applicants and neither before, during nor after the said interviews was any application received from members of the Luhya community, Maragoli, Kisii and Somali despite the fact that the application was open to all Kenyans irrespective of their ethnic origins hence the reason for advertising in the widely circulated Nation newspaper. He adds that after the interviews and the vetting the board prepared a report and tabled the same before the County Assembly for approval on the 6th of June 2013. The appointments of the successful nominees was finally approved by the County Assembly as provided for under **section 12 (3) (d)** of the **County Government Act 2013** and gazettment was done on the 21st of June 2013 vide gazette notice number 8286 annexure **PW6**.
 22. It is further contended that on 24th June 2013 the Board was sworn in and by virtue of the said swearing in, the officials thereof can only vacate office as spelt out under **section 12 (3) (a) (b) (c) and (d)** of the **County Government Act, 2012**, and that it is only the county assembly that has powers to revoke, rescind, review, reverse and disapprove such appointments.
 23. He states further that the game of the applicants is to spread rumours about ethnic bias with a view to getting cheap gain from the said acts of malice, and reiterated that appointments in the county have never been based on the Luo/Kuria fulcrum for which the applicants have not even given proof.
 24. It was Mr. Wakine's further contention that the census as depicted portraying the percentages of each community in the county is not true, saying that appointments are never based on ethnic demographics but follow due process which requires advertisement, public scrutiny and confirmation by the relevant bodies created either by the Constitution or by Statute. He prays that the application herein be dismissed with costs.

The Submissions

25. Mr. Minda is on record for the applicants whereas the respondents are represented by Mr. Mwamu. On 22nd January 2014 both counsel highlighted their submissions as appears hereafter.
26. Mr. Minda for the applicants submitted that the application raised serious constitutional issues touching on the criteria to govern public appointments as contained in **Article 10** of the **Constitution**.
27. Secondly he referred the court to paragraph 10 of the supporting affidavit sworn by Benson Okera

- Magana which he said was not disputed by the Respondent on the number of the inhabitants of Migori County who ought to be considered equally in employment. He also referred the court to paragraph 15 of the same affidavit which he says reveals that Chief Officers and other senior officers come from the Luo and Kuria tribes only. He submits that under the County Government Act, the county assembly is obligated to ensure compliance with **Article 10** of the **Constitution** regardless of whether or not the smaller and marginalized tribes applied for the various jobs. He is of the view that the County Assembly must go out of its way to ensure compliance with **Article 10**, even if it means re-advertising the jobs.
28. Concerning the Replying Affidavits, Mr. Minda submits that the Respondents admit that the employments are ongoing and that there has been discrimination against Somalis, Luhyas and Kisii communities and therefore contends that unless this court intervenes and tells Migori County to respect the law, then it is a recipe for disunity and other bad practices which Kenya as a nation is trying to run away from.
29. He adds that it is not disputed that Kenya is made up of different communities thus requiring that both the national and county cakes be shared by all. He submits that the constitution was enacted to heal historical injustices and the tyranny of numbers where certain communities, such as the Luo in Migori County, conspicuously overshadow others, so that the smaller communities are not denied an opportunity to participate in the governance of their county.
30. Lastly Mr. Minda submits that the court should take judicial notice of the calls made by the transitional authority to county governments to desist from employment that is not in accordance with the Constitution. He urges this court to enforce the provisions of the Constitution and prays for interim orders of stay.
31. Mr. Mwamu in response opposes the said application and states that the law governing injunctions is well established in the **Giella –vs- Cassman Brown case** whose principles are:-
- i. *an applicant must show a prima facie case with a probability of success;*
 - ii. *applicant must demonstrate that he might otherwise suffer irreparable injury which will not be adequately be compensated by an award of damages if order sought is not granted; and*
 - iii. *If the court is in doubt it will decide an application on the balance of convenience.*
32. Mr. Mwamu submits that there is no prima facie case established by the applicants. He adds that the application is incompetent in so far as it is brought under **Rules 23** and **24** of the **Practice and Procedure Rules, 2013**. That the application itself is based on generalities, conjectures and suppositions. That there is no evidence to prove the percentages the applicants are relying on; that the names on the attached documents do not give details of which tribe the names belong to. He submits that the applicants who allege to have come from Migori County have not proved that they indeed come from that county as they should have annexed their voting cards to show that they are truly from Migori County and that they voted there.
33. He submits further that in essence the applicants cannot show they have an interest in the case to stop employment. In any event, Mr. Mwamu submits, advertisements were made in September 2013 but applicants only came to court on 24th December 2013 without giving any reason as to why there was a delay.
34. He argues that since courts do not give orders in vain and there being no prima facie case to warrant the granting of the orders sought, the instant application ought to be dismissed. Mr. Mwamu also contends that even if the court were in doubt, the balance of convenience tilts in favour of the respondents.
35. Regarding details of the advertisements attached to the 2nd Respondent's affidavit, counsel submits that only one vacancy was available for which the advert went out on 15th April 2013 almost 7 months before the application herein was lodged. He poses and asks the question whether the applicants herein applied for the said post and if so, whether they were denied an opportunity to participate on grounds of ethnicity. Counsel submits that the only issue that arose in connection with the stated post was gender balance and that because of that, only female applicants were shortlisted.
36. Counsel also submits that after interviews there was a committee report showing all the 5

shortlisted candidates had Masters Degrees in Public Communications. He also says that professionalism was key in the selection and that in the circumstances, the balance of convenience tilted in favour of the Respondents.

37. He submits that the same procedure was followed by the 1st and 2nd Respondents and none of the applicants has said that his/her application was rejected on grounds of ethnicity. That nobody objected to the short listing of the candidates. He adds that the applicants herein will not suffer loss since there is no proof that applicants are citizens of Kenya and residents of Migori County.
38. He relied on Petition No.25 of 2013 John Kipngeno Koech –vs- Nakuru

County Assembly & others at page 17 for the test to be applied in granting orders sought by the applicants herein, namely:

“However, we are of the opinion that the proper test under the Constitution is whether a petition as stated raises issues which are too insubstantial and so attenuated that a court of law properly directing itself to the issue cannot fashion an appropriate remedy due to the inability to concretely fathom the constitutional violation alleged.

The test does not demand mathematical precision in drawing constitutional petitions. Neither does it require talismanic formalism in identifying the specific constitutional provisions which are alleged to have been violated. The test is a substantive one and inquires whether the complaints against the Respondents in a constitutional petition are fashioned in a way that gives proper notice to the Respondents about the nature of the claims being made so that they can adequately prepare their case.”

- 39.. He re-emphasizes in his submission that the case herein dwells on generalities without any specific tangible evidence, that it is a hypothetical abstract face of conjecture and an abuse of the judicial process. He submits that the applicants herein are motivated by politics in bringing this application and so the orders sought ought not be granted. He concludes by saying that the petition is not properly before this court as same ought to have come by way of Judicial Review. He prays that the applicants’ case be dismissed in its entirety.
40. Mr. Minda in reply submits that this case is not for an injunction as understood in civil law and practice, but for an injunction based on the Constitution whose tests and standards are different. That **Article 22** provides that applicants need not suffer or demonstrate that they would suffer loss for the application to succeed; and that all they need to show is the existence of a constitutional issue raised in the application. He also submits further that the fact that the 3rd Petitioner has walked out of the Petition does not mean that the petition is dead, and that the applicants have shown that a constitutional issue has arisen because of the appointments made by the county government without complying with the Constitution. Mr. Minda’s view is that the case of Giella is not applicable to the circumstances of this case.
41. Having gone through the pleadings herein and the contending arguments, the first issue that arises for determination is whether the petitioners/applicants herein have the *locus standi* to bring the petition before this court. The second issue is whether the respondents, in carrying out the recruitment complained of followed the Constitutional requirements.
42. **Article 3 (1)** of the **Constitution** provides that every person has an obligation to respect, uphold and defend the Constitution, and it does not matter that they are carrying out such an obligation on behalf of another, whether that other is named or otherwise. **Article 159 (2) (d)** provides that courts and tribunals, in exercising judicial authority that is donated to them by the people of Kenya shall do so without undue regard to procedural technicalities. The courts are also under a duty to ensure that the purpose and principles of the Constitution are protected and promoted. Among the principles of the Constitution are the principles of governance which are binding on all State Organs, State Officers, Public Officers and all persons whenever they apply or interpret the Constitution.

43. **Article 10 (2)** sets out the national values and principles of governance which include:-

- a. *patriotism, national unity, sharing and devolution of power the rule of law, democracy and participation of the people;*
- b. *human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized;*
- c. *good governance, integrity, transparency and accountability; and*
- d. *sustainable development.*

44. I have set out the various provisions of the Constitution to show that the applicants herein have the right and therefore the locus standi to approach this court on any matter touching on the application or interpretation of the Constitution or of any law, or in the implementation of public policy decisions. The argument on behalf of the respondents that the applicants needed to produce their national identity cards, to demonstrate that they are Kenyan citizens or their voters' cards to show that they are residents and voters of Migori County runs counter to the provisions of the Constitution.

45. Even if this case were to be treated as an ordinary civil suit, **Order 1 Rule 8** would empower the applicants herein to commence, and unless the court orders otherwise, to continue proceedings by or against all or any of them without being called upon to satisfy the old requirement of representative suits. In a nutshell, the applicants herein are properly before this court.

46. Further, it is clearly provided under **Article 165 (3)** that this court has unlimited original jurisdiction in all criminal and civil matters and has **“jurisdiction to determine the question whether a Bill of Rights has been denied, violated, infringed or threatened.”** In the instant case, the applicants, who have come to court as representatives of the smaller communities within Migori County are saying that their rights to participate in the governance of the county are threatened because of what they perceive as skewed appointments of senior officers where only members of the more prominent groups are appointed.

47. In determining the second issue, regard must be had to the provisions of **Article 165 (3) (d)** which reads:-

“Jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of –

- i. **the question whether any law is inconsistent with or in contravention of this Constitution;**
- ii. **the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;**
- iii. **any matter relating to constitutional powers of State Organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and**
- iv. **a question relating to conflict of laws under Article 191.”**

48. It is argued by counsel for the petitioners/applicants that the criteria set by the constitution makers at **Article 10** of the **Constitution** have not been followed in the appointments undertaken by the Migori County Government. That all the inhabitants of Migori county have not been considered equally in employment as the Luos and Kurias have taken the majority slots. That further and under the County Government Act, the County Assembly has powers to ensure compliance with **Article 10** and they must go out of their way to ensure compliance. That the employments so far done by the Migori County Government have been discriminatory and unless this court intervenes the said employments will be a recipe for disunity and other bad practices. Of course, Mr. Mwamu held a contrary view by relying on the **Giella** case (supra).

49. **Article 10 (1)** provides as:-

1. *The national values and principles of governance in this Article **BIND ALL STATE ORGANS, STATE OFFICERS, PUBLIC OFFICERS** and all persons whenever any of them –*
 - a. *applies or interprets this constitution;*

- b. *enacts, applies or interprets any law; or*
- c. *makes or implements public policy decisions;*

50. It is clear that provisions of **Article 10 (1)** of the **Constitution** are binding

on all State organs, State officers and public officers. It is not disputed that the two ethnic groups that have got slots as Chief Officers in the Migori County Government are Luo and Kuria. It is not enough for the respondents to say that the applicants have not demonstrated that they or other members of their communities applied for the vacancies and were not selected. The law recognizes and provides that in the performance of their duties, all State organs, State officers and Public Officers must be guided by the national values and principles of governance set out under **Article 10 (2)**. In my considered view, it is not apparent on the face of the facts before this court that the recruitment complained of was conducted in accordance with the constitutional provisions. There appears to have been marginalization and discrimination.

51. The conduct of the respondents is also counter to the provisions of **Article**

174 (e) which provides that the objects of the devolution of government are, inter alia, “**to protect and promote the interests and rights of minorities, marginalized communities.**” The respondents’ conduct is also counter to the provisions of **Article 232** 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 appointment at all levels of the public service

of –

- i. *men and women;*
- ii. *the members of all ethnic groups; and*
- iii. *Persons with disabilities.*

52. It is the considered opinion of this court that the respondents cannot hide behind the **Giella** principles in this matter, nor can they say that because the applicants did not come by way of Judicial Review, their application is incompetent. Even if this court were to be guided by the **Giella case** principles, it appears to me that the applicants have established a prima facie case with the probability of success. If I am wrong on this first principle, the balance of convenience would tilt in favour of the applicants in this case. The bigger issue is that the applicants have shown by their pleadings that the complaints against the respondents are of a constitutional nature. The complaints in my view are not mere conjecture; and therefore require investigation by hearing the petition.

53. In the circumstances, and for the reasons above given, I am persuaded that the applicants’ application has merit. The same is allowed in terms of prayer 3 thereof, more particularly that pending the hearing and determination of the petition the 1st and 2nd Respondents be and are restrained and/or prohibited from employing or appointing persons to fill the vacancies in the offices under their jurisdiction without embracing the prescribed constitutional requirements.

54. The costs of this application shall be paid to the applicants.

55. It is so ordered.

Dated, signed and delivered at Kisii this 6th day of February, 2014

R.N. SITATI

JUDGE

In the presence of:

Mr. Minda for Applicants

Mr. Kisia for Mwamu for Respondents

Mr. Bibu - Court Clerk