



Ahmed & 3 others v Governor, Mandera County Government & 5 others; Elias & 32 others (Interested Parties) (Employment and Labour Relations Petition E199 of 2022 & Petition E203 of 2022 (Consolidated)) [2023] KEELRC 556 (KLR) (28 February 2023) (Ruling)

Neutral citation: [2023] KEELRC 556 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

**EMPLOYMENT AND LABOUR RELATIONS PETITION
E199 OF 2022 & PETITION E203 OF 2022 (CONSOLIDATED)**

J RIKA, J

FEBRUARY 28, 2023

BETWEEN

ABDULLAHI MOHAMMED AHMED 1ST PETITIONER
IBRAHIM DAUD BARE 2ND PETITIONER
MOHAMMED ABDI ADAN 3RD PETITIONER
ABDIRAHMAN ADAN HUSSEIN 4TH PETITIONER

AND

=GOVERNOR, MANDERA COUNTY GOVERNMENT 1ST RESPONDENT
MANDERA COUNTY GOVERNMENT 2ND RESPONDENT
CLERK OF THE COUNTY ASSEMBLY, MANDERA COUNTY 3RD
RESPONDENT
SPEAKER OF THE COUNTY ASSEMBLY, MANDERA
COUNTY 4TH RESPONDENT
COUNTY ASSEMBLY COMMITTEE OF APPOINTMENT, MANDERA
COUNTY 5TH RESPONDENT
MANDERA COUNTY PUBLIC SERVICE BOARD 6TH RESPONDENT

AND

RAHMA SAID ELIAS INTERESTED PARTY
ABDIFATAH IBRAHIM OGLE INTERESTED PARTY
MOHAMUD MOHAMED ALI INTERESTED PARTY
MUKTAR ISSACK KASSIM INTERESTED PARTY



YUSSUF MOHAMED KALA INTERESTED PARTY
 HUSSEIN YUSSUF SHEIKH INTERESTED PARTY
 MOHAMED KHALIF ADAN INTERESTED PARTY
 ZEITUN ABDISHAKUR ABDIKARIM INTERESTED PARTY
 HUSSEIN ABDIRAHMAN SHEIKH INTERESTED PARTY
 ADAN ABDIRAHMAN MOHAMED INTERESTED PARTY
 IBRAHIM MOHAMED ALI INTERESTED PARTY
 ABDIKADIR MOHAMED TACHE INTERESTED PARTY
 IBRAHIM ISSACK NUROW INTERESTED PARTY
 FARTUN BULLE IBRAHIM INTERESTED PARTY
 KASSIM YUSSUF HASSAN INTERESTED PARTY
 HALIMA HASSAN ALI INTERESTED PARTY
 ABDIKADIR ADAN ALIO INTERESTED PARTY
 HAMDY AHMED MOHAMED INTERESTED PARTY
 FARHIYA ALI ABDULLAHI INTERESTED PARTY
 FATUMA ABDI HUSSEIN INTERESTED PARTY
 FATUMA MOHAMED TIKO INTERESTED PARTY
 ADOW IBRAHIM MOHAMED INTERESTED PARTY
 ABUKAR ABDI SHEIKH INTERESTED PARTY
 AHMED ABDULLAHI ADEN INTERESTED PARTY
 ABDULAZIZ BARRE HASSAN INTERESTED PARTY
 SAHARA ADOW ADEN INTERESTED PARTY
 ISMAIL OMAR IBRAHIM INTERESTED PARTY
 ZULENKA OSMAN MAALIM INTERESTED PARTY
 ADAN MAALIM ABDULLAHI INTERESTED PARTY
 MUAD MOHAMED KHALIF INTERESTED PARTY
 MOHAMED SHUKRI ABDIKAR INTERESTED PARTY
 ABDI WALHAB MOHAMED ISSACK INTERESTED PARTY
 MISKI HASSAN ABDI INTERESTED PARTY

RULING

1. The Court issued a conservatory order on November 24, 2022, barring the Respondents from issuing letters of appointment/contracts of employment, to any of the Interested Parties, named above,



pending hearing and determination of the Application inter partes. The Interested Parties have been proposed to serve as Mandera County Chief Officers.

2. There were 3 Petitions which were consolidated [E199, E202 and E203 all of 2022]. The Parties are similar, and the subject matter is similar- nomination, vetting and appointment of persons to fill the positions of Mandera County Chief Officers.
3. Petition 202 was withdrawn on January 27, 2022.
4. Today's Ruling concerns whether the order issued on November 24, 2022, should be confirmed, pending hearing and disposal of the Consolidated Petitions.
5. Parties were directed to file and exchange Submissions.
6. The 1st Petitioner submits that on September 26, 2022, Mandera County Public Service Board, advertised 28 vacancies, for the positions of County Chief Officers.
7. On October 26, 2022, the County Government through its Public Service Board, shortlisted 153 candidates.
8. The County Government and the Board however, nominated 33 candidates for the vacancies on November 14, 2022, who are named as the Interested Parties in the Petitions.
9. The 1st Petitioner submits that the number of the nominated candidates, exceeded the number of 28 candidates, advertised for the positions. No explanation was given on the criteria used, in nomination of the extra 5 candidates. There was no advertisement made for the additional candidates.
10. The 1st Petitioner submits that the explanation by the Respondents, that there was an Executive Committee meeting on November 10, 2022, and an Executive Order No 1 of 2022, creating 5 extra vacancies, came after advertisement closed a month before, on October 10, 2022. The alleged Executive Order is an afterthought. The Executive Committee is not mandated to create new offices in the County Public Service.
11. The 1st Petitioner submits that the list of nominees does not take into account sub-clan, sub-tribe and ethnic balance. It does not take into account two-thirds gender rule, people with disability and the youth, contrary to the demands of the Constitution of Kenya.
12. 18 out of 33 nominees are from the Gurre Sub-Tribe, 5 from Degodia Sub-Tribe, 4 from the Murule Sub-Tribe and 3 from the Corner Sub-Tribe. There is Sub-Tribe/ Clan imbalance. Only 9 of the 33 nominees are Women. The 33rd Interested Party Miski Hassan Abdi, graduated in November 2021, and lacks the required 10 years' minimum experience. The 1st Interested Party was a committee clerk at the County Assembly, with not more than 5 years' experience. The advertised positions require candidates to have a minimum of 10 years' experience.
13. The 1st Petitioner submits that he wrote a protest letter to the Respondents, as soon as shortlisting was done. The Clerk of the County Assembly responded, explaining that he is not the appointing authority, while the others stayed mum.
14. The 1st Petitioner argues therefore, that appointment of the Interested Parties would violate among others, Articles 10, 27, and 232 of the Constitution of Kenya.
15. Relying on the Supreme Court of Kenya decision in Gatirau Peter Munya v Dickson Mwenda Kitbinji & 2 Others [2014] e-KLR, the 1st Petitioner submits that in determining whether the conservatory order should be confirmed, the Court should bear in mind that conservatory orders, 'bear a more decided public-law connotation, for these are orders to facilitate ordered functioning within public



agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest.’ Unlike injunctions and orders of stay, conservatory orders are not linked to prospects of irreparable harm, high probability of success, and balance of probabilities. Conservatory orders, it is submitted by the 1st Petitioner, should be granted on the inherent merit of the case, bearing in mind the public interest, the constitutional values, the proportionate magnitudes, and priority levels attributable to the relevant causes.

16. The 1st Petitioner submits that the High Court in *Benson Okera Magana & 5 Others v The County Public Service Board & 2 Others [2014] e-KLR*, while dealing with a similar Application as obtains in the Petitions herein, granted conservatory orders, holding that Article 10 of the *Constitution* is binding on all State Organs, State Officers and Public Officers and that ‘ It is not disputed that the 2 ethnic groups that have slots as Chief Officers in the Migori County Government, are Luo and Kuria. It is not sufficient for the Respondents to say that they or other members of their communities applied for the vacancies, and were not selected. The law recognizes and provides that in performance of their duties, all State Organs, State Officers and Public Officers must be guided by the national values and principles of governance set out under Article 10[2]. In my considered view, it is not apparent on the face of the facts before this Court that the recruitment complained of, was conducted in accordance with the constitutional provisions. There appears to have been marginalization and discrimination.’
17. The 1st Petitioner urges the Court to confirm the conservatory order.
18. 2nd, 3rd and 4th Petitioners [Petitioners in Petition 203] restate the facts as laid out in the 1st Petition. They submit that 28 vacancies were announced. 33 individuals were nominated, without explanation. There was bias, discrimination and gender balance was disregarded.
19. The 2nd, 3rd and 4th Petitioners cite the High Court decision in *Satinderjit Singh Matharu v Armajit Singh Gahir & 5 Others [2016] e-KLR*, where it was held that the Applicant for conservatory measures must demonstrate prima facie case or an arguable case; the Applicant must stand to suffer irreparable harm irreparable by any other relief; and the Court must consider public interest and the balance of convenience. [This decision appears to lean back to principles of injunction and stay orders, which the Supreme Court distinguished, in the Munya decision above].
20. The 3 Petitioners submit that Section 65 [1] and [2] of the *County Governments Act*, requires County Public Service Boards, in appointing County Public Servants, to adopt the Constitutional Principles under Articles 10, 27, 56 and 232.
21. Mandera County is diverse, with multiple ethnic groups and clans. There is no ethnic and clan balance in the nominations. Gabra clan is not represented. Representation of every clan is important because it impacts resource allocation. The 3 Petitioners agree with the 1st Petitioner, that out of 33 nominees, only 9 are Women, which breaches the two-thirds gender rule. In *Feisal Hassan & 2 others v Public Service Board of Marsabit County & Another [2016] e-KLR*, the Court held that the rule of law, and the principle of open and transparent recruitment of Public Servants must be upheld. Conservatory order will issue, where these principles are not adhered to.
22. The Petitioners anchor these Submissions on the 1st Petitioner’s Affidavit sworn on November 22, 2022 and 2 Supplementary Affidavits, sworn on December 6, 2022. The 2nd Petitioner filed an Affidavit sworn on November 23, 2022, in support of conservatory measures.
23. The Clerk, the Speaker and the County Assembly Committee of Appointment, filed joint Submissions dated January 9, 2023. County Secretary Billow Issack Hassan, filed an Affidavit sworn on November 1, 2022, explaining the position of the County Governor, the County Government and the County Public Service Board.



24. Their collective position is that the County Government, through its Public Service Board, invited candidates to fill the 28 positions of County Chief Officers, on September 26, 2022. The advertisement clearly stated the academic, moral and statutory qualifications to be met, by the candidates.
25. The County Executive Committee, Mandera County, met on November 10, 2022, and deliberated on creation of the new County Government. This culminated in Executive Order No 1 of 2022. The Order established 10 County Ministries, and a total of 33 County departments to be headed by County Chief Officers. 28 positions had been advertised, and the Executive Order therefore created 5 more positions- Executive Coordination; Public Service Welfare and Benefits; Prevention of Radicalization and Extremism; Energy and Natural Resources; and County Infrastructure.
26. The additional positions could not be factored in, at the time advertisement was made.
27. 153 candidates applied, and interviews were conducted between 1st and November 3, 2022. Each interviewee was measured against the requirements announced in the advertisement, in accordance with Section 65 of the [County Governments Act](#). The 5 additional candidates were interviewed from the pool of shortlisted candidates. Nomination was based on merit and was not in any way discriminatory. Nominees are not friends, relatives and/or clan members of the Governor as suggested by the Petitioners. The Nominees represent the face of Mandera County.
28. The County Secretary further submits that the contention by the Petitioners, that some Nominees did not meet the qualifications is ambiguous. The correct forum to raise objection would have been, the County Assembly.
29. The County Assembly conducted hearings on 14 out of the 33 nominees, before suspending the process, following the intervention of the various Courts. The issues raised in the Petitions herein have not been placed before the County Assembly. Out of 33 nominees, 11 are Women, which satisfies the two-thirds gender rule. Hussein Yusuf Sheikh, 6th Interested Party, is a person living with disability. On Miski Hassan Abdi, the County Secretary submits that, it is unfair to condemn her without a hearing. The County Secretary prays the Court to decline the Application, and allow the process to conclude.
30. The Clerk, the Speaker and the County Assembly Committee of Appointment, take the same position as the Co-Respondents, on the advertisement of the vacancies, the applications, shortlisting and vetting.
31. They invoke the Munya decision, in submitting that the Petition discloses no arguable constitutional issues, and that the Petitioners will not suffer any prejudice, if the conservatory order is not confirmed. They further rely on High Court decision, *Centre for Rights, Education and Awareness [Creaw] & 7 Others v Attorney- General [2011] e-KLR*, where it was held that a party seeking conservatory orders is required to demonstrate a prima facie case with a likelihood of success. The Petitioners are seeking to interfere with statutory and constitutional powers of the Respondents, without legitimate reasons.
32. Section 7[5] of the Public Appointments [County Assemblies Approval] Act No 5 of 2017 requires persons with objection on nominees, to present their objection before the County Assembly. The Petitioners have approached the Court prematurely.
33. It is not in the public interest to confirm the conservatory order. Service delivery to the People of Mandera will be affected if the process is not concluded. The Court must exercise caution, and not reach a final determination on an interlocutory application.
34. The Respondents on the whole submit that the Petitioners have not satisfied the requirements for grant of conservatory orders.



The Court Finds__:

35. The Petitioners challenge the proposed appointment of the 33 Interested Parties as County Chief Officers.
36. Appointment of County Chief Officers, is principally regulated by Section 45 of the County Governments Act No 17 of 2012, which is worded: -
‘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’
37. The challenge revolves around alleged failure by the Respondents, to meet various constitutional standards, in particular the rights under Article 27 of the Constitution, broadly defined as the rights of equality and freedom from discrimination.
38. They submit that the recruitment, nomination, vetting and proposed appointment of the Interested Parties, disregarded-
 - a. Two-thirds gender rule.
 - b. Disability rights.
 - c. Youth rights.
 - d. Ethnic balancing.
 - e. Meritocracy.
 - f. Transparency.
39. The Public Service [Values and Principles] Act, 2015, which gives effect to Article 232 of the Constitution states that for purposes of ensuring two-thirds gender rule, disability rights and ethnic balance are achieved in Public Service, Public Institutions are allowed not to unduly rely on merit in making appointments. Meritocracy, in other words, should not override affirmative action. The wisdom in this is that emphasis on meritocracy may inadvertently disadvantage groups which are already disadvantaged such as Women, Persons with Disabilities, and Ethnic Minorities. Pure meritocracy is feared to accentuate discrimination, in what scholars of the subject, such as Emilio Castilla and Stephen Bernard, refer to as ‘The Paradox of Meritocracy,’ *Administrative Science Quarterly*, Vol 55, No 4 [December 2010] pp 543 – 576].
40. Although the dispute herein concerns Sub-tribes/ Clans in one ethnic group – the Somali- it is worth noting that the law abhors the disproportionate representation of one ethnic group, in any one County Public Service. Section 65 [1] [e] of the County Governments Act, commands County Public Service Boards, in making appointments, to ensure at least 30% of vacant positions at entry level, are filled by candidates who are not from the dominant ethnic community in the County.
41. What this means is that Counties in the Central Region for instance, must employ at least 30% Non-Kikuyu and Counties in Western Region, must employ at least 30% Non- Luhya. Counties predominantly inhabited by other communities such as Kalenjin, Luo, Kamba, Kisii and Turkana ought to have at least 30% of their County Public Service Jobs, reserved for other communities. In the



- case of Mandera County, the Respondents ought to have reserved 30% of the County Chief Officers vacancies to Non-Somali, before sharing out the remainder of 70% to the Somali Sub-tribes and Clans.
42. This is the intention of the law, but no County, with a few exceptions such as Kilifi, is striving to meet the ideals of the law. The National Cohesion and Integration Commission, in its Report titled 'Ethnic and Diversity Audit of the County Public Service, 2016,' found that 32 Counties contravened Section 65 [1] [e] of *County Governments Act*, on appointments into their Public Service. The observation about Kilifi, is drawn from this Report. The law intends that Counties become strong foundations for national cohesion, rather than ethnic fiefdoms, which they have descended into.
 43. Two-thirds gender rule. Article 27 [8] of the *Constitution* requires the State to take legislative and other measures, to implement the principle that, not more than two-thirds of the members of elective or appointive bodies, shall be of the same gender.
 44. The Petitioners submit that out of 33 nominees, only 9 are Women. At 24, Men are in excess of two-thirds of the nominees.
 45. The Petitioners have not given specific names of nominees, with an indication of their gender to support this ground. They just submit that there are only 9 Women out of 33 nominees.
 46. The Governor submitted the names of the nominees to the Clerk Mandera County Assembly, for purposes of Assembly hearings, through a letter dated November 14, 2022. The gender details are stated in the letter.
 47. The Women include-
 1. Rahma Said Elias.
 2. Zeitun Abdishakur Abdikarim.
 3. Fartum Bulle Ibrahim.
 4. Halima Hassan Ali.
 5. Hamdi Ahmed Mohamed.
 6. Farhiya Ali Abdullahi.
 7. Fatuma Abdi Hussein.
 8. Fatuma Mohamed Tiko.
 9. Sahara Adow Adan.
 10. Zhulekha Osman Maalim.
 11. Miski Hassan Abdi.
 48. 11 is 1/3 of 33, and prima facie evidence on record does not show that the Respondents disregarded two-thirds gender rule. Conservatory order is not therefore supported by this ground on violation of the two-thirds gender principle.
 49. Disability. Like Article 27 [8] of the *Constitution* on two-thirds gender rule, Article 54 [2] of the *Constitution* seeks to affirm the rights of another disadvantaged social group- persons with disabilities. It requires that, the State shall ensure the progressive implementation of the principle, that at least 5% of the members of the public in elective and appointive bodies, are persons with disabilities.



50. Section 13 of *Persons with Disabilities Act* No 14 of 2003, states that the National Council for Persons with Disabilities, shall endeavour to secure the reservation of 5% of all casual, emergency and contractual employment in the public and private sectors for persons with disabilities. It is not clear why there is no endeavour for reservation of employment for persons with disabilities, in the permanent and pensionable positions, in the public and private sector under this Act. The *Constitution* does not refer to reservation of 5% of casual, emergency and contractual employment for persons with disabilities.
51. The Respondents submit that they did not discriminate any candidate on the basis of disability. To the contrary they nominated Hussein Yusuf Sheikh as County Chief Officer, Community Cohesion and Conflict Management. The nominee's Certificate of Person with Disability, issued by the National Council for Persons with Disability, has been exhibited by the Respondents.
52. 1 out of 33 nominees, is a person with disability. 5% of 33 would yield 1.65, and nomination of 1 person with disability, is not way off the mark, of the ideal contemplated on disability rights, under Article 54[2] of the *Constitution*.
53. Prima facie evidence does not support the submission that the Respondents discriminated any candidate, based on their disability. One nominee is certified to be a person with disability.
54. Youth. The allegation by the Petitioners that nomination discriminated against the youth, has no evidential support. There is no indication by the Petitioners, about the age of the persons who applied, and those nominated. A party cannot allege age-based discrimination, without supplying the Court with the names of discriminated persons and their respective age. The Petitioners complain about the experience of some nominees such as Miski, arguing that she only recently graduated from the University, which would suggest that she is a youthful nominee. There is no evidence from the Petitioners that the list of nominees is predominated by hardy methuselahs, with no consideration for the youth. This ground is declined.
55. Sub-tribe/Clan-balancing. This appears to be the backbone of the Petitions. The Petitioners state that of the 33 nominees, 18 are from one sub-tribe known as Garre/Gurre. 5 are from Degodia sub-tribe. 4 are from Murule sub-tribe and 3 from the Corner sub-tribe. 2nd, 3rd and 4th Petitioners submit that some clans, such as the Gabra, are completely excluded.
56. The Respondents were not very helpful to the Court in responding to this ground. County Secretary Billow Issack Hassan, simply answered at paragraph 45 of his Affidavit, that the list of nominees is an accurate representation of the residents of Mandera.
57. This being the backbone of the Petitions, it is the view of the Court that the Respondents ought to have given to the Court, a panoramic view of the sub-tribe/clan demography, of the County of Mandera. The issue raised by the Petitioners cannot be trivialized. It relates to proportionate representation of the sub-tribes/clans in the County Public Service, and their overall cohesion in Mandera County Public Service. Section 45 [2] of the *County Governments Act*, places the office of a Chief County Officer, in the County Public Service.
58. The Court does not have the complete demography of Mandera County. Perhaps this is evidence to be supplied upon the full trial of the Petitions. From the viewpoint of an outsider, it is concerning that out of 33 nominees to public office, more than half, are from one demographic group.
59. Perceived predominance has the potential to create tension in the wider community. It has the potential at National and County levels, to create feelings of clan/ethnic exclusion, marginalization and removal



- from the centre of decision-making and resource allocation. It is a tinderbox, known to cause ethnic strife, and break nation-states.
60. The Court is cautious, as urged by the Respondents on authority of *Isaiab Luyara Odando & Another v Kenya Revenue Authority & 6 Others; Nairobi Branch Law Society of Kenya [Interested Party] [2022] e-KLR*, not to make conclusions, about the apparent predominance of one sub-tribe/clan in the list of nominees. There is perhaps a logical explanation, which has not been proffered or adequately explained by the Respondents at this interlocutory stage. The Petitioners have nonetheless, established a prima facie case, on their challenge concerning sub-tribe/ clan imbalance.
 61. Meritocracy. The 1st Petitioner wrote to the Clerk, Mandera County on November 17, 2022, seeking information on certain nominees. He asked for details of Miski Hassan Abdi nominee for Department of Cooperative Development and Marketing. He alleged that she graduated from Jomo Kenyatta University of Agriculture and Technology, in November 2021. He wished to be told where she worked before. The vacancy advertisement required candidates to have a minimum 10 years' experience.
 62. He asked for information on Abukar Abdi Sheikh, nominee for Public Health and Sanitation, who was serving as Chief Officer for Medical Services. He alleged that the nominee had severally been through the revolving doors at Integrity Centre, as a guest of the Ethics and Anti-Corruption Commission, in relation to Covid-19 public funds. He alleged that the Auditor- General had flagged misuse of funds under the nominee. The 1st Petitioner also asked for information concerning Muad Mohamed Khalif, nominee for Public Works.
 63. The response from the Respondents on this issue of meritocracy, is again jumbled. County Secretary states at paragraph 34 of his Replying Affidavit, that the challenge on Miski is unfounded. He explains rather obliquely, that the advertisement inviting applications, required candidates to have at least 10 years' experience, including 5 years' experience, in leadership and management. He then goes on to state that the advertisement did not call for 10 years' post-graduate experience. This was hardly understood by the Court. Did Miski have 10 years' work experience before she applied for the job? It is not clear from the explanation of the County Secretary. The Respondents did not say anything about the other 2 nominees, subject of the 1st Petitioner's request for information.
 64. Although the Respondents submit that the Petitioners ought to have presented their objections on the nominees at the floor of the County Assembly, they did not respond to the 1st Petitioner's request for information. The Clerk alone responded, advising the 1st Petitioner, that he is not the appointing authority. The Respondents ought to have supplied the information to the 1st Petitioner, in accordance with Section 4 of the *Access to Information Act*, No 31 of 2016, for the 1st Petitioner to be adequately prepared for the hearings at the County Assembly.
 65. The submission by the Respondents that the nominees ought not to be condemned unheard, has no merit. The Court directed joinder of all the nominees as Interested Parties, from the beginning.
 66. There is prima facie evidence that principles of transparency and provision to the public of timely and accurate information; and merit as the basis of appointment under Article 232 of the *Constitution*, were not given adequate consideration by the Respondents.
 67. Transparency. The vacancy announcement made by the County Public Service Board, advertised 28 positions. The Petitioners complain that there were however, 33 nominees in the end. There was no transparency, with regard to 5 added nominees.
 68. County Secretary Billow Issack Hassan, explains in his Affidavit that the County Executive Committee, held its inaugural sitting, on November 10, 2022. It deliberated on restructuring of



- the County Government. This resulted in Executive Order No 1 of 2022 which established 33 departments to be headed by Chief County Officers. 5 new departments were created. The candidates to fill the positions were interviewed from the pool of candidates, who had applied for the 28 positions.
69. The Court is of the view that once 5 fresh openings were made, they ought to have been publicized. Invitations ought to have been made for interested persons to apply. Those who had not succeeded on the first advertisement, ought to have been encouraged to apply. New applicants who did not apply in the first instance, ought to have been given the opportunity to apply. It was not transparent for the Governor and his Executive Committee, to create 5 new departments under the guise of an Executive Order, after the County Public Service had invited applications for 28 slots, received 153, and closed the advertisement. Transparency required fresh advertisement for the 5 vacancies, interviews and nomination. The choice made by the Respondents to create new departments and not advertise afresh, would lead to suspicions and enquiries by the residents of Mandera County, on the motive behind the choice. It could be asked whether the Governor and his team, created 5 departments behind closed doors, to be allocated to persons of their choice. Such questions, stemming from lack of transparency, would taint the image of the County Leadership.
70. Taking into account the highly-charged sentiments of some demographic groups about the sub-tribe/ clan distribution of the slots, creation of extra slots, without transparency, was likely to compound the feelings of anger and exclusion. Transparency is about perception, openness, and accountability. There was need for transparency with respect to creation of the 5 new departments and in appointing persons to fill those 5 new departments.
71. While the County Executive Committee is allowed by Section 46 of the *County Governments Act* to establish, continue, vary or abolish departments, the County Executive Committee must do so, recognizing that if the change results in additional public service vacancies, the vacancies must be advertised and competitively filled. Establishment and abolishment of public offices remains the mandate of the County Public Service Board, under Section 59 [1] [a]. The County Executive should exercise caution not to create new County Public Offices, through Executive Orders, under the guise of departmental restructuring.
72. Section 66 of the *County Governments Act* demands that, if a public office is to be filled, the County Public Service Board shall invite applications through advertisement and other modes of communication, so as to reach as wide a population of potential applicants as possible, and especially persons who for any reason, have been or may be disadvantaged. Potential candidates for the new 5 positions, were excluded by lack of advertisement. The idea of creating vacancies, after the vacancies have been advertised, is prima facie evidence of a disorderly functioning of the Respondents. It warrants confirmation of the conservatory order. The Court would agree with the Petitioners that the change from 28 positions to 33 positions, was not transparent.
73. The prima facie evidence supplied by the Petitioners is adequate to show that the Respondents did not embrace in full, the national values and principles of governance, under Article 10 of the *Constitution*, in particular, the rule of law, inclusiveness, non-discrimination, good governance, integrity, transparency and accountability.
74. The Petitioners have established that their complaints are of a constitutional nature.
75. Ultimately the Court is satisfied, guided by the Supreme Court of Kenya decision, *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others* [2014] e-KLR, that a conservatory order is warranted, based on the inherent merit of the Petitions, bearing in mind the public interest of the residents of Mandera County, and the Constitutional values involved.



It Is Ordered: -

- a. A Conservatory Order is hereby granted to the Petitioners, restraining the Respondents, from appointing/employing any of the Interested Parties / Nominees to the positions of Chief County Officers, Mandera County, pending hearing and determination of the consolidated Petitions.
- b. Costs in the cause.

DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY, AT NAIROBI, UNDER THE MINISTRY OF HEALTH AND JUDICIARY COVID-19 GUIDELINES, THIS 28TH DAY OF FEBRUARY 2023.

JAMES RIKA

JUDGE

