



REPUBLIC OF KENYA



KENYA LAW
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Association of Muslim Lawyers & another v Governor, County Government of Nairobi & 2 others (Petition E184 of 2022) [2024] KEELRC 663 (KLR) (15 March 2024) (Judgment)

Neutral citation: [2024] KEELRC 663 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E184 OF 2022
B ONGAYA, J
MARCH 15, 2024

IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010
IN THE MATTER OF ENFORCEMENT OF FUNDAMENTAL
RIGHTS AND FREEDOMS

IN THE MATTER OF NATIONAL VALUES AND
PRINCIPLES OF GOVERNANCE UNDER ARTICLE 10 OF
THE CONSTITUTION

IN THE MATTER OF FUNDAMENTAL RIGHTS AND
FREEDOMS UNDER ARTICLES 20, 21, 23, 27, 28, 32, 38, 47,
73, 174, 179 AND 258 OF THE CONSTITUTION OF KENYA

IN THE MATTER OF THE CONTRAVENTION AND
THREATENED CONTRAVENTION OF FUNDAMENTAL
RIGHTS AND FREEDOMS UNDER ARTICLES 56 OF THE
CONSTITUTION OF THE REPUBLIC OF KENYA

-AND-

IN THE MATTER OF SECTION 7 OF THE NATIONAL
COHESION AND INTEGRATION ACT, 2008.

-AND-

IN THE MATTER OF SECTION 35(1) COUNTY
GOVERNMENTS ACT, 2012.

-AND-

IN THE MATTER OF FAIR ADMINISTRATIVE ACTION
ACT, 2015.



-BETWEEN -

BETWEEN

ASSOCIATION OF MUSLIM LAWYERS 1ST PETITIONER
NUBIAN RIGHTS FORUM 2ND PETITIONER

AND

GOVERNOR, COUNTY GOVERNMENT OF NAIROBI 1ST RESPONDENT
SPEAKER OF THE COUNTY ASSEMBLY OF NAIROBI 2ND RESPONDENT
COUNTY GOVERNMENT OF NAIROBI 3RD RESPONDENT

JUDGMENT

1. The petitioner filed the amended petition dated 23.11.2023 through Abdiaziz & Company Advocates seeking the following prayers:
 - a. A declaration that the purported nomination, vetting and appointment of the County Executive nominees for the position of County Secretary and senior advisors of the Governor did not meet the laid down substantive and procedural constitutional requirements applicable in public service appointments and nominations; and is therefore unconstitutional, unlawful, irregular, null and void for being in contravention of Articles 10, 27, 56, 73(2) and 232 of the Constitution of Kenya, 2010.
 - b. A declaration that the 1st and 3rd Respondents' purported nomination, vetting and appointment of the County Executive nominees for the position of County Secretary and senior advisors of the Governor vide the press release dated 26th October, 2022 and letter to the Speaker without following the laid out substantive and procedural, constitutional and statutory requirements applicable in public service appointments and nominations; the said nominations are unconstitutional, unlawful and irregular for being in contravention of Articles 10, 27, 56, 73(2) and 232 of the Constitution of Kenya, 2010.
 - c. An permanent order quashing the nominations, vetting and appointment of the County Executive nominees for the position of County Secretary and senior advisors of the Governor vide the press release dated 26th October, 2022 and letter to the Speaker which the 1st and 3rd Respondents purporting to appoint Charles Kerich, Michael Gumo, Brian Mulama, Patrick Mbogo, Stephen Mwangi, Auma Nyangoya, Rosemary Kariuki, Maureen Njeri, Anastancia Nyalita & Suzanne Silantoi as Nairobi County Executive Committee Members and David Njoroge, Lawrence Wambua, Elias Mutuma, Dr. Samora Otieno, William Ndung'u, Prof. Yotto Ochieng, John Mwangi & Priscilla Mahinda as Nairobi County Secretary Members.
 - d. A declaration that the 1st and 3rd Respondents' conduct in the nomination, vetting and appointment of the County Executive nominees as well as nominees for the position of County Secretary of Nairobi County Government violates Article 10, Chapter six and thirteen of the Constitution of Kenya and for that reason the 1st and 3rd Respondents are unsuitable to hold Public Office; appointive and elective.



- e. An order directing the 1st and 3rd Respondents to ensure that future nominations, appointments and re-appointments to the Nairobi County Government strictly adhere to the substantive and procedural, constitutional and statutory requirements applicable in public service.
 - f. An order of mandamus to issue compelling the 1st and 3rd Respondents to revoke the appointment of Charles Kerich, Michael Gumo, Brian Mulama, Patrick Mbogo, Stephen Mwangi, Auma Nyangoya, Rosemary Kariuki, Maureen Njeri, Anastancia Nyalita & Suzanne Silantoi as Nairobi County Executive Committee Members and David Njoroge, Lawrence Wambua, Elias Mutuma, Dr. Samora Otieno, William Ndung'u, Prof. Yotto Ochieng, John Mwangi & Priscilla Mahinda as Nairobi County Secretary Members.
 - g. A declaration be and is hereby issued that the directives by the 1st Respondent to nominate, vet and appoint Charles Kerich, Michael Gumo, Brian Mulama, Patrick Mbogo, Stephen Mwangi, Auma Nyangoya, Rosemary Kariuki, Maureen Njeri, Anastancia Nyalita & Suzanne Silantoi as Nairobi County Executive Committee Members and David Njoroge, Lawrence Wambua, Elias Mutuma, Dr. Samora Otieno, William Ndung'u, Prof. Yotto Ochieng, John Mwangi & Priscilla Mahinda as Nairobi County Secretary Members violates Articles 10, 20(1), 25(c), 27(1), 41, 47, 48, 50, 56, 131(b), 153(1) and (4) (a) and 236 as read together with Section 35 of the County Governments Act No. 17 of 2012 and the decision and action thereto are invalid, null and void *ab initio*.
 - h. Costs of this Petition be borne by the Respondents.
 - i. Such other orders this Honourable Court shall deem fit pursuant to Article 23(3) of the Constitution of Kenya, 2010.
2. The petition was based upon the supporting affidavit of Mohamed Dayib Ali an Advocate of the High Court of Kenya and the Vice Chairperson of the 1st Petitioner herein and annexures thereto filed together with the petition and sworn on 23.11.2023. The petitioner's case is as follows:
- a. That on 26th October during the unveiling of the County Executive Committee Members (CECM), the 1st Respondent announced the list of nominees for the CECM as well as nominees to the position of County Secretary. The list of the said members was annexed.
 - b. That the list did not reflect the community and cultural diversity of the County of Nairobi by omitting members of the Muslim and Hindu faith who have made massive contribution to the economic progression of the county.
 - c. That the list also failed to accommodate members of other ethnic and marginalized communities like the Somali, Arab, Indian, Nubian and Borana.
 - d. That the list also fell short of meeting the two third gender rule enshrined in Article 56 of the Constitution and section 35(1) (a) of the County Government Act having five (5) female nominees out of a total of 18.
 - e. That upon the announcement of the nominees, the Muslim Community held a meeting to air their concerns at Jamia Mosque in Nairobi on 27th October, 2022 and exhibited the statement of their meeting.
 - f. That the Court made a ruling on 30.11.22 allowing the respondents to continue with the process of vetting and appointment of the nominees who were then sworn 08.12.2022.



- g. That the previous regimes have been nominating members from the minorities and muslim community and that the 1st Respondent's exclusion of them was deliberate and political.
 - h. They concluded by pleading that it is in the interest of justice and fairness that the court allows the petition and grant the orders sought.
3. The 1st respondent in his replying affidavit on behalf of himself and the 3rd respondent herein sworn on 29.02.2024 and filed through Okatch & Partners Advocates. He stated and urged as follows:
- a. That on 26.10.2022 in fulfilment of part of his executive functions as stipulated in Article 179 of the Constitution of Kenya 2010, he announced publicly a list of the nominees for the County Executive Committee members and advisors of the Governor.
 - b. That the said function is based on Pleasure Doctrine and he hence has discretion and liberty to appoint anyone as long as they have fulfilled requirements as stipulated under Chapter six of the Constitution of Kenya, 2010.
 - c. That there were only 18 nominees in the said positions and it would be humanly impossible to include all the 47 tribes and religions in Kenya.
 - d. That the claim by the petitioners to be contributing 30% of the Nairobi City County's GDP is not backed by any documentary evidence.
 - e. That inclusivity in the County Government cannot be based on County Executive Committee, which only has 10 slots, and the County Secretary that has 8 slots.
 - f. That the non-inclusion in the appointments does not in any way affect service delivery to the residents of the Nairobi City County.
 - g. That member of the County Assembly vetted the nominees in an open and transparent manner as well as public participation by submission of memoranda.
 - h. That the assembly consists of members of various religions and has a number of members from the Muslim faith.
 - i. The 1st respondent concluded by urging the court to dismiss the petition herein and pleaded that it is only meant to creat a rift between religions in Nairobi City County.
4. The 2nd respondent Kennedy O. Ng'ondi also filed his replying affidavit sworn on 20.12.23 and through Nchoe, Jaoko & Company Advocates. in which he stated as follows:
- a. That he is the speaker of Nairobi City County Assembly elected under Article 178 of the Constitution.
 - b. That the Constitution under Article 179 (2) (b) and Section 35 of the County Government Act (No.17 of 2012) empowers the Governor, who is the 1st respondent to appoint with the approval of the County Assembly the county executive committee and to ensure the fullest extent possible, the composition of the members reflects the community and cultural diversity of the county.
 - c. The 2nd respondent in his affidavit pleaded that the 1st respondent had acted according to the law in vetting and appointing the nominees and did not in any way discriminate against any religion od community.



- d. The 2nd respondent also pleaded in his affidavit that the petitioners herein have not in any manner demonstrated that the respondents violated the laws and the Constitution in vetting and appointing the nominees and that the petition lacks precision in the manner in which the provisions of the law and the Constitution have been violated.
 - e. That the amended petition herein is overtaken by events since the said members were duly vetted and appointed after the stay orders in petition E184 of 2022 were dismissed.
 - f. He concluded by urging that the amended petition herein be declined.
5. Final submissions were filed for the parties. The Court has considered all the material on record. The Court returns as follows:
- a. While the petitioners alleged lack of inclusion on account of gender, religion, and ethnicity or community of origin basis, they have failed to give an analysis of the parameters as obtains in the County of Nairobi. Other than listing the impugned nominees per paragraph 2 of the affidavit supporting the amended petition, there is no further material evidence on the parameters. The petition would fail for want of more and sufficient evidence.
 - b. The petitioners' case appears to be that the ethnic and religious minority they seek to urge the case in their benefit and favour have been in previous two successive Governments. However, without material evidence, there is no established case that the minorities have been so omitted. The petitioners' evidence is in fact that the alleged minorities have been included in previous Government and in absence of reliable data and material evidence, it is difficult to fault the appointments for want of a comparator to determine if the constitutional and statutory thresholds have been undermined. The appointments would therefore be rested, as without due established facts and evidence, there would be no basis to disturb the same.
 - c. The substantive and procedural constitutional as well as statutory provisions guiding the respondents in making the appointments were elaborated by the Court in the ruling delivered on by the Court on 30.11.2022 (Mwaure J). The Court will not go back to reproduce the same as that ruling applies sufficiently. The petitioners have not shown that they presented their grievances to the County Assembly during the vetting processes and even if due evidence were provided, the Court would decline to delve into merit considerations for want of exhaustion of the statutory vetting procedure which was available to the petitioners to make their concerns and grievances known. The Court further holds that contrary to submission made for respondents that the Governor exercises pleasure doctrine in making the appointments, the pleasure doctrine does not apply in Kenya's new Republic. The Governor's exercise of the power to appoint is chained by reasonableness and fairness as per the constitutional provisions in Article 10, 232, and chapter 6 of the Constitution as well as the substantive and procedural applicable statutory provisions already referred to in the ruling earlier delivered in this petition.
 - d. The upshot of the findings is that the petitioners have failed to establish the claims and the petition is liable to dismissal. It was a genuine public interest litigation and no orders on costs.
6. In conclusion, the petition is hereby dismissed with no orders on costs.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS FRIDAY 15TH MARCH 2024.

BYRAM ONGAYA

PRINCIPAL JUDGE

