



IN THE HIGH COURT OF KENYA

AT NAKURU

PETITION NO.17 OF 2014

**IN THE MATTER OF ARTICLES 10, 19, 27, 56 (C), 233(H) & 165 (3) OF THE CONSTITUTION
OF KENYA AND SECTION 58 (3) OF COUNTY GOVERNMENT ACTG NO.17 OF 2012**

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND
FREEDOMS UNDER ARTICLES 19 AND 22 OF THE CONSTITUTION OF KENYA**

BETWEEN

JAMES AKELERIO ALIAS MUGUU.....1ST PETITIONER

BONIFACE EYIANAE LOWOI.....2ND PETITIONER

VERSUS

MOSES KASAINI LENOLKILAL.....1ST RESPONDENT

COUNTY GOVERNMENT OF SAMBURU.....2ND RESPONDENT

SAMBURU COUNTY PUBLIC SERVICES BOARD.....3RD RESPONDENT

STEPHEN LELEMGWE.....4TH RESPONDENT

RULING

1. The Petitioners, **James Akeleria Ngofia** and **Boniface Eyianae Lowoi** are residents of Samburu County and representatives of Turkana Community of Samburu County.
2. The Petition dated 10th March, 2014 was filed on 11th March, 2014 seeking various reliefs to wit:
 - a) **A declaration that the Samburu County Public Service Board be nullified and the same be reconstituted in compliance with Article 10 of the Constitution of Kenya and County government Act No.17 in particular Section 58(3).**
 - b) **A declaration that the nominees of Chief Officer submitted by the County Public Service Board to the County Assembly for debate and approval be declared null and void.**
 - c) **A declaration that the Governor and the Samburu County Assembly do re-advertise posts of members of County Public Service Board forthwith.**

d) Costs of the Petition be borne by the Respondents in any event.

3. Simultaneously with the Petition was filed an interlocutory application under a certificate of urgency. The Chamber Summons dated 10th March, 2014 was certified urgent by Hon. Lady Justice H. Omondi on 12th March, 2014. She further granted conservatory order barring the 1st, 2nd and 4th Respondents from submitting the nominee list of Chief Officers for vetting by the County Assembly pending *inter-partes* hearing and/or until further orders of the court; that there be *inter-partes* hearing on 19th day of March, 2014; that the application to be served upon all the Respondents herein .
4. On 19th March, 2014, the hearing was adjourned to 31st March, 2014, to allow the Petitioners' Counsel time to seek instructions from his clients.
5. At the hearing, Mr. Nyandiko, the learned counsel for the Petitioners submitted that the purpose of the hearing was an application for conservatory orders pending final hearing of the Petition. The prayer is set out in the Chamber Summons as follows:

a) That this court do grant the applicants a Conservatory Order by issuing such orders, direct and writs as may be necessary to bar the members of the 3rd Respondent from carrying on with any functions of their office pending the hearing and determination of this Petition.

6. The application is supported by the affidavit of **James Akelerio Ngofia alias Muguu** dated 10th march, 2014 and is based on the following summarised grounds:

a) That the 1st and 3rd Respondents have violated, infringed the rights and freedoms of the Applicants community members.

b) that the 3rd Respondent since its formation has conducted several recruitments in the county for the following positions:

i) Recruitment of Country Secretary – Mr. Letinina.

ii) Recruitment of Head of Treasury – Mr. Lenanyekie.

iii) Recruitment of Count Sub-County Administrators – all of Samburu tribe.

iv) Recruitment of County Executive Committee (9 posts) – only one Turkana candidate was considered.

v) Recruitment of County Chief Officers (8 posts) – all of Samburu tribe.

vi) Recruitment of County Chief Officers (8 posts) – all of Samburu tribe.

c) That the conduct of the 1st, 3rd and 4th Respondents has been wanting for entertaining reports of candidates submitted by the 3rd Respondent to the County Assembly for approval and adoption of members of the same tribe.

d) That the actions of the Respondents are in breach of the provisions of the Constitution of Kenya and County Governments Act.

e) That the 1st Respondent has declared total oppression of Turkana members in the County by denying them business and employment opportunities.

f) That the County Public Service Board of Samburu be dissolved and positions re-advertised as the current composition is violating the Constitution and the rights of natives.

g) That the members of the 3rd Respondents are in breach of Section 55(h) of the County Governments Act No.17 of 2012 and hence should be dissolved.

h) That our educated children will not get County jobs due to discrimination committed to them by Samburu Public Service Board despite being qualified for the jobs.

7. The 3rd Respondent has filed Grounds of Opposition and a Replying Affidavit of Benard Lenaronkoita, the Chairman of the Public Service Board (hereinafter referred to as “The Board”) Samburu County. The Grounds of Opposition and Replying Affidavit are dated 18th March, 2014. The latter is sworn with authority of the Board and the 1st, 2nd and 4th Respondents herein.
8. He stated that the Board was competitively recruited immediately after the 4th March, 2013 General elections and is comprised of a Chairman, Secretary and five members. That no member of the Turkana Community applied for the position of member of the Board.
9. That the Board is charged by both the Constitution and statute with the responsibility of recruiting staff for the County. In so doing, the Board is open and transparent and considers the rights of the minorities subject to application, qualification and competence.
10. That the Board advertised for the position of Sub-County Administrator which he avers did not attract any person from the Turkana community. The Board also conducted the first recruitment for the post of Chief Officer which attracted one Turkana, namely **Mary Kanyakam Ekai**. However, the County Assembly dismissed the list of nominees in its entirety. The Governor, (1st Respondent) directed that the Board re-advertise the positions which it duly complied.
11. The re-advertisement attracted three Turkanas, namely **Asunta Lokia**, who was not an undergraduate as required by the Board; **Celina Akuru**, a degree holder but in a different field of profession; **Mary Kanyamanan Ekai**, who was qualified but scored 63 marks which was below the set mark. That of the eight Chief Officers recruited by the Board, four hail from Samburu tribe; two are from the Rendile Tribe; One from the Lkunono and another from the Kalenjin tribe.
12. The deponent avers that the Board has not discriminated any Turkana and treats all communities comprising Samburu County with utmost respect and dignity. He further deposes that the Petition before the court is premature as the Petitioners had not exhausted the other remedies.
13. Further the Respondent opposed the application on the following grounds *inter alia*:

a) That the application is grossly incompetent, inept in law and an abuse of the court process;

b) That the application does not disclose any reasonable cause of action;

c) That the application does not meet the threshold set in the case of Anita Karimi Njeru;

d) That the Petition and application forms grievances which ought to have been placed before the County Assembly;

e) That the application offends the principals of separation of powers and the court is being invited to stop the one arms of the Government, that is the County Assembly from carrying out its statutory and Constitutional duties.

14. The application was argued before me on 31st March, 2014. The learned Counsel **Mr. Nyandiko** and **Mr. Karanja** submitted for the Petitioners and Respondents respectively.
15. **Mr. Nyandiko** stated that the application is confined to conservatory orders pending the hearing and determination of the Petition. He sought to rely on **Articles 10, 19, 27, 56, 232 and 165 (3)** of the **Constitution** and **Section 58(3)** of the **County Government Act** in his submissions.
16. He submitted that various positions of Chief Officers of the County were advertised by the Board. **Mary Kanyamanan Ekai**, a resident of Samburu County and from the Turkana tribe, applied for consideration by the Board for the position of Chief Officer for Medical Services. A list of names of the successful candidates was subsequently tabled before the County Assembly for vetting.

- Following the vetting process, the Assembly resolved that the recruitment be conducted afresh. It recorded a strong reservation as to the competency of three nominated candidates, namely Mrs. **Josephine Lenasalia**, **Mrs. Mary Kanyamanan** and **Bernard Lesurmat**.
17. Counsel further submitted that the Replying Affidavit filed by the Respondents purport that the Board conducted a fresh recruitment exercise in which Mary Kanyamanan re-applied for the same position. She however attained a score of 63 points which was below the 70 mark cut off. According to counsel, the marks of the other candidates have not been disclosed by the Respondents with the purposes of giving the court an opportunity to compare Mary Kanyamanan's performance with that of the successful candidates.
 18. Further, counsel submitted that a candidate, namely Josephine Lenasalia, who had applied and interviewed for the position of Chief Officer for Culture Social Services and Gender was recommended by the Board to the Ministry of Environment and Natural Resources. This was in order to comply with the Constitution on gender rule and affirmative action. However, according to counsel, Josephine hails from Samburu and therefore both the County Government and the Service Board were biased in their recruitment. He stated that Mary Kanyamanan was never considered because of her qualification while other candidates who were equally unqualified were swapped and taken to other dockets.
 19. Mr. Karanja opposed the application. He stated that the application is premature. That the process of recruitment of Chief Officers governed by **Section 45** of the **County Government Act** which provides that the Governor shall nominate on recommendation of County Service Board after competitive recruitment. The names of the candidates are then forwarded to County Assembly for vetting. The County Assembly invites members of the public to share information of candidates for purposes of vetting. According to counsel, any reservations and/or objections ought to have registered then. However, the Petitioner did not record any objections but instead came to court to stop the vetting process.
 20. Further, Mr. Karanja submitted that there were eight nominees pending vetting before the County Assembly; only four are Samburus and the others are from different tribes. He contends that there is no discrimination and the Petitioners are arguing the case of Mary Kanyamanan in the guise of discrimination of Turkana community.
 21. In further submission, **Mr. Karanja**, stated that no person challenged the decision of the County Assembly on the grounds of discrimination. He stated that the Board invoked the gender balance and affirmative action by recommending Josephine Lenasalia. He stated that she scored a higher mark than the set cut off.

ISSUES FOR DETERMINATION

22. After hearing submissions made by both Counsel for the Petitioners and the Respondents this court finds no reason to delve into the issue of whether the Petitioners have made out a prima facie case and instead this court shall limit itself and address the following issues;
 - (a) Whether the Petitioners filed an objection against the process.
 - (9) Whether the application is premature.

ANALYSIS

23. From the submissions made it is not disputed that the Board in exercise of the powers conferred upon it by **Section 59(1)** advertised, interviewed and nominated candidates for the vetting by the County Assembly. The candidates were subjected to an interview and each received a score against a set mark. The County Assembly then invited members of the public to participate in the process of vetting of the candidates.
24. The procedure adopted by the Board is not the contentious issue but the list of the nominated candidates is the genesis of the Petitioner's grievances. They allege that the list is not a fair representation of the residents of Samburu County.

25. The Petitioners appear not to have voiced any objections at any of the aforementioned stages as against the nominated candidates to the Board or to the County Assembly.
26. Nevertheless, all was not lost as the provisions of Section 77(2) of the County Governments Act allows any person dissatisfied or affected by any decision relating to employment of persons including a decision in respect of recruitment, selection, appointment to any office made by the County Public Service Board to appeal to the Public Service Commission against such decision.
27. The operative words in the above section are ‘...*shall entertain appeals...*’ The Petitioners in their application and submissions have not demonstrated to this court that they had appealed against the decision of the Board to the Public Service Commission.
28. This court is guided by the Court of Appeal decision in the case of **The Speaker of the National Assembly V. The Honorable James Njenga Karume**, Civil Application No.192 of 1992 (UR) where it was held;

‘.....where there is clear procedure for the redress of any particular grievance prescribed by the Constitution or and Act of Parliament, that procedure should be strictly followed.....’

29. The first port of call before coming to the High Court to seek redress would have been the Public Service Commission. It is apparent that the Petitioners did not follow the due process provided by law.
30. The Petitioners have also not cited or invoked any provisions in the Constitution or any other written law that allows the circumvention of the due process provided by law to address such grievances.

FINDINGS

31. For the reasons set out above this court finds no reason to grant the conservatory orders sought as the Petitioners did not present their objections at the first port of call and further finds that this court has no jurisdiction to entertain the application as it is premature.

CONCLUSION

32. The application is hereby dismissed.
33. Costs of the application are granted to the Respondents.

It is so ordered.

Dated, Signed and Delivered at Nakuru this 13th day of May, 2014.

A. MSHILA

JUDGE