



Alibusayyid & 3 others v Governor, County Government of Mombasa & 2 others; Ali & 12 others (Interested Party) (Cause E001 of 2023) [2023] KEELRC 286 (KLR) (2 February 2023) (Ruling)

Neutral citation: [2023] KEELRC 286 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE E001 OF 2023
AK NZEI, J
FEBRUARY 2, 2023**

BETWEEN

ABDULMAJID ALI ALIBUSAYYID & 3 OTHERS PETITIONER

AND

**GOVERNOR, COUNTY GOVERNMENT OF MOMBASA & 2
OTHERS RESPONDENT**

AND

FADHIL MAMUNI ALI & 12 OTHERS INTERESTED PARTY

RULING

1. The application before me is dated January 16, 2023, and was contemporaneously filed together with the petition herein. The Petitioner/Applicants seek the following orders:-
 - a. an interim order of injunction restraining the 3rd Respondent from debating, vetting and/or approving of the nomination of the Interested Parties as appointed by the 1st Respondent in his Executive Notice dated January 15, 2023 pending hearing and determination of the application.
 - b. an interim order of injunction restraining the Interested Parties from taking office as appointed by the 1st Respondent in his Executive Notice dated January 15, 2023 pending the hearing and determination of the application.
 - c. an interim order of injunction restraining the 3rd Respondent from debating, vetting and/or approving of the nomination of the Interested Parties as appointed by the 1st Respondent in his Executive Notice dated January 15, 2023 pending the hearing and determination of the instant petition.



- d. an order of injunction restraining the Interested Parties from taking office as appointed by the 1st Respondent in his Executive Notice dated January 15, 2023 pending the hearing and determination of the instant petition.
 - e. any other order the court deems just and fit to grant in the circumstances.
2. The application is expressed to be brought under Section 1A, 3 and 3A of the *Civil Procedure Act* and Order 51 of the *Civil Procedure Rules*, and is based on a supporting affidavit of Abdullmajid Ali Al Busayyid (the 1st Petitioner/Applicant) sworn on January 16, 2023. It is deponed in the said affidavit:-
- a. that on January 15, 2023, the 1st Respondent issued an Executive Notice Regarding Nomination and Appointments in the County Government of Mombasa; and that the Executive Notice contained appointments of Interested Parties into various public offices in County Government of Mombasa, including Executive Committee Members.
 - b. that in line with the law relating to appointments in the public service, the appointing authority has to ensure that such appointments are as a result of fair and transparent competitive process, which ought to be subjected to public participation as envisioned in the letter and spirit of the *Constitution of Kenya, 2010*.
 - c. that being the appointing authority, the 1st Respondent shrouded the appointments made through the Executive Notice dated January 15, 2023 in secrecy, in total offense of the *Constitution* and all other relevant laws.
 - d. that the appointment of ten (10) of the nominees to the offices of County Executive Committee members is in contravention of the two-thirds gender rule on public appointments as there are two (2) women nominees in comparison to eight (8) men on the said team.
 - e. that the 1st Respondent's Executive Notice on Nominations and Appointments has overlooked persons with disabilities on his list, an act that is not only discriminatory, but goes against the very spirit and letter of the *Constitution*.
 - f. that the nominee for the position of County Attorney is an incumbent in the said office and has been in acting capacity for the last ten (10) years in the previous regime's term in office; and offends the law as he was meant to serve the term commensurate to the term of the 1st Governor of Mombasa County as held in Malindi ELRC Petition No E001 of 2020; *Commission for Human Rights and Justice -vs- Michelle Bibi Fondo, Governor Kilifi County & PSB Kilifi County Government*.
 - g. that the 1st Respondent's Executive Notice dated January 15, 2023 offends the mandatory provisions of the Bill of Rights and Chapter 6 of the *Constitution* on Leadership and Integrity.
 - h. that the Petitioners and other residents of Mombasa ought to be involved in the public institution and appointments of officers into the said offices.
 - i. that the list of nominations and appointments falls short of the local employment scheme which mandates such appointments to cater for local residents of Mombasa County to the tune of 70%.
 - j. that no ripe fruit can come out of a rotten tree, thus any appointment arising from a flawed process is nullity ab initio.
3. The 1st Respondent filed grounds of opposition dated January 18, 2023, opposing the application on grounds:-



- a. that the application and petition are premature and incompetent as the Petitioners have misunderstood the whole legal process about how the Interested Parties are appointed.
 - b. that orders sought in the application are futuristic in nature and as such the application is bad in law.
 - c. that the orders as sought cannot be granted at this stage until the hearing and the determination of the main matter (Petition); and that granting the orders at this stage would amount to determining the main suit.
 - d. that orders sought in the application bear a decided public law connotation as it leans more in the interest of the public unlike private party issues, and as such general good tilts in favour of the Respondents and Interested Parties.
 - e. that the Applicants have not proved that they have a prima facie case to warrant temporary injunctive orders.
4. On January 23, 2023, the 1st Respondent filed an affidavit in response to the application, sworn by one Dr Noah Akala on even date. It is deponed in the said affidavit, inter-alia:
- a. that contrary to what the Petitioners have presented, the 1st Respondent took all measures to ensure that the nomination of County Executive Committee was as a result of fair and competitive process.
 - b. that the 1st Respondent advertised for the post of County Executive Committee Members on social media, on Standard Newspaper and the Star on November 16, 2022, even though the law does not make it compulsory for advertisement of such posts.
 - c. the Section 35 of the [County Government Act](#) gives the 1st Respondent the prerogative to nominate individuals for the position of County Executive Committee Member.
 - d. that a selection panel was constituted to assist in the process.
 - e. that public participation in the process will be done during vetting by the 3rd Respondent, where the general public will be able to participate in the vetting process and also be represented by their elected leaders (Members of County Assembly).
 - f. that the nomination of Executive Committee Members conforms to the two-thirds gender rule as there are three (3) ladies and six (6) men, the Deputy Governor being an elected leader who has only been assigned a Department; and that the two-thirds rule has been complied with even if the Deputy Governor is included in the computation.
 - g. that the nominations were done in compliance with Section 35(a) of the [County Governments Act](#); and that the Petitioner/Applicants have not proved their allegations.
 - h. that on the other appointments, the appointment of the Mombasa County Secretary, the Chief Executive Officer to the Mombasa County Public Service Board, was done competitively under Sections 44 and 58(c) of the [County Governments Act](#).
 - i. that no prove has been given by the Petitioner/Applicants on the allegation that the nominee for the post of Mombasa County Attorney has been in office for ten (10) years. That the [Office of the County Attorney Act](#) provides for the tenure of the County Attorney as six (6) years, and does not indicate that the six years term is fixed such that an individual cannot be appointed for



another six (6) years and another six (6) years; provided he or she is appointed by the Governor and approved by the County Assembly.

- j. that the Applicants have not established a prima facie case as their allegations have not been supported/justified.
5. The 1st Respondent exhibited copies of the Standard Newspaper and the Star Newspaper adverts for November 16, 2022, advertising ten (10) posts of Executive Committee Members and sixteen (16) posts of Chief Officers.
6. Matters deponed to in the 1st Respondent's said replying affidavit have not been controverted by the Petitioner/Applicants.
7. The Petitioner/Applicants and the 1st and 3rd Respondents filed written submissions on the application pursuant to the Court's directions in that regard, which I have considered.
8. In his Executive Notice dated January 15, 2023, which appears to have triggered the proceedings herein, the 1st Respondent stated in part:

“Further to deep consideration and careful thought, and in line with Article 179 of the Constitution of Kenya 2010, I do hereby nominate the following individuals for vetting by the County Assembly of Mombasa as County Executive Committee.

I have dispatched this in writing to the Hon Speaker of the County Assembly and I am confident that once approved, these Kenyans shall serve the people of Mombasa with distinction.”

9. Article 179(1) and (2) of the [Constitution of Kenya, 2010](#) provides:-
- “(1) The executive authority of the County is vested in, and exercised by, a county executive committee.
- (2) The county executive committee consists of-
- (a) the county governor and the deputy county governor; and
- (b) members appointed by the county governor, with the approval of the assembly, from among persons who are not members of the assembly.”
10. Sections 35(1) and (2) of the [County Governments Act](#) on the other hand provides that:-
- “(1) he governor shall, when nominating members of the executive committee:-
- (a) ensure that to the fullest extent possible the composition of the executive committee reflects the community and cultural diversity of the county; and
- (b) take into account the principles of affirmative action as provided for in the constitution.
- (2) The county assembly shall not approve nominations for appointment to the executive committee that do not take into account-
- (a) not more than two thirds of either gender.



- (b) representation of the minorities, marginalized groups and communities; and
- (c) community and cultural diversity in the County."

11. It is clear from the foregoing Constitutional and statutory provisions that the governor cannot exercise the power to appoint members of the County Executive Committee without approval of the County Assembly. The County Assembly is composed of Members of the County Assembly who are elected by the electorate, the Kenyan Public or "Wanjiku" as members of the Kenyan Public are many a times referred to in Kenya. The vetting and approval exercise by the County Assembly is itself a public exercise. In my view, the public participates in the exercise at this stage, either directly or through duly elected Members of the County Assembly. The decision the County Assembly arrives at at the close of the exercise is, therefore, a product of public participation.

12. Nomination of persons by the governor for vetting and approval by the County Assembly does not, in the context of Article 179 of the *Constitution of Kenya 2010* and Section 35 of the *County Governments Act*, amount to appointment of County Executive Committee Members. Nomination and appointment are not synonymous.

13. The Court stated as follows in the case of *Peter Kyalo –vs- Alfred Mutua, Governor Machakos & Others* [2018] eKLR, and I agree:-

"74. In my view, the appointment of County Executive Committee Members being a process, it cannot be that every stage of that process must be subjected to public participation ...

75. In this case similarly there is no requirement that the Governor should advertise the positions for nomination for the members of the County Executive Committee. As defined by Black's Law Dictionary, the word nomination denotes a suggestion which is not binding. In my view, the process of nominating people for appointment as contemplated under Article 179 of the Constitution as read with Section 35 of the County Governments Act, amount to mere recommendation. As stated in Black's Henry Campbell, 1968, Black's Law Dictionary, Definition of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern, (4th ed) West Publishing Co; St. Paul, MINW the words "recommend" means "to advise or counsel" as opposed to "direct" which means "to appoint; guide; order; command; instruct."

14. The Court in the *Alfred Mutua* case (*supra*) further stated, and I respectfully agree:-

"In my view, to subject such mere recommendation which is not itself an appointment to public participation and at the same time subject the process of approval by the County Assembly to the process of public participation would be an unnecessary expensive and tedious exercise if every stage of appointment process is subjected to public scrutiny..."

15. Under Section 35(2) of the *County Governments Act*, it is the County Assembly which is mandated and obligated to ensure, during the vetting and approval process, that the governor's nominations take into account the two-thirds gender rule, representation of minorities and marginalized groups/communities, community and cultural diversity in the County, Chapter 6 of the *Constitution*



(Leadership and Integrity), knowledge, experience and career of the nominees. Injuncting the process at this particular point would be a pre-mature judicial intervention.

16. The Court in the Alfred Mutua case (supra) cited with approval the case of *Marafong Demarcation Forum and Others –vs- President of the Republic of South Africa and Others* (CCT 41/07) [2018] ZACC 10; 2008 (5) SA171 (CC); 2008 (10) BCLR 968(CC) where it was stated:-

“Parliament and provincial legislatures must be given a significant measure of discretion in determining how best to fulfil their duty to facilitate public involvement. This discretion will apply both in relation to the standard rules promulgated for public participation and the particular modalities appropriate for specific legislative programmes. Yet, however great the leeway given to the legislature, the Court can, and in appropriate cases will, determine whether there has been the degree of public involvement that is required by the Constitution ...”

17. The allegation by the Petitioner/Applicants that the 1st Respondent’s (governor’s) nominations fell short of the two-thirds gender rule, among other issues; allegations that the 1st Respondent denied and submitted that there are three ladies out of the ten (10) nominees, are issues that will be probed by the County Assembly during the vetting and approval process.
18. The allegation that the nominations were shrouded in secrecy was countered by the 1st Respondent with a clear demonstration that the posts of Executive Committee Members were widely advertised in the print media. This despite the fact that the 1st Respondent was not bound by the law to advertise the positions. The posts of Chief Officers were also shown, by the 1st Respondent, to have been widely advertised. The allegation of secrecy was not proved.
19. The post of the County Attorney, which does not appear to have been a subject in the 1st Respondent’s Executive Notice dated January 15, 2023, is one whereby nominees thereto must be vetted and approved by the County Assembly. Public participation will take place at that level. No material was presented in this Court to show that the nominee to the office of the County Attorney has previously acted in that office, and no law disqualifying such nominee was pointed out to the Court by the Petitioner/Applicants. Any disqualifying factors, if at all, are bound to be revealed during the vetting and approval process, for that is the purpose and essence of that process.
20. In view of all the foregoing, I am not convinced that the application dated January 16, 2023 is merited. The same is hereby dismissed with costs.
21. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 2ND DAY OF FEBRUARY 2023

AGNES KITIKU NZEI

JUDGE

ORDER

In view of restrictions on physical Court operations occasioned by the COVID-19 Pandemic, this Ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:



Mr. Tajnhai.for Petitioner

Mr. Theuri for Respondent

