



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CONSTITUTIONAL PETITION NUMBER 2 OF 2014

(CONSOLIDATED WITH BUNGOMA PETITION NUMBER 2 “A” OF 2014)

JOHN MINING TEMOL.....1ST PETITIONER

JOB ARNOLD CHEPKWESI.....2ND PETITIONER

VERSUS

THE GOVERNOR OF BUNGOMA COUNTY 1ST RESPONDENT

THE HONOURABLE ATTORNEY GENERAL..... 2ND RESPONDENT

THE SPEAKER OF THE COUNTY ASSEMBLY..... 3RD RESPONDENT

THE BUNGOMA COUNTY PUBLIC SERVICES BOARD.....4TH RESPONDENT

AND

MURUMBA CHILU..... 1ST INTERESTED PARTY

EVANS FWAMBA..... 2ND INTERESTED PARTY

PETER MUKENYA..... 3RD INTERESTED PARTY

CONSOLATA WAKWABUBI..... 4TH INTERESTED PARTY

JOHN MUKHWANA..... 5TH INTERESTED PARTY

ROBERT SIMIYU..... 6TH INTERESTED PARTY

DAVID BARASA..... 7TH INTERESTED PARTY

CHRISTINE MURENGE.....8TH INTERESTED PARTY

JACOB EKIRAPA.....9TH INTERESTED PARTY

MONICA SALANO.....10TH INTERESTED PARTY

CHRISPINUS BARASA.....11TH INTERESTED PARTY

HERBERT KIBUNGUCHI.....12TH INTERESTED PARTY

MARTIN NDIWA.....13TH INTERESTED PARTY

CHEROTICHI MANGOU.....14TH INTERESTED PARTY

J U D G M E N T

Introduction

1. The consolidated Petitions herein seek to challenge the selection, nomination and vetting of the 14 Interested Parties as the County Chief Officers of Bungoma County by the 1st and 4th Respondent, respectively. They also seek orders to prohibit the 1st Respondent from appointing the Interested Parties to the various positions they were nominated to. It is the contention of the Petitioners that the process of selection, nomination and vetting by the 1st, 3rd and 4th Respondent was conducted in an unconstitutional manner since it failed to adhere to the standards set out in the both the Constitution of Kenya 2010 and statutory law .

Background

2. The first case to be filed in connection with the subject matter of the consolidated Petitions was **Bungoma High Court Petition No. 2 of 2014 (John Mining Temoi & Another vs. The Governor Bungoma County & 3 others)** through a Petition dated 3rd February, 2014. The Petitioners subsequently amended the Petition on 12th February, 2014.
3. The second Petition was **High Court of Kenya at Bungoma Petition No. 2 “A” of 2014 (John Wekesa Khaoya (Centre for Human Rights) vs. The Governor Bungoma County & 2 others)** where the Petitioner through his Petition dated 17th February, 2014 prayed for the following orders:-
 1. *That the vetting committee of the County Assembly be restrained from vetting the listed Chief Officers names by the Clerk Bungoma County Assembly as listed in the Star Newspaper dated 30th January, 2014 pending the hearing and determination of the Petition.*
 2. *That the vetted Chief Officers presented for approval of the County Assembly be restrained from taking up office pending the hearing and determination of the Petition.*
4. With the consent of the parties, the Petitions were consolidated on 5th March, 2014 with Petition Number 2 of 2014 as the head file. As a result, the 1st Respondent remained the Governor, Bungoma County, the 2nd Respondent, the Attorney General, the 3rd Respondent remained the Speaker of the County Assembly of Bungoma County while the 4th Respondent became the Bungoma County Service Board.

The Petitioners’ Case

5. In the affidavit sworn on 12th February 2014, both in support of the Petition and the interlocutory application, it was deposed that in or about the latter part of 2013 the County Secretary of Bungoma County invited applications for various positions in the County Government through an advertisement in the local dailies. That subsequently, various applicants applied for, were shortlisted and interviewed whereby on the recommendation of the 4th Respondent, the 1st Respondent nominated the fourteen (14) Interested Parties and forwarded their names to the Bungoma County Assembly (hereinafter “the County Assembly”) for approval. That the County Assembly has since vetted the said interested parties. The Petitioners contended that the process

- was neither fair nor transparent as the 3rd, 4th, 7th, 11th and 14th Interested Parties were nominated by the 1st Respondent for positions they were not shortlisted or interviewed for.
6. According to the Petitioners, the 1st and 4th Respondent's actions were an affront to Articles 10, 27(4), 56(c) and 232(1) of the Constitution and go against the principles of good governance, integrity, transparency and accountability. In the foregoing, it was the Petitioners contention that the actions of the Respondents constituted breach of the fundamental rights and freedoms enshrined in the Constitution. The Petitioners further complained that the Bongomek Community, which is a marginalized community in Bungoma County, were not included in the list of nominees despite certain candidates who hail from the said community having been shortlisted and interviewed. It was averred that the Bongomek community have a right to be included in the governance of Bungoma County. That the community has been discriminated against in the selection process of the County Chief officers.
 7. The Petitioners further alleged that the actions of the 1st, 3rd and 4th Respondent had violated the Petitioners' right to fair administrative action by proceeding with the vetting of Interested Parties while the Petitions of the Bongomek community and Mr. John Wekesa Khaoya, the Petitioner in Petition No. 2 "A" of 2014 had not been acted or deliberated upon by the County Assembly. That the Clerk of the County Assembly had acknowledged receipt of the said Petitions that touched on the process of recruitment and subsequent nomination of the County officers. That further, no feedback was received with regard to the issues raised in the said Petitions. According to the Petitioners, in so acting, the County Assembly had offended the provisions the Constitution. For these reasons, the Petitioners urged the Court to grant the prayers sought in the consolidated Petitions.
 8. The Petitioners' case was argued by Mr. Ocharo, Learned Counsel for the 1st and 2nd Petitioner and Mr. Khaoya who appeared in person in respect of his Petition No. 2 "A" of 2014.
 9. It was Mr. Ocharo's submission that; given the changes in constitutional practices and notions of constitutionalism, judicial review needed to be set in the context of mechanisms which seek to achieve broader political accountability; that based on the foregoing, the Court was clothed with the jurisdiction to interfere with the actions of the 1st and 4th Respondents if the same are unconstitutional. Counsel relied on the cases of **Federation of Women Lawyers in Kenya (FIDA-K) & 5 others -vs- The Attorney General & Another (2011) eKLR and Trusted Society of human Right Alliance -vs-The Attorney General and 2 others Petition Number 229 of 2012** in support of this contention.
 10. Counsel submitted that the Bongomek community was a marginalized community and as such should have been considered in the nominations for appointments of the County Officers given the provisions of Section 59(1) (e) of the County Governments Act, 2012 and Articles 10 and 232 of the Constitution which enjoins the 1st and 4th Respondent to protect the interests of the marginalized communities in Bungoma County in the appointment of public officers within the County. That though Parliament was yet to legislate on what constituted marginalized communities, the rights of the marginalized are not suspended due to this fact and public bodies, such as the Bungoma County Executive, should endeavor to put in place affirmative action measures to ensure representation of marginalized communities in appointive posts.
 11. Mr. Ocharo further argued that the failure on the part of the 1st and 4th Respondent to nominate a candidate from the Bongomek community as a County Chief Officer was against the spirit and tenor of the National Cohesion and Integration Act, 2008. This is so because Section 7 of that Act imposes an obligation on all public establishments to seek diversity of the people of Kenya in the employment of their staff. That due to the various acts complained of, the Respondents were in breach of the fundamental rights set out in Article 10, 27, 47, 56, 107 and 232 of the Constitution.
 12. With regard to the nomination of the 3rd, 4th, 7th, 11th and 14th Interested Parties to positions

they were not shortlisted for, Mr. Ocharo, submitted that the 1st and 4th Respondent had admitted in the Affidavits in reply that the Interested Parties had not applied for these positions which was an illegality as the 4th Respondent had invited applications for specific positions. That by nominating persons that had not been interviewed in the specific job positions, the 4th Respondent acted against the principle of fair competition, merit, accountability and transparency as set out in Article 232(h) and (i) of the Constitution. Mr. Ocharo further submitted that although the 1st and 4th Respondent had a margin of discretion in the appointment of Chief Officers, the same should not be exercised arbitrarily and capriciously, but rationally and reasonably. The Petitioners cited the case of **Pharmaceutical Manufacturers of SA: In re Ex Parte President of the Republic of South Africa 2000(2) SA 674 (CC)** in support of this submission. It was also the Petitioners' argument that the Court should use Sections 63 and 65(2) of the County Government's Act as a yardstick in determining whether the nomination of the 14 interested parties as County Officers was done in accordance with the law.

13. Mr. Ocharo further argued that the 3rd Respondent who is the Speaker of Bungoma County Assembly was properly enjoined in the case, as he also had the duty of safeguarding and upholding the Constitution in the execution of his public functions. That though the County Assembly was not enjoined in this Petition, the Speaker who is its titular head was properly before the Court and could thus answer for the actions of the County Assembly. He pointed out that upon receipt of the Petitions presented by the Bongomek community and John Wekesa Khaoya, the 3rd Respondent had the duty to ensure that the Petitions were tabled before the County Assembly for debate as the same raised weighty constitutional issues. That since the Petitions were never heard nor deliberated upon, the rights of the Petitioners in terms of fair administrative action had been breached. It was further submitted that the argument advanced by the 3rd Respondent that the reasons why the Petitions were not debated was due to the sub judice rule was lacking in merit. According to Mr. Khaoya, the Petitions by the Bongomek Community and himself were presented to the County Assembly and the Speaker before the present Petitions were lodged in the Courts.
14. On the issue raised by the Interested Parties that enjoining them was unwarranted, it was the submission of both Mr. Ocharo and Mr. Khaoya that doing so was necessary as the Interested Parties had an identifiable stake in the outcome of the Petition. That accordingly, it was prudent to enjoin them in the interests of natural justice. In conclusion, the Petitioners urged the Court to allow the orders sought in the consolidated Petitions with costs.

The Respondents' case

15. All the Respondents, save for the 2nd Respondent, addressed the Court wholesomely with regard to the various issues raised by the Petitioners, through their filed pleadings and written submissions. It is noteworthy that the 2nd Respondent, the Attorney General, did not enter appearance with regard to the Petitions despite service of the pleadings upon him.

The 1st, 4th Respondent and Interested Parties' case

16. The 1st and 4th Respondent together with the Interested Parties filed responses to the Petitions. They also filed Replying Affidavits all sworn on 11th March, 2014 by Kenneth Lusaka Makelo, Elizabeth J. Wanyonyi and Murumba Chilu, respectively. They contended that the consolidated Petitions were defective, bad in law and ought to be struck out with costs. They averred that the recruitment process was not done in violation of the Constitution or any written law as alleged by the Petitioners; that the Interested Parties were recruited, interviewed and nominated through a competitive, fair and transparent process in accordance with the procedure prescribed by Sections 44 and 45 of the County Governments Act. The 4th Respondent deponed that it advertised for the positions in various local dailies and subsequently interviewed the various applicants. That having noted their skills and expertise, the 4th Respondent recommended to the 1st Respondent that certain personnel could do better in certain dockets though having excelled in the area they had

applied for. That such recommendations were within the 4th Respondent's mandate given that all the candidates that were nominated had been interviewed and selected in a competitive manner.

17. It was also the contention of the 1st and 4th Respondent that there was no bias against the Bongomek community especially in respect to one of the candidates by the name of Protus C. Kirui who was in third place in the position he had applied for. That the said person had not produced any evidence of such bias. According to the 1st Respondent, Parliament was yet to pass legislation to define what constitutes a marginalized group. That in the premises, the Petitioners had not proved that the Bongomek was a marginalized community that could warrant special consideration while considering appointments in the County Executive of Bungoma County.
18. It was further deponed by the 1st Respondent that, Bungoma County has 42 tribes hence it would be improper for the Bongomek community to allege that it was sidelined and discriminated against in the nominations and selection process of County Chief officers given the limited slots for those positions. That further, the need to have marginalized groups, special persons with disabilities and youth is a requirement to be fulfilled when taking into account representatives of the County Assembly and not County Chief Officers as alleged.
19. Mr. Kituyi, Learned Counsel for the 1st, 4th Respondent and Interested Parties, submitted that John Wekesa Khaoya who brought the Petition on behalf of a community based organization ("CBO") in Petition Number 2 "A" of 2014 did not have locus standi to do so. That it is only the Secretary, Treasurer and Chairman or all of the said officials of the organization that had the legal capacity to bring the Petition and not Mr. Khaoya who had deponed in his affidavit in support of the Petition that he was the coordinator of the organization. As such, Mr. Kituyi submitted that the Petition should be struck.
20. With regard to the allegations of discrimination of the Bongomek community, Mr. Kituyi argued that the Petitioners had failed to illustrate that indeed the Bongomek qualified as a marginalized tribe in Bungoma County. That even if the Bongomek community was indeed marginalized as contended by the Petitioners, the appointment of people that belong to marginalized groups in public bodies cannot be enforced immediately but progressively. He relied on the **Supreme Court Advisory Opinion Number 2 of 2012 In the Matter of the Principle of Gender Representation in the National Assembly and the Senate** in support of this argument.
21. In Mr. Kituyi's view, the Respondents had clearly illustrated through the various annexures in their respective Replying Affidavits that the process of recruitment of the County officers was done in accordance with Sections 44 and 45 of the County Governments Act, 2012. He submitted that all the persons who were nominated had been taken through a rigorous process of selection and vetting and that therefore the contention presented by the Petitioners that there was lack of transparency and accountability in the selection and nomination process was misleading. That upon presentation of the three candidates qualifying in each category of the advertised posts by the 4th Respondent, the 1st Respondent had the discretion to choose from the three candidates presented. That further, the 1st Respondent placed special considerations on sub county representation as opposed to tribe and ethnicity. In the foregoing, Mr. Kituyi argued that two nominees from the Mt. Elgon where the Bongomek community prominently reside had already been slated as County Officers. In the foregoing, it was the contention of the Respondents that the Petitioners had failed to illustrate that there was discrimination of the aforesaid community on the part of the 1st and 4th Respondent in the appointment of the County Chief officers.
22. In addition, Mr. Kituyi faulted the Petitioners for enjoining the Interested Parties. He submitted that the Interested Parties were enjoined without any proper legal basis and should be struck out from the Petition; that the Chairman of the 4th Respondent had also been wrongly enjoined in Petition Number 2 "A" of 2014 though he cannot be held personally liable for the actions of the County Service Board. Mr. Kituyi therefore urged the court to strike out the name of the Chairman of the 4th Respondent from the Petition. Counsel urged that the Petition be dismissed with costs .

The 3rd Respondent's Case.

23. In response to the Petition, the 3rd Respondent filed a response and a Replying Affidavit sworn on 12th March, 2014. He contended that as the Speaker of Bungoma County Assembly, he was not involved in the interviewing process of the County Chief Officers. That the only time the County Assembly gets involved in the process of appointing County Chief Officers is when the names of the nominees for the County Chief offices are forwarded by the Governor for purposes of vetting and approval as required by Section 8(4) (a) of the County Governments Act, 2012 and the Public Appointments (Parliamentary Approval) Act No. 33 of 2011. That in this regard, it was his role to table the names in the County Assembly as required and have the respective committees conduct the vetting and approval hearings as required. In the premises, the 3rd Respondent contended that as Speaker of the County Assembly, he was not a party to the deliberations of the sectoral committees' in the vetting process.
24. The 3rd Respondent further averred that in the spirit of Article 196 of the Constitution, an advertisement with respect to the vetting of the Interested Parties was placed in the local dailies setting forth the dates and time of vetting of the nominees by the respective committees of the Assembly. That subsequently, the respective house committees and the County Assembly deliberated on the proposed nominees for the County Officers and the said reports were yet to be adopted by the entire County Assembly. It was thus the contention of the 3rd Respondent that he did not violate the Constitution in facilitating the aforesaid deliberations as that was what the law required of him.
25. The 3rd Respondent admitted having received the Petitions by the Bongomek community and one John Wafula Khaoya. That the said Petitions requested the County Assembly to refrain from the vetting and approval exercises due to alleged anomalies in the process. The 3rd Respondent contended that there was no Standing Committee in the Assembly as per the Bungoma County Assembly Standing Orders that could be restrained from carrying out its functions as prayed for in the aforesaid Petitions. That in any event, the 3rd Respondent had tabled the said Petitions to the relevant committees to interrogate and consider them during the vetting process of the County Officers.
26. The 3rd Respondent's case was argued by Learned Counsel Mr. Situma. It was his submission that the Speaker of the County Assembly as an ex-officio member does not debate nor take part in any decision making process of the Assembly. That the 3rd Respondent cannot be faulted for presiding over matters of the Assembly regarding the approval of the nominees forwarded to the Assembly through his office by the 1st Respondent. That in carrying out the vetting exercise, the various committees of the County Assembly make decisions based on the law, facts and evidence before them. That if the Petitioners had any misgivings on the process, they should have channeled their reservations through the various sectoral committees vetting the said nominees of the County Chief Officers. That such was the essence of the advertisement run on the local dailies with regard to the vetting exercise by the County Assembly. That the law as enshrined in Article 196 of the Constitution expected the Petitioners to present their grievances during the vetting sessions and express their reservations there. That given that the Petitioners failed to do so, they are estopped from raising these issues in court.
27. In the foregoing, Counsel urged the court to find that the consolidated Petition lacked merit and should be dismissed with costs.

Determination

28. Having considered the pleadings and the submissions of the respective parties, both oral and written, I consider the following to be the broad issues for determination:-
- i. ***Whether the 1st and 4th Respondent were in violation of any provision of the***

Constitution or any written law with regard to the nomination of the candidates for the position of County Officers.

- ii. ***Whether the Speaker as well as the County Assembly acted unconstitutionally or illegally in not considering or debating the Petitions presented by the Bongomek Community and John Wekesa Khaoya.***
- iii. ***Whether the rights of the Petitioners were violated by the Respondents in the selection, nomination and vetting of the interested parties as the County officers of Bungoma County.***
- iv. ***The costs of the Petition.***

29. Before the determination of the above issues, it would be prudent to resolve a number of issues that were raised by the Respondents in their Replying Affidavits and respective submissions. One such concern regards the jurisdiction of this court in granting the prayers sought in the consolidated Petition. I believe and hold that this issue was conclusively dealt with in the ruling of 5th March, 2014 when the Court ruled on the Preliminary Objection by the 1st and 4th Respondent and the Interested Parties in connection with jurisdiction. The parties are therefore estopped from raising the issue in these proceedings as the same is res-judicata.

30. However, for the avoidance of doubt, this Court reiterates that no person, state officer or state organ is above the Constitution or the law. All organs created by the Constitution are subordinate to it. Further, Article 10(1) binds all state organs, state officers, public officers and all persons while applying, interpreting the Constitution or the law or public policy. Therefore, when any of these organs, including the County Executive, County Assembly and the Speakers of either Parliament or County Assemblies act in breach of the Constitution or outside their areas of operation, this Court will not hesitate to intervene and reverse those actions. The Constitution is supreme and its dictates are to be jealously protected by this court. That is what Article 165 of the Constitution decrees.

31. As such, the Court has jurisdiction to determine the constitutionality of the process of selection, nomination, approval as well as any appointment by the County Public Service Board, the Governor or by the County Assembly. The scope of the court's jurisdiction extends to the procedural improprieties, as well as the legality of the appointment decision to determine whether they accord with the constitutional threshold. See the Case of **John Kipng'eno Koech & 2 others v Nakuru County Assembly & 5 others [2013] eKLR.**

32. The next preliminary issue raised by the Respondents was on joinder of parties. From the submissions, the Respondents took issue with the joinder of the 3rd Respondent who is the Speaker of the County Assembly on the ground that he was not involved in the process of selection, nomination and vetting of the County Officers. From my understanding, it was the 3rd Respondent's claim that the County Assembly should have been enjoined in this case as the acts complained of fell within its mandate. In addition, it was argued that the joinder of the Interested Parties in this Petition was unwarranted as they are innocent parties who applied and were nominated for the posts of County officers. The joinder of the Chairman of the 3rd Respondent was also objected to.

33. With regard to the contention that the County Assembly should have been enjoined in the Petition since the Speaker is not involved in the process of selection, nomination and vetting of the County Officers, it is not in dispute that the County Assembly as a distinct institution in the County Government, capable of suing and being sued was a proper party in these proceedings. However, in a case such as this one, the Speaker must also be enjoined together with the County Assembly. See the Case of Simon **Wachira Kagiri v County Assembly of Nyeri & 2 others (supra).** This is so considering the allegations against him that he failed to cause the Petitions of the Bongomek Community and Mr. Khaoya to be deliberated upon. Further, although the County Assembly should have been enjoined as a party, the omission in my view did not occasion any prejudice. The Speaker of the Assembly as its titular head is a party. His actions and those of the Assembly were in issue and his presence suffices. In any event, although the practice of non-joinder of

parties is not to be encouraged, this Court must dispense justice without undue regard to technicalities.

34.As Regards the Interested Parties, the **Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2012**, (hereinafter “the Mutunga Rules”) in Rule 2 defines an interested party as:-

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

35.In the present case, all the Interested Parties have been nominated by the 1st Respondent and subsequently vetted by the County Assembly. They were slated to become the County Chief Officers of Bungoma County. The remedies sought in the Petition would affect their appointments. I am therefore in agreement with the submissions of Mr. Ocharo and Mr. Khaoya, that the Interested Parties having had a legal interest or identifiable stake in the outcome of these proceedings were properly enjoined in the Petition.

36.As regards the Chairman of the Bungoma County Public Service Board, it was Mr. Kituyi’s argument that it was improper to enjoin the said Chairman in his personal capacity for acts done by the Bungoma County Public Service Board. In rejoinder, Mr. Khaoya submitted that the 3rd Respondent was properly enjoined as he was the head of the Bungoma County Public Services Board and further that, he was a party to the Petition in the capacity of the office holder and not in his personal capacity.

37.The Chairman of a County Public Service Board is not liable to be sued or to sue on behalf of the said Board. The County Public Service Board as a body corporate, is a legal entity capable of suing and being sued under Section 57 of the County Governments Act, 2012. It therefore follows that the Chairman should not have been sued or enjoined in these proceedings for the actions and omissions of the County Public Services Board which is a legal entity on its own. In this regard, the inclusion of the Chairman of that Board in Petition No. 2 “A” of 2014 was irregular. However, since that Petition was Consolidated with Petition No. 2 of 2014, which had properly joined the Board, nothing turns out on it. However, the Chairman is hereby struck out of the proceedings with no order as to costs as he was not sued in his own personal, but in his official capacity.

38.In conclusion it was argued that John Wekesa Khaoya lacked locus standi to bring the action on behalf of the Human Rights Association known as Centre for Human Rights on Behalf of Public Interest (“the organization”). It was the contention of Mr. Kituyi that it is not clear whether Mr. Khaoya brought the Petition in his own capacity or on behalf of the organization. That if at all the same was brought on behalf of the organization which is a community based organization, Mr. Khaoya lacked the capacity to represent the said organization. The cases of **FREE PENTECOSTAL FELLOWSHIP OF KENYA VS. KENYA COMMERCIAL BANK NBI HCCC. NO. 5116 OF 1992 (UR)** and **KENYA AUTO BAZAAR ASSOCIATION VS. THE KENYA REVENUE AUTHORITY & ANOR NBI HCCC NO. 1491 OF 2000** were relied in support of these proposition.

39.It was contended that since the organization is a community based organization, any action undertaken by the same in form of a civil litigation should be brought by the Secretary, Chairman or Treasurer of the Organization. Mr. Kituyi further argued that Mr. Khaoya had deponed that he was only a co-ordinator in the said organization. In rebuttal, Mr. Khaoya dismissed these contentions and submitted that under the Constitution, every person, including himself has the right to institute court proceedings claiming that a right or fundamental freedom in the bill of rights had been denied, violated or infringed.

40. I have considered the opposing arguments on this issue. I am of the view that Article 22(1) and (2) of the Constitution has expanded the horizons of locus standi in matters of enforcement of fundamental rights and freedoms. The same provides that:-

“22. (1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.

(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by–

- a. **a person acting on behalf of another person who cannot act in their own name;**
- b. **a person acting as a member of, or in the interest of, group or class of persons;**
- c. **a person acting in the public interest; or**
- d. **an association acting in the interest of one or more of its members.”**

41. The above provision is also similar to Article 258 which gives any person unhindered access to the courts where the Constitution has been contravened or there is threatened contravention of the Constitution. A literal interpretation of Articles 22 and 258, in my view confers upon any person the right to bring action in more than two instances. Firstly, in the public interest, and secondly, where a breach of the Constitution is threatened in relation to a right or fundamental freedom. Where one purports to enforce the rights of another, it is my view that there must be a nexus between the parties. In this case, Mr. Khaoya has described himself as the **“CEO/COORDINATOR”** of the organization and the Petition is about alleged violation of the Constitution. These facts are not in question. Mr. Khaoya has, in my view, illustrated that there is a nexus between him and the organization. I am therefore unable to agree with Mr. Kituyi that John Wekesa Khaoya lacks the locus standi to institute Petition No. 2 “A” of 2014. The cases of **FREE PENTECOSTAL FELLOWSHIP IN KENYA (Supra) and KENYA AUTO BAZZAAR ASSOCIATION (Supra)** relied on by the 1st and 4th Respondent are not applicable in that those cases concerned the application of normal civil litigation under the **Societies Act, Cap 108 and the Civil Procedure Act and Rules** which is not the case here. In the instant case, this is a Constitutional Petition in which the Constitution itself has relaxed the *locus standi* rule. I accordingly dismiss the Respondents’ objection.

41. Having dispensed with the preliminary issues, I now turn to the crux of the consolidated Petitions and determine the main issues.

Whether the 1st and 4th Respondent were in violation of any provisions of the Constitution or any written law with regard to the nomination of the candidates for the position of County Officers.

42. The Constitution of Kenya 2010 has established two levels of Government, that is, at the National level and the County level. It has provided for 47 County governments under Section 6 (1) and listed the Counties under the First Schedule. The status, functions, and powers of County Governments are provided for under Chapter 11, Article 176, and Fourth Schedule (part 2) of the Constitution.

43. The Constitution also spells out the structure and institutions of devolved governance at the Counties. At the center of the County Government, are the County Assembly and the County Executive. The former playing the legislative role, while the latter carries out the executive functions of the County. Additionally, the Constitution has given County governments the power to establish staff positions in the County, and to hire, discipline and remove staff in those positions. This is primarily an executive function and legislation, such as the County Governments Act of 2012, provide the standard norms and procedures to be followed by all Counties in this respect.

44. Sections 30 and 31 of the County Governments Act, 2012 in turn define the functions and responsibilities and powers of the Governor in running the County Executive affairs. The subject matter in this Petition has to do with the appointment of County Chief officers, who play a vital role in the County Executive. The office of the County Chief officers is established under Section

45 of the County Governments Act which provides that:-

“45. (1) The governor shall—

- a. ***nominate qualified and experienced county chief officers from among persons competitively sourced and recommended by the County Public Service Board; and***
- b. ***with the approval of the county assembly, appoint county chief officers.”***

45. Section 57 of the County Governments Act, establishes the County Services Board which is empowered under Section 45 (1) (a) of the said Act to make recommendations to the County Governor with reference to appointment of County Chief officers. However, like County Executive Committee Members, the Governor is obligated to send the names of such nominees to the County Assembly for approval prior to appointment. In this case, the County Assembly in approving the nominations of the Governor with respect to the County Chief Officers would be carrying out an oversight function in vetting the suitability of such nominees as opposed to a legislative function.

46. The core of the Petitioners’ grievance is that the Respondents failed to adhere to the Constitution and the law in the selection, nomination and vetting of the Interested Parties as County Chief Officers. Two matters have specifically been pointed out in this respect. Firstly, there was the contention that five (5) nominees namely, the 3rd, 4th, 7th, 11th and 14th Interested Parties were nominated by both the 1st and 4th Respondent for positions they were neither shortlisted nor interviewed for. Secondly, the Petitioners assert that the failure by the 1st Respondent to nominate a person from the Bongomek community as a County Chief Officer was in violation of their rights as enshrined in the Constitution and other statutory provisions.

47. I propose first to deal with the issue of the selection and nomination of the 3rd, 4th, 7th, 11, and 14th Interested Parties by the 1st and 4th Respondent. It is not in dispute that 13 posts for the County Chief officers were duly advertised and interviews carried out. In the Supporting Affidavit sworn on 12th February, 2014 the second Petitioner deposed in paragraphs 13, 14 and 15 as follows:-

“ 13. THAT the following interested parties were shortlisted and interviewed for the posts as shown hereunder;

14. THAT strangely the above mentioned persons were nominated for positions for which they were not shortlisted or interviewed, to wit:-

<i>N o.</i>	<i>NAME</i>	<i>POST</i>
1.	<i>David Barasa Kibiti</i>	<i>Education Science and ICT</i>
2	<i>Chrispinus Barasa</i>	<i>Trade Energy & Industrialization</i>
3	<i>Peter Mukenya</i>	<i>Makokha Finance and Economic Planning</i>
4	<i>Consolata Wakwabubi</i>	<i>Public Administration</i>
5	<i>Cherotich Mungou</i>	<i>Youth and Sports</i>

15. THAT the Petitioners, other interested persons and or organizations owing to the foregoing premises, raised concerns and petitioned the 1st and 3rd Respondents to halt the process of recruitment pending an address of the raised

concerns and the Petitions”.

48. From the averments by the Petitioners set out above, concerns have been raised about how the nomination process of the 3rd, 4th, 7th, 11th and 14th Interested Parties was carried out. In answer to the Petitioners allegations, the 1st, 3rd and 4th Respondent contended that the process of the selection, nomination and vetting of the Interested Parties was done in accordance with the Constitution and County Governments Act. Of importance is paragraph 12 of Elizabeth J. Wanyonyi’s Replying Affidavit sworn on behalf of the 4th Respondent wherein she deponed as follows:-

“12. THAT the Board having interviewed the various applicants and having noted their skills and expertise, it recommended to the Governor that certain personnel could do better in certain dockets and perform better having excelled in the area they had applied which was part of the recruitment exercise and which was within the Boards mandate.”

49. From the above disposition, the 4th Respondent admitted that it had re-designated some nominees to positions that they had neither applied nor been interviewed for. In the same vein, the County Public Services Board alluded to the fact that it had the discretion to do so. According to the submissions of Mr. Ocharo, such discretion was not exercised properly as it offended Articles 10, 27, 56 and 232 of the Constitution as read together with Section 65 of the County Government’s Act.

50. Section 65 of the County Governments Act sets the threshold which the County Public Services Board should adhere to when making appointments. I am in agreement with the submission, and so hold, that what is set out in that Section should be the yardstick in determining the legality of the nominations. The said provision states, inter alia, that:-

“65 (1) In selecting candidates for appointment, the County Public Service Board shall consider—

- a. ***the standards, values and principles set out in Articles 10, 27(4), 56(c) and 232(1) of the Constitution;***
- b.
- c.
- d.
- e.
- f. ***the need for open and transparent recruitment of public servants; and***
- g. ***individual performance.***

(2) In determining whether an appointment, promotion or re-designation has been undertaken in a fair and transparent manner, the overriding factors shall be merit, fair competition and representation of the diversity of the county.”
(emphasis added)

51. The law as set out above is clear. In considering issues of appointment of County Chief Officers, the 4th Respondent should follow the Constitutional guidelines. It is therefore imperative to look at the standards, values and principles as set out in Articles 10, 27(4), 56(c) and 232(1) of the Constitution. Article 10 provides that all state officers and organs are bound by the national values and principles of governance when applying the Constitution or any law or implements public policy decisions. Some of these values and principles are equity, social justice, inclusiveness, human rights, protection of the marginalized, transparency and accountability.

52. Articles 27, 56(c) and 232(1) of the Constitution provides for affirmative action that ensures that the marginalized groups are provided **special opportunities** for access to employment and the values and principles of public service which include accountability for administrative acts,

competition and merit in appointments and representation of Kenya's diverse communities. These are some of the factors the 4th Respondent was called upon to consider before recommending the nominees to the 1st Respondent for appointment.

53. It is not in dispute that the posts for the County Chief Officers for Bungoma County was intended to be through a competitive process. The evidence on record indicates that the said posts were duly advertised for in the local dailies. Shortlisted candidates were also publicized in the same manner. What concerns the court is however, what transpired during the selection process. In the **Indian Supreme Court case of Centre for PIL and Another –vs- Union of India and Another, Petition Writ No. 348 of 2010**, the Court adopted the approach that judicial review of appointments must scrutinize not only the appointment process but also adherence to the eligibility criteria. Thus while this court is not enjoined to review the merits of the decision of the 4th Respondent, where the 1st and 4th Respondent did not adhere to eligibility criteria, their decisions are subject to judicial review. See the case of **Trusted Society of Human Rights (supra)**. The question then becomes whether the 4th Respondent adhered to the eligibility criteria it had set while selecting the Interested Parties as County Chief officers.

54. I have seen the Report on the Selection and Recruitment of the County Secretary and County Chief Officers marked as ***Exhibit E-3*** by the 4th Respondent annexed to the Replying Affidavit of Elizabeth J. Wanyonyi. At paragraph 2.5 thereof, the requirements of Chief Officers were among other things to have ***“Vast knowledge and experience of not less than 10 years in the relevant field, with five years in management level.”***

55. The outcome of the interviewing process and the marks awarded for each candidate were tabulated in paragraph 4 of the said report. In particular 3rd, 4th, 7th, 11th and 14th Interested Parties scored the following in their specific categories;

56. However, in paragraph 5 the report states that:-

“The results section shows the performance in each docket after interviewing. However, during the interviewing process the CPSB identified special skills and qualifications in some candidates and felt that it was wise to move them from the dockets they had interviewed in so far as to optimize their skills. The CPSB therefore recommends to the Governor three names in each docket but they have moved some candidates from the dockets they applied for, while maintaining their respective positions.....H.E the Governor will in turn nominate any one of them to be presented to the County Assembly for approval.” (emphasis mine)

57. The net effect of this statement was that the 3rd, 4th, 7th, 11th and 14th Interested Parties were nominated in the categories they had not been interviewed for. This is as follows:-

1. ***David Barasa Kibiti - Education Science and ICT***
2. ***Chrispinus Barasa - Trade Energy & Industrialization***
3. ***Peter Makokha Mukenya - Finance and Economic Planning***
4. ***Consolata Wakwabubi - Public Administration***
5. ***Cherotich Mungou- Youth and Sports***

58. The question that arises is whether the actions of the 4th Respondent were within Section 65 of the County Governments Act. According to Petitioners, this action was the antithesis of the new constitutional dispensation which required transparency and accountability in terms of public appointments. In reply, the 4th Respondent maintained that it had the discretion of re-designating the nominees to different categories rather than the slots they had applied for. I do not think so. Section 65(1) provides for appointments only. Nowhere on record did the Respondents show that when advertising for the posts, they reserved any right to move an interviewee to another post not interviewed for. If that was the intention, the 4th Respondent should have expressly stated so in the advertisement produced as “exhibit “E-a” in the Affidavit of Elizabeth. That advertisement

- should have asked the applicants to apply for multiple posts for which they thought they would be suited for. That, in my view, would have enabled each and every applicant to be interviewed and compete effectively with the others in all the posts that they would have likely to have been nominated for. Further, I do not agree that the 4th Respondent had the discretion to re-designate the applicants. Re-designation as quite correctly submitted by Mr. Khaoya is undertaken under Section 69 of the County Government Act and applies to already serving officers not to fresh applicants. The re-designation referred to in Section 65 (2), is in respect of what is to be considered when undertaking the matters set out therein and not re-designation of fresh applicants for advertised posts. In my view, by moving candidates from interviewed position to others, the 4th Respondent breached the principle of competition, merit, accountability, equity and transparency.
59. Those who may have qualified in those posts did not have a fair competition with the ones “re-designated.” A simple comparison is the marks scored by the ‘re-designated’ nominees vis a vis what the others scored in those positions reveals this fact.
60. David Barasa Kibiti had 340 marks in Public Administration. He was nominated in Education where his marks placed him number 6. All the other applicants for this post who had between 349 and 380 marks, were overlooked and never competed with him. Chrispinus Barasa scored 389 in Finance and Economic Planning, he was nominated for Trade and Energy whose results the 1st and 4th Respondent withheld from the Court for unknown reasons. Peter Makokha Mukenya’s marks were never disclosed to the Court yet he was favoured in the place of Nicholas Sile, Jeremiah Murumba and Nicholas Thomas Toywa Simiyu who had scored very high marks for that post. Consolata Wakwabubi scored 403 in Youth and Sports yet she was given Public Administration. Lastly Cherotich Mungou who had scored 386 marks in Education was sent to the Youth and Sports docket in the stead of Alice Katila Wanyonyi who had scored 399 marks for that post.
61. It is also evident from the said report that when the 4th Respondent was recommending the said nominees to the 1st Respondent, it ranked them first in those posts or categories so that the 1st Respondent, who seems to have made his mind to pick all those who were returned as number one, will pick them. One might not be faulted in concluding that the list of the nominees may have been predetermined by the 4th Respondent, otherwise how do they rank David Kibiti No. 1 with 340 marks ahead of five others who had between 349 and 380!
62. In any event, even if I was wrong on the issue of the 4th Respondent’s alleged discretion to re-designate the applicants, which I firmly believe I am not, a reading of Section 65(2) is clear that certain considerations have to be made in exercise of any such discretion, if it existed. The said provision states as follows:-

“In determining whether an appointment, promotion or re-designation has been undertaken in a fair and transparent manner, the overriding factors shall be merit, fair competition and representation of the diversity of the county.”

63. That is the law, and the Court must interpret the same as provided. In the instant case, the 4th Respondent requested for applications for specific positions. The Advertisement exhibited as E-2”a” is proof of that fact. I am therefore in agreement with the Petitioners’ submissions that logic dictates that qualifications for the various positions were not uniform and that is the reason why the 4th Respondent was specific in calling for the applications. Indeed, the 4th Respondent in its very own report at paragraph 2.5 aforesaid indicate that among other things, the candidates for the various posts had to possess vast knowledge and experience of not less than 10 years in the relevant field, with five years in management level.
64. To my mind, merit and fair competition demand that nominees must be interviewed and selected in the specific positions they have applied and interviewed for. This is the essence of transparency and accountability as expounded in the Constitution. To do otherwise would be in contravention of Section 65 of the County Governments Act. In this regard, the 3rd, 4th, 7th, 11th and 14th Interested Parties did not qualify as nominees for the post of County Chief Officers nominated for

- by the 4th Respondent. With such glaring irregularity, how sure can one be that even the others were properly rated and nominated. It leaves a heavy doubt in the Court's mind. I therefore find and hold that the 4th Respondent acted ultra vires the Constitution and the County Governments Act in proposing to the 1st Respondent the 3rd, 4th, 7th, 11th and 14th Interested Parties as nominees for Chief Officers in the dockets shown in the Report by the 4th Respondent.
65. Having made the foregoing findings, it then follows that the actions of the 1st Respondent in nominating the 3rd, 4th, 7th, 11th and 14th Interested Parties and forwarding their names to the County Assembly was a nullity. Accordingly, and for the reason of the doubts the Court has expressed above, I hold that the exercise of the nomination was unconstitutional, illegal and therefore a nullity.
66. At this juncture, I wish to deal with the issue raised by the Petitioners that the 1st Respondent failed to nominate a person from the Bongomek community even though an applicant from that community had been proposed as one of the three nominees by the 4th Respondent in the category of County Chief officer for Trade and Energy. As correctly argued by the Petitioners, the Constitution has now divided the country into 47 Counties and demands diversity in public appointment of all State Organs including the County Government. However, does this consideration of regional and ethnic diversity demand that every tribe in Bungoma County be represented in the Bungoma County Government in order for the institution to be deemed to have complied with the law? What would be the case where positions are limited?
67. It is my finding that in order to impugn the decision of the 1st, 3rd and 4th Respondent, the Petitioners must show that the Respondents failed to consider the special interest of the Bongomek as a marginalized community in nomination of the County Chief officers. It was argued by the 1st Respondent that the Petitioners had failed to illustrate that the Bongomek was a marginalized community in Bungoma County and that in the absence of legislation, there is no definition of what comprises of a marginalized group. Firstly, the absence of legislation does not suspend the rights of a particular group. Secondly, it has not been denied that the Bongomek community resides in Bungoma County.
68. The Petitioners have shown in Exhibit No. "JAC 4" that out of a population of over two (2) million in Bungoma County, the Bongomek constitute only 3704 individuals. That they do not have any representation in the governance of the County, that is, the County Representatives, Members of Parliament, Senate, Governor or in the County jobs. They have shown that according to the 2009 Population and Housing Census Report, there were five (5) tribes considered to be the inhabitants of Bungoma County. These are the Bukusu, Batura, Tachoni, Teso, Sabaots and the Bongomek. That whilst all the others ethnic communities had a representation in the governance of the County, the Bongomek had none at all. According to the Petitioners, the Bongomek were a marginalized group that was entitled to an affirmative action by the Respondents in terms of the constitutional requirements.
69. I agree with the Respondents that neither the Constitution nor the County Government Act define who the marginalized groups are. However, **the Concise Oxford English Dictionary, 12th Edition at Pg 874** has defined the term **Marginalise** as "*to treat as marginal or periphery*" while **Marginal** has therein been defined as "*of secondary or minor importance*".
70. In this regard, without attempting to define who the marginalized groups are, from the Petition presented by that community to the County Assembly and produced herein as exhibit "JAC-4", the Bongomek can be said to be at '*periphery of the administration and governance of Bungoma County*'. I am bolstered in this believe by the fact that none of the Respondents denied these facts and further that, the 1st and 4th Respondent alleged that there were 42 tribes in Bungoma without giving any specifics or details as the Petitioners did in their assertions. Indeed anyone with conscience looking at table 1 of page 3 of exhibit "JAC-4" cannot but wonder what else marginalization constitute.
71. Be that as it may, what is of importance is the fact that the Bongomek represent the ethnic diversity of Bungoma County. What the appointing authorities, that is the 1st and 4th Respondent were required to do in nomination of the County Chief Officers was to do the best they could to accommodate the requirement of this diversity in all its form. I am alive to the fact that diversity in representation of various special interest groups in both elective and appointive positions in State

organs can only be achieved progressively and not immediately as enunciated by the Supreme Court in **Supreme Court Advisory Opinion Number 2 of 2012**. From the evidence on record and as already set out above, out of the various ethnic communities in Bungoma County and their representation in the political landscape, that is, in terms of County Representatives, Members of the Bi-cameral Parliament, and County Jobs the Bongomek is not represented in any sphere of Governance. Whilst I appreciate the principle set out in the aforesaid Advisory Opinion by the Supreme Court, I do not think that there is any magic date set, either by the Constitution or any other law, when this so called progressive realization of affirmative action in the Constitution has to set in. To my mind it could be any day including **NOW** especially for appointive positions. In any event, it should be remembered that the Supreme Court in the Advisory Opinion was specifically dealing with the issue of the 3rd gender rule in elective positions which is a delicate issue that would actually require legislative steps unlike appointive positions as in this case.

72. I am not in agreement with the Respondents that since the alleged Mr. Protus C. Kirui did not swear any affidavit in these proceedings, the Petitioners had failed to prove that he was a Bongomek and had applied for the posts. I hold that whilst the details of those who had applied and had been interviewed and their marks were in the possession of the Respondents, the 4th Respondent conveniently withheld the results of the applicants for the position of Trade, Energy and Industrialization which the said Mr. Kirui is alleged to have applied. In any event, I have seen the 4th Respondent's Exhibit "E-b", the List of the shortlisted interviewees. Under number 5 in the post of Trade, Energy and Industrialization is one Protus Chemonges Kiruhi who may be the Protus C. Kirui contended by the Petitioners. To this end, I am of the view, and so hold that the Bongomek community is a marginalized group in Bungoma County and its rights under the Constitution to be treated as such had been violated.

Whether the Speaker as well as the County Assembly acted unconstitutionally in not considering or debating the Petition presented by the Bongomek Community and John Wekesa Khaoya

73. It was the contention of the Petitioners that in a bid to have their concerns with regard to the appointment of the County Chief officers addressed, the Bongomek community and Mr. John Wekesa Khaoya, presented petitions dated 27th January, 2014 and 3rd February, 2014 respectively to the County Assembly. That in blatant disregard to the issues raised therein, the County Assembly went ahead to vet the Interested Parties for the post of County Chief officers without further reference to the Petitioners. That this was against the Petitioners right to fair administrative action as enshrined in Article 47 of the Constitution. In a rejoinder, the 3rd Respondent maintained that the Petitioners should have directed their grievances to the various sectoral committees of the County Assembly in respect to the nomination of the Interested Parties. That in any case, the Petitions could not curtail the County Assembly from deliberating the nominations of the County Chief Officers.

74. I have considered the rival arguments by the Parties. Article 37 of the Constitution provides that every person has the right, peaceably and unarmed to assemble, to demonstrate and to present petitions to public authorities. From this Constitutional provision, it is evident that any person can present a Petition to any public body, including the County Assembly. The County Governments Act further provides for Petitions by ordinary citizens or constituents of the County. Section 15 provides that:-

"15. (1) A person has a right to petition a county assembly to consider any matter within its authority, including enacting, amending or repealing any of its legislation.

(2) Each county assembly shall prescribe a procedure for exercising the right under subsection (1). "

75. Additionally, Sections 88 and 89 of the same Act provide that:-

“88.(1)Citizens have a right to petition the county government on any matter under the responsibility of the county government.

(2)Citizens petitions shall be made in writing to the county government.

(3)County legislation shall give further effect to section 88(1).

89) ... County government authorities, agencies and agents have a duty to respond expeditiously to petitions and challenges from citizens.” (underlining mine)

77. From the foregoing, it is clear that the right to Petition the County Assembly is in pursuance to Article 37 of the Constitution and aims at enhancing public participation in the legislative process. Under the County Government Act, it is a right under Part VII, for Citizen Participation in devolved governments. In this regard, it was erroneous for the Petitioners to claim that their right to fair administrative action under Article 47 had been breached, since the right to Petition is not an administrative action, but rather a way to enhance public participation in both the oversight and legislative functions of the County Assembly. It is a right on its own and cannot be loaded on another right.

78. The parties did not tell the Court whether or not Bungoma County Assembly had passed any legislation with regard to a citizen’s right to Petition the County Assembly pursuant to Section 88(3). That notwithstanding, it is the finding of this Court that once the Petitions by the Bongomek community and John Khaoya were presented to the 3rd Respondent, it was incumbent upon him to table them before the County Assembly for debate in accordance with the Standing Orders and the law.

79. In this regard, the 3rd Respondent’s contention that the said Petitions were presented to the respective committees of the house for consideration during the vetting of the Interested Parties has no foundation. The Petitions should have been tabled at the floor of the County Assembly for debate and resolution. Appropriate directions could have been given with regard to the concerns raised by the Bongomek community and Mr. Khaoya. That should have been undertaken before any vetting or debate on the nominees by the Assembly was commenced. Further, the right to petition is different from a situation where a Committee of the House calls for public participation in the vetting of public officials. Once a Petition is presented to the County Assembly under Section 88 of the County Government Act, it has to be responded to one way or the other. The notice in the interview advert by the 4th Respondent in my view does not satisfy the provisions of Sections 88 and 89 of the County Government Act as to Petitions.

80. In addition, the Bongomek Community and Mr. Khaoya were entitled to an expeditious response to the issues they had raised in their respective Petitions in line with Section 89 of the County Governments Act. For instance, the 3rd Respondent should have ensured that the Petitioners received in writing, the decision of the House. In any event, nothing was produced to show that even the various committees of the County Assembly ever considered the grievances raised by the Petitioners in their Petitions and the responses thereto. In the absence of such evidence, I find that the right of the Bongomek community and Mr. Khaoya to Petition the County Assembly under Article 37 and Sections 88 and to receive response under Section 89 had been breached by the 3rd Respondent and the County Assembly.

Whether the rights of the Petitioners were violated by the Respondents in the selection, nomination and vetting of the Interested Parties as the County officers of Bungoma County.

81. As a basic minimum, the Petitioners are required to not only cite the provisions of the Constitution which have been violated but also the manner in which they have been violated with regard to them. See the case of **Anarita Karimi Njeru (1976-80) 1 KLR 1272** and Trusted

Society of **Human Rights Alliance -v- Attorney General & Others High Court Petition No. 229 of 2012.** In demonstrating the manner in which there has been a violation of their rights or of the Constitution, the Petitioners should present before the court evidence or a factual basis on which the court can make a determination whether or not there has been a violation. The Court finds that the right of the Bongomek Community and Mr. Khaoya was breached by the 3rd Respondent in failing to consider their Petitions. Further, the Court finds that the 1st, 3rd and 4th Respondent violated the Constitution and the law as already set out above.

Reliefs

82. Having made the foregoing findings, the Court must determine the appropriate reliefs in the circumstances of this Case. In so doing, I am alive to the provisions of Article 23(3) of the Constitution which provides that in any proceedings brought under Article 22, a Court may grant appropriate relief, which includes but not limited to declaration of rights, injunction, conservatory order, a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24, an order for compensation; and an order of judicial review.

83. Having found that the 1st and 4th Respondent violated the Constitution and the law in the nomination of the 3rd, 4th, 7th, 11th and 14th Interested Parties, further having found that the 3rd Respondent violated the Constitution and the County Government Act in relation to the Petitions of the Bongomek Community and Mr. Khaoya, the impugned process cannot stand. A Court of law cannot condone or uphold a process that undermines the Constitution and the Law. The days when public servants acted and made decisions without regard to the citizens are long gone. Article 73 of the Constitution declares that public positions are held in trust for the citizenry. There has to be transparency and accountability for each action and decision made by state organs as well as officers. As costly and unfortunate as it might be, the process of selection, nomination, approval and appointment of the nominees to the posts of the Chief Officers for the County of Bungoma has to be reversed.

84. One issue however that I have noted is that, the Petitioners fundamentally complained about the nomination exercise of the County Chief Officers positions. There was no complaint about that of the County Secretary. Accordingly, this judgment and orders do not affect that position and the 1st Interested Party is hereby excluded therefrom.

85. I therefore make the following orders:-

- a. The process of recruitment and recommendation of the 2nd to 14th Interested Parties by the 4th Respondent, for their nomination by the 1st Respondent was unconstitutional, illegal, null and void.
- b. The 1st Respondent's act of nominating the 2nd to 14th Interested Parties and presentation of their names to the County Assembly for approval was unconstitutional, illegal, null and void and of no effect whatsoever.
- c. A declaration that the Bongomek Community is a minority group and ought to be treated as such in the governance of Bungoma County.
- d. An order of Certiorari do hereby issue to remove to this court and hereby quashes the decision by the 4th Respondent of picking the 2nd to 14th Interested Parties as the successful candidates and recommending them for nomination and appointment by the 1st Respondent.
- e. The vetting and approval by the County Assembly of Bungoma County of the 2nd to 14th Interested Parties and their ultimate appointment as Chief Officers is hereby declared irregular, unconstitutional and a nullity.
- f. Each party to bear his/her own costs of the Petition.

DATED, SIGNED and DELIVERED at Bungoma this 5th day of May, 2014

.....

A. MABEYA

JUDGE