REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

JR. MISCELLEANEOUS CIVIL APPLICATION NO. 10 OF 2013

IN THE MATTER OF: AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS OF PROHIBITION AND CERITORARI

AND

IN THE MATTER OF: THE TANA RIVER COUNTY ASSEMBLY TO APPROVE THE TANA RIVER GOVERNOR'S NOMINEES FOR THE MEMBER OF TANA RIVER COUNTY EXECUTIVE COMMITTEE

BETWEEN

REPUBLIC ……..…….APPLICANT

AND

TANA RIVER COUNTY ASSEMBLY ……..1ST RESPONDENT

GOVERNOR, TANA RIVER COUNTY ……..2ND RESPONDENT

AND

IBRAHIM BOCHA …….EX PARTE APPLICANT

JUDGMENT

Introduction

1. The background to these proceedings can be summarized as follows:In April, 2013, the Tana River County Assembly (1st Respondent) and the Governor of the County (2nd Respondent) commenced the exercise leading to appointment of nine members of the County executive pursuant to their constitutional mandate. In this regard an advertisement was placed in a local newspaper, the Daily National published on 12th April, 2013.

2. As required, the County committee on appointments presented its report on the vetting of the County executive nominees pursuant to Article 179 of the Constitution, for appointment by the County Governor with the approval of the County Assembly. Eventually, nine persons were appointed, and their names gazetted vide Gazette Notice No. 9397 of 8th July, 2013. These are:

1. Adam Barissa Dhidha

2. Abdi Bile Suleiman
3. Hassan Barhe Kuno
4. Ismail Jilo Alji
5. Sophia Oblia Wedo
6. Salim Mohamed Dame
7. Omar Wachu Buketa
8. Yussuf Adow Kuno
9. Eunice Lazima Mungatana

The Pleadings

3. On 17th July, 2013 the ex parte applicant Ibrahim Bocha approached the court by way of certificate of urgency and successfully applied for leave to apply for judicial review orders of prohibition against the 2nd respondent to prohibit him from gazetting the appointees, and certiorari to quash the 1st respondent's resolution of 3rd July, 2013 approving the 2nd respondent's nominees. The main motion was subsequently filed on 30th July, 2013. It is supported by the affidavit of the ex parte applicant.

4. The key complaint raised in the said affidavit was that the 1st respondent's purported approval of the nominees, was in breach of the Constitution on the following grounds:

a. Out of the nine members of the proposed executive only two were women. That three nominees previously rejected by the committee on appointments were approved.

b. The approved list of nominees failed the cultural diversity test as it did not include any person from minority communities in the county such as the Malakote, Watta, Bajunis, Somaliwen, Kikuyu and Kamba.

c. That the period advertised for submission of applications was too short (6 days) and the eligibility criteria too high.

d. The public did not get sufficient time to participate in the vetting exercise.

5. The respondents filed an affidavit in reply through the 2nd respondent on 1st October, 2013. He depones that no application was received from the minority communities mentioned by the ex parte applicant, even while confirming that the eventual appointees were drawn from the Pokomo, Orma and Wardei communities, and that only the two women met the appointment criteria under Section 35(3) of the County Governments Act. Further that although the public was notified of the vetting of the nominees, the ex parte applicant did not make any representations. He explained that the three nominees rejected at the vetting stage were unanimously approved for appointment by the County Assembly via an amended motion on 3rd July, 2013. Subsequently, the names approved were duly gazetted. The 2nd respondent asserted that the respondents acted within the law and the prayers sought by the ex parte applicant do not lie.

6. On 2nd October, 2013 when the main Motion came up for hearing the parties agreed to dispose of it by way of written submissions, which were received on 7th November, 2013. The court has considered the Motion and the parties' respective affidavits and submissions.

Analysis

7. The key facts leading up to this dispute are not contested. These include the process undertaken by the respondents in the selection and appointment of the nine persons eventually gazetted as members of the Tana River County Executive Committee, on 8th July, 2013. There is no doubt in my mind that the key question raised by these proceedings is one of the legality or illegality of the

impugned exercise. In the case of **Meixner & Another v Attorney General [2005]2 KLR 189** which Mr. Kilonzo for the respondents relied on, the Court of Appeal held that:

> **"Judicial review is concerned with the decision making process and not with the merits of the decision itself. Judicial review deals with the legality of decisions of bodies or persons whose decisions are susceptible to judicial review. A decision can be upset through certiorari on a matter of law if on the face of it, it is made without jurisdiction or in consequence of an error of law. Prohibition restrains abuse or excess of power."**

Thus the scope of judicial review is in many ways narrower than in a constitutional petition such as the two cited by Mr. Abubakar for the ex parte applicant.

8. The legal framework relating to the process of appointment of County Executive Committee Members is in Constitution and the County Governments Act. Thus in considering the legality or otherwise of the impugned exercise, the court must consider whether there was full compliance with the said law. Finally, the remedies, if any available to the ex parte applicant. I propose to deal with each limb of the ex parte applicant's objections as earlier outlined in this judgment even while restating the same as issues for purposes of determination.

A. Whether the appointments comply with Article 197 of the Constitution

9. Article 197 of the Constitution is in the following terms:

> **"(1) Not more than two-thirds of the members of any county assembly or county executive committee shall be of the same gender.**
>
> **(2) Parliament shall enact legislation to—**
>
> **(*a*) ensure that the community and cultural diversity of a county is reflected in its county assembly and county executive committee; and**
>
> **(*b*) prescribe mechanisms to protect minorities within counties."**

10. The County Governments Act in giving effect to this article provides at Section 35 (3) the qualifications required for appointment into the County Executive Committee. A candidate must:

a. be Kenyan citizen

b. be a holder of at least a first degree from a university recognised in Kenya.

c. satisfy the requirements of Chapter Six of the Constitution and

d. have knowledge, experience and a distinguished career of not less than five years in field relevant to the folio of the department to which appointment is considered.

11. While the Governor is empowered to nominate the executive committee members, under Section 35 (2) of the Act he is obligated, to ensure that the list he submits to the County Assembly for approval is compliant with Article 197(1) of the Constitution. Indeed the County Assembly is prohibited from approving nominations for appointment to Executive Committee that do not comply with the Constitutional prescription in Article 197.

12. As I understood it, the respondents' response to this limb of the objection is that only two women applicants qualified for appointment. That could very well be the position. However, the law was

breached by the purported nomination, approval and appointment of more than 2/3 members of executive belonging to one gender. It matters not that no other applicants qualified, although that is not a matter for this court to determine. The process was not in accordance with the law.

13. In considering this question is necessary to look at the objects of devolution at Article 174. These objects are inter alia:

> **"a) to promote democratic and accountable exercise of power;**
>
> **b) to foster national unity by recognizing diversity;**
>
> **c) to give powers of self-governance to the people and enhance the participation of the people in the exercise of the powers of the State and in making decisions affecting them;**
>
> **d) to recognize the right of communities to manage their own affairs and to further their development;**
>
> **e) to protect and promote the interest and rights of minorities and marginalised communities;"**

14. The foregoing objects resonate with the themes espoused as national values in Article 10 2(a) which include national unity, sharing, devolution of power, rule of law, democracy participation of the people, human dignity, equality, social justice, equity, human rights, non-discrimination, good governance and accountability. The respondents are bound by these principles under the Constitution. I find that the impugned appointments contravene the dictates of the Constitution and the law and to that extent constitute an illegal exercise of the mandate and duty placed upon the respondents.

B. <u>Whether the list of nominees passes the cultural diversity test and whether the period advertised for submission of applications was adequate</u>

15. The theme of inclusiveness, participation, equality, non-discrimination and protection of minorities runs through the Constitution and the County Governments Act. Recognition of minorities, protection and promotion of minorities and marginalized communities are some of the relevant objects of devolution listed in Article 174, already cited above.

The importance of diversity is underscored by the requirement inserted in Article 197 (2) for legislation to:

> **"a) ensure that community and cultural diversity of a county is reflected in its county assembly and committee; and**
>
> **b) prescribe mechanisms to protect minorities within counties"**

Hence Section 35 of the County Governments Act.

16. Section 35 (1) of the County Governments Act reads in part:

> **"The governor shall, when nominating members of the executive committee**

a. **Ensure that to the fullest extent possible, the composition of the executive committee reflects the community and national diversity of the county."**

Secondly, the Governor must take into account the principles of affirmative action. The Governor is also bound by the principles in Article 56 regarding affirmative action for minorities and the marginalized by dint of Article 20 of the Constitution.

17. In the instant case, the respondents admit that only the three main communities in the County are represented on the Executive Committee. Whereas it may not be possible to include all communities in the Executive Committee, Section 35 of the County Governments Act enjoins the respondents to ensure that the nominations take into account minorities, marginalized groups and communities, and community and cultural diversity within the county.

18. In paragraph 9 and 10 of his replying affidavit the 2nd respondent stated:

> **"THAT I am informed by Mr. Tom Onyango the 1st respondent's clerk…that there was no single application from the Kamba, Watta, Malakote, Kikuyu, Bajunis and Somaliwen communities for the listed positions and no application was received by the 1st respondent from the said counties.**
>
> 10. **THAT I am informed … that majority of the applicants who qualified for the position of the 1st respondents county executive committee were from the Orma and Pokomo communities…"**

The 1st respondent's duty under Section 351 (b) must be read together with the definition of affirmative action under Article 160 of the Constitution.

It states:

> **"affirmative action" includes any measure designed to overcome or ameliorate an inequity or the systemic denial or infringement of a right or fundamental freedom."**

19. That is not to suggest that the respondents could very well appoint unqualified persons into the executive in breach of Section 35 (3). What it means is that the respondents must put in place measures to ensure diversity and representation of the minorities and marginalized. It does seem from paragraphs 9 and 10 of the respondents' affidavit that the respondents misapprehended the extent of their duty as prescribed by the Constitution and the law as to constitute an error in law (See **Meixner's** case).

20. This misapprehension of the law, and therefore, the legal duty imposed upon the respondents is in my considered view further demonstrated by the evidently short notice given in the advertisement for submission of application for the executive committee positions. The advertisement published on April 12th 2013 gave the closing date as 18th April, 2013 – a period of only six days. From the respondent's depositions, once they so advertised they were seemingly satisfied that they had done their duty. But in my considered view advertising in a national newspaper was only a minimum step. Section 66, 87 (a-d), 91 and 97 of the County Governments Act leaves no doubt that other modes are envisaged as necessary for purposes of reaching the disadvantaged. Section 91 even suggests structures for dissemination of information in aid of public participation, including notice boards to announce jobs, appointments, awards and other important announcements of "public interest".

21. The rationale behind these sections is simple: the outcome of any process can only be as good as the process itself. The Governor's functions and responsibilities as set out in Section 30 of the County Governments Act are extremely wide, almost daunting. Section 30(3) further provides that:

> **"In performing the functions in subsection (2) the governor shall;**
>
> a. **……**

b. **……**
c. **promote democracy, good governance, unity and cohesion within the county**
d. **…..**

e) promote the competitiveness of the county

f) …..

g) ….”

The 2nd respondent was therefore under a statutory duty to satisfy himself that the procedure adopted for the appointment of the county executive could yield the correct mix of candidates to satisfy constitutional and statutory requirements. By relying solely on the newspaper advertisement and given the rather short notice to candidates, the respondents clearly misdirected themselves as regarding the carrying out of their duties. This amounts to an error of law in my humble view. The consequence is that the eventual list of nominees fails the cultural diversity test.

C) Whether sufficient time was allowed for public vetting of candidates

22. This question is superfluous in light of the foregoing. I am not convinced that any amount of extended vetting could have cured the flawed process which commenced with a newspaper advertisement giving very short notice. I need not say more on this aspect. The respondents have faulted the ex parte applicant for failing to avail himself of the vetting and the petition procedure under Section 15 and 88 of the County Governments Act. Partly, for the reasons I have given earlier, the vetting procedure could not sanctity an already flawed process. Secondly, the availability of a petition procedure under Section 15 and 88 of the County Governments Act cannot exempt the respondents from complying with the law under which they operate, or the consequences of noncompliance.

Determination

23. For the reason that the impugned appointments contravene the Constitution and the County Governments Act as outlined above, the respondent’s resolution is illegal having been arrived at as a consequence of error of the law. The next question is whether the remedies sought by the applicant are available in the circumstances of this case. Firstly, I agree with Mr. Kilonzo for the respondents that an order of prohibition cannot lie: the act proposed to be prohibited (gazettement) has already been done. (See **Kenya National Examinations Council v R ex parte Geoffrey Gathenji Njoroge & Others (1997) eKLR**

24. In an innovative attempt to salvage the situation, Mr. Kilonzo has invited the court to consider issuing an order of mandamus, directing the respondents to comply with Article 197(2) of the Constitution by advertising for an extra position reserved for a woman who qualifies under Section 35 (3) of the County Governments Act. That invitation though attractive is to a path wrought with many difficulties. In the first place, this court already found that the process of selection and appointment of the nine County Executives was flawed, for reasons other than failure to comply with Article 197 (2) of the Constitution. The court cannot purport to sanctify such a process by engaging a patently formalistic compliance mechanism. Secondly, the court is least suited to determine whether such appointment would not run afoul of Article 179(3) of the Constitution. Finally, the ex parte applicant has not sought such an order. I therefore decline the invitation.

25. In the Kenya National Examinations Council case, the Court of Appeal stated that where a decision had already been made only an order of certiorari is appropriate. The court has been urged to eschew this remedy to avoid grounding the operations of the County Government of Tana River. It is however, not clear whether the county executive has assumed office since July 2013. Even while appreciating the additional cost and inconvenience a certiorari order is likely to cause, I do not accept that any body or organ could justify the suspension of the operation of the Constitution and the County Governments Act out of expediency. The considered provisions of the Constitution and County Governments Act exist for

specific purpose and must be upheld, especially in a county where intermittent inter-ethnic strife, breakdown of the rule of law and complaints about marginalization and discrimination are a matter of public record. I do therefore grant prayer (ii) of the Notice of Motion filed on 30th July, 2013.

Due to the public interest nature of these proceedings, I order that each party bears its own costs.

Delivered and signed at Malindi this **3rd** day of **March, 2014** in the presence of Mr. Matata holding brief for Mr. Kilonzo for the Respondents, Mr. Abubakar for the Applicants absent. Court clerk – Evans

C. W. Meoli

JUDGE

ORDER – Typed ruling be supplied.

C. W. Meoli

JUDGE