



REPUBLIC OF KENYA



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**254Hope v Governor, Vihiga County & 2 others (Employment and Labour Relations
Petition E011 of 2022) [2023] KEELRC 514 (KLR) (23 February 2023) (Ruling)**

Neutral citation: [2023] KEELRC 514 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
EMPLOYMENT AND LABOUR RELATIONS PETITION E011 OF 2022**

JW KELI, J

FEBRUARY 23, 2023

BETWEEN

254HOPE PETITIONER

AND

GOVERNOR, VIHIGA COUNTY 1ST RESPONDENT

SPEAKER COUNTY ASSEMBLY OF VIHIGA 2ND RESPONDENT

COUNTY ASSEMBLY OF VIHIGA 3RD RESPONDENT

RULING

1. The Petitioner 254Hope stating to be an organization established by and made up of going professionals drawn up from different professional backgrounds for the promotion of good governance filed in court instant Petition dated November 9, 2022 seeking among others for issuance permanent injunction against further consideration, approval, appointment or assumption of office of County Executive Committee Member for Vihiga County pursuant to the nomination made by the Governor and impugned in this Petition.
2. The petition was supported by affidavit of Clarence Eboso Mwerasa sworn on the November 9, 2022. In addition to the Petition the Petitioner filed Notice of Motion of even date seeking an order of temporarily injunction to restrain the 1st Respondent from appointing any of the nominees upon approval by the 3rd Respondent and if perchance a buried appointment process is made, an order barring the assumption of office of any approved nominee pursuant to the impugned nomination list.
3. The 2nd & 3rd respondent entered appearance vide Principal Legal Counsel Francis Otieno Rakewa while the 1st responded entered appearance vide the office of County Attorney Vihiga County Attorney Aggrey BL Musiega.



4. The 2nd and 3rd respondent filed ground of opposition to the application which were dated November 21, 2022.
5. The 1st respondent filed notice of preliminary objection dated November 15, 2022 seeking for the Petition to be struck off on the following grounds:-
 - a. 254Hope, being an entity that is unknown to the law had no and has no locus standi to institute nor to maintain this petition in its name in the present form or at all.
 - b. One Dr. Clarence Eboso Mweresa was and still is incompetent of maintaining this petition in the name of or on behalf of 254HOPE.
 - c. Both the petition and application are premised upon supporting affidavits which are fatally and incurably defective by reason of the jurats being on separate pages and completely delinked and or unconnected to the body/bodies of the affidavits.
 - d. The Petitioner, if at all is capable of maintaining the petition , is guilty of wanton violation of the principle of exhaustion for squandering his opportunity for redress and justice by failing to take up his objection to the County Assembly as provided in section 7 (10) of the *Public Appointments (County Assemblies) Approvals Act* despite being notified of his right to do so.
 - e. Maintaining the petition in the manner presented would be itself unconditional and in gross violation of the rules of natural justice in particular for Dr. Mwandih Madaga who has been adversely mentioned but not enjoined to the petition.
 - f. The pleadings as drawn do not satisfy the mandatory and minimum requirements of a constitutional petition.
 - g. The petition amounts to gross abuse of the process of the honourable court as evidenced from the pleadings which contains factual errors and untruth and the documents filed which are irrelevant and unconnected to the petition.
 - h. The Petition discloses no known cause of action known to the law.
6. The petitioner filed in court response to the notice of preliminary objection and to the grounds of opposition which response was dated December 21, 2022.
7. The court directed that the petition be canvassed by way of written submission. The petitioner filed written submission drawn by Dr. Clarence Eboso Mweresa dated November 28, 2022.
8. The 1st respondent filed written submissions dated January 7, 2023 drawn by Aggrey BL Musiega the County Attorney.

Determination

9. The petitioner addressed all issues under the notice of preliminary objection.
10. The respondent addressed all grounds of the preliminary objection save for ground 3 which they indicated they withdrew.
11. The Court having considered the pleadings and the notice of preliminary objection and addressing itself to the law on preliminary objection as set out in the locus classicus in *Mulisa Biscuits Manufacturing Co. Ltd* (insert authority later) is of the considered opinion that the grounds under the preliminary objection which merit consideration are ground 1 and 2 on the locus standi of the petition and ground 4 on jurisdiction challenge on basis of failure to exhaust redress mechanism



under section 7 (10) of the *Public Appointments (County Assemblies) Approvals Act* by the Petitioner despite being notified of his right to do so.

Background to the objection

12. As per supporting affidavit of the petitioner the 1st respondent on the October 13, 2022 submitted to County Assembly Vihiga, a nomination list of persons to be approved for appointment as members of the County Executive Committee of Vihiga (CE1).
13. That the Clerk of the county Assembly Vihiga published in the Daily Watu Newspaper on October 20, 2022 outlining the list of nominees dates and venue for the vetting exercise.
14. The County Assembly considered the vetting exercise of the nominees between October 27, 2022 and October 31, 2022. That the Committee on appointments on November 12, 2022 tabled a report before the Assembly approving the appointments of all nominees but one woman on basis of lack of degree leaving 7 person of male gender and 2 persons of female gender.
15. The petitioner alleged the Assembly had no power to discriminate the list by approving some nominees and not others. The petitioner specifically challenged nomination of the nominee for Health on basis who had no career background or knowledge in health.

Whether the Petitioner has locus to bring the petition.

16. It was not in dispute that the Petitioner is not a registered entity . Indeed there was no prove of its establishment which would have entailed a constitution on its membership and activities.
17. The Court considered authorities cited by the parties . The doctrine of hierarchy means that the court is bound by decision of superior courts. Specifically decision of the Supreme Court are binding on this court. The Supreme Court in *Mumo Matemu – vs- Trusted Society of Human Rights Alliance & Others* Civil Application No. 29 of 2014 had opportunity to address locus standi of unregistered association like the petitioner in the instant case and held at paragraph 67 as follows:- “ It is to be noted that the promulgation of the 2010 Constitution enlarged the scope of locus standi in Kenya. Articles 22 and 258 have empowered every person where corporate or non-incorporated to move the courts, contesting any contravention of the Bill of rights or *the Constitution* in general”.
18. The Court of Appeal in *Randu Nzai Ruwa & 2 Others -vs- The Secretary, the Independent Electoral and Boundaries Commission and Others* upheld the *Mumo Matemu* case (supra) . In allowing appeal against decision of a 5 member bench of the High Court finding the Appellants, unregistered association, had no locus standi to file the petition, the court of appeal in allowing the petition (Justice Ouko) held that “ the strict common law rule of standing which insists persons to have requisite locus standi by show that they have a personal and sufficient interest in the matter, a greater interest than that of the rest of the Public , has now been erowed and broaded under *the constitution. The Constitution* today gives standing to any member of the Public who is not a mere busy body or meddlesome interloper and who acts in good faith to institute proceedings challenging any violations under bill of rights. The objection did not file any authority to the controversy. Article 260 of *the Constitution* defines “ person “ to include a company association, or other body of persons whether incorporated or unincorporated”.
19. In conclusion taking into consideration the Supreme decision in *Mumo Matemu* unincorporated association like the Petition are allowed to bring Petition under *the Constitution* in Public Interest.
20. That ground of objection is overruled.



Whether the Petition is incompetent for failure to exhaust redress mechanism under Section 7 (10) of the Public Appointments (County Assemblies)

21. Approvals Act despite being notified to do so. The objector submits that the procedure for appointment of County Executive Committee members is governed by section 35 of the County Governments Act on vetting and approval of nominees to wit (Insert later.....

That Section 10 of the Act provides for rejection if the Assembly of persons nominated by Governor who do not meet the criteria provided by law. That section 7 (10) of the Act grants every citizen the opportunity to object to the appointment of any candidate and the right of audience by the County Assembly on the objection.
22. That the petitioner never objected on the nomination of the nominee for Health Dr. Mwandih before the County Assembly and relies on the decision of the Speaker of National Assembly -vs- Njenga Karume (2008) eKLR 425 and further decision on the decision in David Mwithirwa (Cite later)
23. The petition on the issue appeared to take the position that their petition sought vide remedies and submits that the provision cited by the objector is one that permits Public participation in the performance of the County Assembly legislative role. It was not an alternative route to resolving legal controversies .

Decision

24. Section 7 (10) of the Public Appointments (County Assembly) Approval Act states:- “ Any person may, prior to the approval hearing, and any written statement on oath, provide the Clerk with evidence contesting the suitability of a candidate to hold the office to which the candidate has been nominated.
25. Section 10 of the Act provides for rejection of candidates and that include any of the candidates. It is the finding of the court that indeed section 7 (10) of the Public Appointments (County Assemblies Act provides from redress mechanism for grievances agency.
26. The suitabilities of nominated candidates for the County Executive Committee members. The court respecting separation of the powers ought not to interfere with the said process. The court of Appeal has held in Speaker of the National Assembly case that where redress mechanism exist they must be exhausted in the instant , the Supreme Court set out principles to be applied by the court while observing the doctrine of Separation of powers as follows:-

(Insert)...
27. The court had cited Mumo Matemo case (Insert)

The court finds that Governor and County Assembly are bound by provision of constitution in exercise of this action and by power of Public appointment (cite the process

The transmission of names to the Governor by Assembly concludes the vetting process. The court may only intervene upon the conclusion of the process.
28. The court finds that instant petition would qualify as meddlesome as described of Guch Petitions by Justice Ouko JA (as he then was) in Randu Nzai Ruwa & 2 Others -vs- the Secretary, the Independent Electoral and Boundaries Commission & Other when he stated the court would entertain petitions brought by persons alleging violation of the Constitution so long as they were not meddlesome and were brought in Public Interest.



Conclusion

29. The petitioner is a non incorporated persons as per definition of person . Under article 260 of the Constitution thus has locus standi to bring a petition in court alleging violation of the Constitution in public interest.
30. The instant petition was filed prematurely without exhausting the available redress mechanism under section 7 (10) of the Public Appointments (County Assemblies) Approvals Act provided by the legislature for redress of grievances like the ones alleged in the instant Petition concerning the nomination process of County Executive members Committee.
31. The Court of Appeal decision in Speaker of the National Assembly -vs- James Njenga Karume (1992) eKLR which has been upheld as good law by all superior courts was clear that “ where a clear procedure for redress of any particular grievance prescribed by the Constitution or act of parliament, that procedure should be strictly followed”. It is not optional.
32. The court uphold the said decision to apply in the instant case and proceeds to uphold the preliminary objection dated November 15, 2022 on ground of failure to exhaust existing redress mechanism on vetting of nominees to the County Executive members Committees under section 7 (10) of the Public Appointments (County Assembly).
33. Approval Act. The court strikes out the petition dated November 9, 2022 for being premature.
34. The petition was brought in Public Interest . Each party to bear own costs.
35. It is so ordered.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT BUNGOMA THIS 23RD DAY OF FEBRUARY, 2023.

J. W. KELI,

JUDGE.

In the Presence of:--

Court Assistant : Brenda Wesonga

Petition :-

1st Respondent : Godia holding brief for Mulabi

Dr Clarence Eboso Mweresa.

