



**Abdudo & 15 others v County Government of Marsabit & 5 others; Qotto & 23 others (Interested Parties) (Employment and Labour Relations Petition E001 of 2023) [2023] KEELRC 843 (KLR) (13 April 2023) (Judgment)**

Neutral citation: [2023] KEELRC 843 (KLR)

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MERU**  
**EMPLOYMENT AND LABOUR RELATIONS PETITION E001 OF 2023**  
**ON MAKAU, J**  
**APRIL 13, 2023**

**BETWEEN**

**ALIW TEPO ABDUDO & 15 OTHERS ..... PETITIONER**

**AND**

**COUNTY GOVERNMENT OF MARSABIT ..... 1<sup>ST</sup> RESPONDENT**

**COUNTY PUBLIC SERVICE BOARD OF MARSABIT ..... 2<sup>ND</sup> RESPONDENT**

**THE GOVERNOR, MARSABIT COUNTY ..... 3<sup>RD</sup> RESPONDENT**

**THE CLERK, MARSABIT COUNTY ASSEMBLY ..... 4<sup>TH</sup> RESPONDENT**

**THE SPEAKER, MARSABIT COUNTY ASSEMBLY ..... 5<sup>TH</sup> RESPONDENT**

**THE COUNTY ASSEMBLY OF MARSABIT ..... 6<sup>TH</sup> RESPONDENT**

**AND**

**ROBA QOTTO & 23 OTHERS ..... INTERESTED PARTY**

**JUDGMENT**

1. The petition before court is dated 27<sup>th</sup> January, 2023 and the facts contained therein are largely uncontested. On or about 19<sup>th</sup> October, 2022, the 2<sup>nd</sup> respondent (Board) published a notice declaring 19 vacancies in the post of County Chief Officer (CCO) in the 1<sup>st</sup> respondent (County Government). Numerous applications were made, out of which 101 candidates were shortlisted vide a notice dated 7<sup>th</sup> November 2022. Subsequently they were all interviewed and the 3<sup>rd</sup> respondent (Governor) published a list of 24 persons who were nominated for the position of CCO vide a notice dated 17<sup>th</sup> January, 2023. The 24 were picked from a long list forwarded to the Governor by the Board, which allegedly included successful candidates from all the 12 communities of Marsabit but the Governor failed to



- nominate any candidate from El Molo, Samburu, Sakuye and Waata communities or any persons with disabilities (PWDs).
2. Out of the 12 communities of Marsabit, the Governor nominated candidates from 8 communities only and excluded 4 communities. Further the majority of the nominees were from the two majority clans. Specifically, the Borana, Gabbra and Rendile which are the dominant majority communities got 9, 5 and 2 nominees respectively. Burji, Dassanect and Garre which are minorities got 2, 1 and 3 nominees respectively but the other minorities got nil nominees just like the PWDs.
  3. The petitioners who are residents of Dabel location, Golbo Division, Marsabit County bring this petition alleging that the said nominations are discriminative, illegal, sham and grossly violates Article 27 (4), 56 (a) & (c), 174(e) and 177 (1) (c) of *the Constitution* which prohibits discrimination of the marginalized communities, rights to participate in Government and access to employment.
  4. Further it is alleged that the impugned nominations violates section 6 of the Public Appointments (County Assemblies Approvals) Act as well as the National values of governance and principles of Public service in that the notice published was not accompanied by sufficient information about the nominees to the public to facilitate public participation as required by Article 196 of *the Constitution*.
  5. Besides, it is alleged that the nomination of candidates from the dominant communities is a sham and the objective is to reward political loyalists in gross violation of Article 54, 73 and 75 of *the Constitution*, the County Government Act and the Public Appointments (County Assemblies Approvals) Act as well as the national values of governance and principles of public service. As a result it is alleged that the appointments did ignore regional balance and the minorities including PWDs contrary to *the constitution* and the attendant legislations and therefore the respondents acted ultra vires their lawful mandate.
  6. Based on the foregoing matters, the petitioners seek the following reliefs:-
    1. A declaration that the process leading to the nomination of all the nomination of all the interested Parties herein was unconstitutional, irregular and illegal for flouting clear provisions of the law and hence null and void ab initio.
    2. A declaration that the decision of the 3<sup>rd</sup> Respondent nominating the interested parties herein is unconstitutional and thus null and void ab initio and of no consequence whatsoever.
    3. A declaration that the failure to nominate the shortlisted successful candidates of all the marginalized/minority communities of Marsabit County was unconstitutional and the nomination process therefore a nullity.
    4. A declaration that the process leading to the Approval hearings of the nominations of the Interested Parties herein by committees of the 6<sup>th</sup> Respondent is unlawful for flouting relevant statutory provisions and any approval hearings conducted pursuant thereto are null and void.
    5. That an order of certiorari do issue to bring to this Honourable court for purposes of being quashed the decision by the 3<sup>rd</sup> respondent nominating the Interested parties for the positions of the 1<sup>st</sup> to the 24<sup>th</sup> County Chief Officers, Marsabit County Government in the respective Departments thereof on the 17<sup>th</sup> January, 2023.
    6. That this Honourable court be pleased to issue an order of permanent injunction as against the Respondents jointly and severally, restraining them and their members, agents, employees and/or any person acting at their behest from conducting any sitting and/or acts of approval hearings, vetting, appointment, gazettelement and/or swearing in of any of the persons



nominated by the 3<sup>rd</sup> respondent on the 17<sup>th</sup> January 2023 for the positions of Chief Officers following the advertisement made on the 17<sup>th</sup> January, 2023.

7. That this Honourable court be pleased to issue any other relief amenable in the circumstances.
8. That this Honourable court be pleased to order that the costs of this Petition be borne by the Respondents.
9. The County Government and the Governor filed a joint response dated 15<sup>th</sup> February 2023. In brief they admitted that the Board declared 19 vacancies in the position of CCO in its official Website and in the Standard Newspaper on 17<sup>th</sup> October 2022. Subsequently, the County Executive committee of the 1<sup>st</sup> respondent met on 13<sup>th</sup> December 2022 and deliberated on restructuring the portfolios of government and it was resolved that 5 more portfolios be added to enhance efficiency in service delivery to the people of Marsabit County.
10. The resolution adopted Executive Order No.1 of 2022 which was communicated to the Board and the 6<sup>th</sup> respondent (Assembly). As a result the Board declared additional 5 vacancies for the position of CCO in its official Website and in the Standard Newspaper on 20<sup>th</sup> December, 2022 raising the vacancies to 24.
11. The Board received applications, shortlisted, interviewed the candidates and made recommendation, to the Governor, names of the most qualified and experienced candidates for the position of CCO from among persons it had competitively considered. Subsequently, the Governor in exercise of his executive authority considered the candidates recommended by the Board on merits, academic and professional competencies alongside the constitutional and statutory requirements and nominated 24 of them and forwarded to the clerk of the Assembly on 17<sup>th</sup> January 2023 for vetting and approval under section 45 of the [County Governments Act](#).
12. The 1<sup>st</sup> and 3<sup>rd</sup> respondents deny that minorities and PWDs were excluded from the list of the nominees forwarded to the Assembly and averred that the petitioners have confirmed in paragraph 37 of their petition that minority communities have been included in the list of nominees for the position of CCO. The court is urged to dismiss the petition on the basis of paragraph 37 of the petition.
13. Further it was averred that there is no automatic right to appointment due to a persons for either making an application, belonging to a particular community or being disabled. Rather, the said considerations are viewed holistically and in consonance with competency in delivering services to the people of Marsabit.
14. As regards the alleged violation of Section 6 of the [Public Appointments \(County Assemblies Approval\) Act](#), it was contended that Governor duly notified the Assembly and the public of the nominations for the CCO positions in accordance with said section 6 of the Act. It is further averred that the petition herein is an attempt to usurp the powers of the Assembly to exercise its constitutional and statutory mandate of vetting the 24 nominees and subject them to a “public” vetting exercise.
15. It is further respondents’ case that the advertisement, interview and nomination for CCO positions was carried out with strict adherence to the relevant laws and no evidence has been adduced to demonstrate that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents acted ultra vires their constitutional and statutory mandate. Besides the petitioners have failed to plead specifically any member from a marginalized/ minority community or PWDs who applied for the position and was denied the opportunity despite having the requisite qualifications. Consequently, it was contended that the petition is premature as petitioners should direct their objection to the Assembly under Section 7 of the [Public Appointments](#)



(County Assemblies Approval) Act or file appeal to the Public Service Commission (PSC) under section 77 of the County Government Act.

16. Finally, the 1<sup>st</sup> and 3<sup>rd</sup> respondent averred that the reliefs sought are not tenable since the petition does not meet the threshold for granting constitutional reliefs. It was averred that the petitioners have not pleaded with precision the alleged violation to the constitution and the statute, and the specific applicants or nominees to which the allegations attach. Further no material has been placed before the court that brings to question or discredit any of the 24 nominees or to demonstrate any applicant who was disenfranchised by Board's and the Governor's considerations. The court was therefore urged to dismiss the petition with costs because it is in the public interest that the Assembly be allowed to perform its statutory mandate to facilitate public service delivery.
17. The 2<sup>nd</sup> respondent (Board) basically reiterates the averments above. In brief it averred that on 17<sup>th</sup> October, 2022 it published a notice declaring 19 vacancies in the post of CCO in compliance with section 45 of the County Government Act. The positions were advertised in its website and the Standard Newspaper on 17<sup>th</sup> October 2022. It further advertised additional 5 positions of CCO on 20<sup>th</sup> December 2022 in its website and the Standard Newspaper.
18. Subsequently it received applications, interviewed the shortlisted candidates and made recommendations, to the Governor of the most qualified and experienced candidate for the positions of CCO as provided by section 45 of the County Government Act. It averred that it was guided by merit, academic and professional competencies alongside constitutional and statutory requirements especially section 65 of the Act which sets out the matters to consider when making appointments and recommendations.
19. It maintained that it strictly adhered to the relevant law in the advertisement, interview and recommendation of person for the positions of CCO. It further averred that the petitioners have admitted in paragraph 36 of the petition that the Board forwarded a comprehensive list from all the communities of Marsabit to the Governor. Consequently, the Board prayed for suit against it to be dismissed with costs because the petitioners have not demonstrated any constitutional and statutory contraventions by it or any evidence that the candidates it recommended to the Governor were unsuitable under the law.
20. The 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> respondent also reiterated the averments by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents above, save to emphasize that the petition herein is premature by dint of section 77 of the County Government Act which provides that any person dissatisfied by decision of the County Public Service Board may appeal to the PSC. Further the petitioners have another avenue for presenting their grievances to the Assembly under section 6, 7 and 8 of the Public Appointment (County Assemblies Approval) Act.
21. It was averred that the Assembly has the mandate to reject the names of the nominated candidates after considering all the relevant laws that pertain to qualifications of persons who can hold public office. That during the vetting the Assembly has the same powers as High court to summon any person including officers of the Board, and compel the production of documents and to examine witnesses under oath in the public glare. Consequently, the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> respondents maintained that the suit is premature and ought to be dismissed with costs.
22. The petitioners filed supplementary affidavit to respond to the respondents' response to the petition. In brief they reiterate averments in the petition and the supporting affidavit save to add that Moktar Intallo Guracha and Abdullahi Guyo Wario from Sekuye community, who were shortlisted as No.2 and 14 respectively, were qualified but they were not nominated by the Governor in furtherance of his discrimination of minority communities.



23. They maintained that the court has jurisdiction to interpret *the constitution* and the petitioners had the locus standi to bring the petition for redress of denial, violation, infringement and threat to a right or fundamental freedom in the Bill of Rights. Therefore it prayed for the petition to be allowed because it is in the public interest and large interest of substantive justice.

### Submissions

24. Mr.Githinji Advocate, for the petitioners relied upon the skeleton submissions, and the affidavits sworn on 27<sup>th</sup> January 2023 and 27<sup>th</sup> February 2023 in support of the petition. He submitted that the responses by 1, 2 and 3<sup>rd</sup> respondents are not supported by any evidence and therefore they have not converted the evidence laid before the court by the petitioners. Further the only evidence left to challenge the petition is the replying affidavit filed by the 4, 5 and 6<sup>th</sup> respondents which is irrelevant.
25. On the other hand it was submitted that the petition is before the court pursuant to Article 22, 23, 27 and 258 of *the Constitution* to seek redress for the violations of their rights as members of minorities. For emphasis reliance was placed on the case of John Mining Temoi & another v Governor of Bungoma County & 17 others (2014) eKLR which is on all forms with the instant petition and where the court affirmed the rights of the minorities.
26. The counsel submitted that the petitioners have shown that members of their communities applied, were interviewed and their names forwarded to the Governor but he failed to nominate any one of them. Accordingly it was pointed out that the whole established has no one from the minorities.
27. In conclusion the counsel urged the court to find that the failure to file evidence by the 1, 2 and 3<sup>rd</sup> respondents was deliberate in order to avoid exposing themselves. Finally he urged the court to affirm the rights of the minorities granting the reliefs sought.
28. Ms Hashi Advocate for 1<sup>st</sup> and 3<sup>rd</sup> respondents submitted that the response by her clients was proper by dint of Rule 15 of Mutunga Rules. She then relied on the skeleton submissions, that notice of preliminary objection dated 8<sup>th</sup> February 2023 and the Response dated 15<sup>th</sup> February 2023 to oppose the petition. From the onset it was submitted that the court lacks jurisdiction because the statutory procedures established under Article 174 and 185 of *the Constitution*, section 77 and 45 of the County Government Act read with section 7 of the *Public Appointments (County Assemblies Approval) Act* have not been exhausted.
29. It was argued that the said provisions of *the Constitution* and County Government Act are couched in mandatory terms that any decision of County Public Service Board shall be appealed to the PSC. No evidence had been tendered to show that any attempt was made by the petitioner to use that avenue. Further, the vetting by the Assembly was highlighted as the other avenue for the petitioners to agitate for their rights as minorities. Accordingly the suit herein was described as premature because the petitioners have elected not to take cognizance of other remedies availed to them with regard to the appointment of CCOs.
30. For emphasis, the counsel cited the case of Law Society of Kenya & 2 others v Attorney General & 3 others; Julius Korir & 50 others (Interested parties) (2022) eKLR where this court dismissed consolidated petitions challenging the nomination and vetting of the permanent secretaries for having been filed prematurely before the National Assembly Committee had vetted the nominees.
31. The counsel further cited the case of Samuel Otara Arama v Nakuru County Public Service Board & 2 others (2017) eKLR where also the court held that the notice of motion was prematurely filed.



32. Finally on the preliminary objection, it was submitted that the petition offends Rule 9(2) of the ELRC procedure Rules which required that a party bringing a representative suit shall file authority signed by all the other persons being represented.
33. As regards the merits of the petition it was submitted that the process of nominating the CCOs was done within the strict confines of the law. All the required notices were published in the Board's website and Standard Newspaper declaring 24 positions of CCOs Applications were received by the Board, and it shortlisted, and interviewed the candidates. Subsequently, the Board recommended names of the most qualified and experienced candidates for the positions of CCOs from among the persons it had competitively considered.
34. Further, the Governor carefully considered the suitability of the recommended candidates and in exercise of his executive authority vested by Section 30 read with section 45 of the County Government Act, selected the most suitable ones based on academic and professional qualifications, experience, as well as affirmative action considerations and forwarded them to the Assembly on 17<sup>th</sup> January 2023 and notified the public in accordance with section 6 of the *Public Appointments (County Assemblies Approval) Act*.
35. It was further submitted that Public participation process is yet to be done as petitioners filed suit prematurely before giving the Assembly the opportunity to carry out its constitutional and statutory mandate. It was contended that section 7 of the Act allows any persons contest suitability of a candidate to hold office to which the candidate is nominated by filing a statement on oath, and provide evidence to the clerk prior to the approval hearing. Therefore it was submitted that the petitioners jumped the gun by filing this petition.
36. As regards the alleged discrimination of the El Molo, Samburu, Waata and Sakuye communities in the nomination of the 24 CCOs, it was submitted that, the petitioners have not placed before the court any evidence of the applications made to the Board by members of the said communities supported by their academic, professional and competences to warrant consideration for nominations. No Samburu, El Molo or Waata has filed any affidavit to support the claim raised by the Sakuye community of Marsabit. Further, no Sakuye applicant with the requisite qualifications has presented their case before this court to determine the alleged discrimination.
37. On the contrary, it was submitted that section 37 of the petition and paragraph 3, 7 and 9 of the supporting affidavit confirm that indeed minorities have been included. The case of Shadrack Koskei & Another v Governor of Nakuru County & 2 others (2016) eKLR, the court held that it is not possible to have all the tribes and counties included in every single Public office. Likewise in the case of Mathew Lempurkel v Joshua Wakhora Irungu, County Governor Laikipia County & 2 others (2013) eKLR the court held that Constitutional requirement of diversity in government does not demand a seat for each community nor does it require the use of mathematical precision in allocating seats, but rather, that certain factors be considered in to have an outcome of diversity.
38. Finally the counsel submitted that the reliefs sought are not warranted since the petition does not meet the threshold set by the court in Anarita Karimi Njeru v Republic as regards precise pleading.
39. Mr. Jarso Advocate for the 2<sup>nd</sup> respondents relied on the Response dated 28<sup>th</sup> February 2023 and skeleton submissions dated 1<sup>st</sup> March 2023 to oppose the petition. He concurred with the submissions made for the 1<sup>st</sup> and 3<sup>rd</sup> respondents that the petition is not proper under Mutunga Rules.
40. As regards the merits of the petition, it was submitted that the Board played its role of competitively sourcing and recommending qualified and experienced persons for appointment. It was submitted



that the Board followed the principles set out for recruitment including advertisement, shortlisting, interviewing and forwarding the list of candidates to the Governor for consideration and appointment. No evidence was tendered to show that the Board acted contrary to the said principles. For emphasis reliance was placed on the Shadrack Koskei case, supra.

41. It was further submitted that the petitioners have failed to show that they were qualified and they applied but were denied the nomination. All what they are alleging is that they are marginalized but in the Board's view, marginalization is not a card for appointment.
42. Further it was submitted that upon submitting the list of recommended candidates to the Governor, its role was sealed. No evidence has been tendered to show that upto the point of the said recommendation, there was any violation done by the Board. Reliance was placed on the Anarita Karimi Njeru case and Mumo Matemu case to urge that the petition lacks precision on the alleged violations and how they were perpetuated.
43. Further it was submitted that section 77 of County Government Act provides for appeal procedure which has not been followed. Consequently it was argued that the court lacks jurisdiction as the internal mechanism has not been exhausted before filing the suit. For emphasis the case of Speaker of National Assembly v Njenga Karume (1992) eKLR and Geoffrey Muthiga Kabiru & 2 others v Samuel Munga Henry & 1756 others (2015) eKLR where the doctrine of exhaustion was affirmed.
44. Mr.Wahukwe Advocate for the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> respondents relied on the 4<sup>th</sup> respondents Replying Affidavit and the Skeleton submissions filed. It was confirmed that the impugned list of nominees for the position of CCO was placed before the Assembly under Section 6 (3) of the Public Appointment (County Assemblies Approval) Act for vetting by the relevant committee of the Assembly in public hearing. The hearings are published in a newspaper of national wide circulation and any person can challenge the appointment of any candidate. The Assembly has the power to summon any person to give information and to reject a candidate.
45. For emphasis reliance was placed on the case of Peter Kyalo v Dr.Alfred Mutua & 6 others (2018) eKLR where the court nomination by the Governor is not final but subject to the decision of the Assembly to ratify or reject the decision by the Governor after public participation through inviting the public to submit their views on the nominated candidates.
46. In addition, the counsel submitted that the avenue of appeal to the PSC under section 77 of the County Government Act was not exhausted before filing the instant suit and as such the suit offends section 87(b) of the PSC Act. For emphasis, the counsel cited the decision of the Court of Appeal in the case of Secretary, County Public Service Board & another v Hulbhai Gedi Abdille (2017) eKLR where the court held that it was not allowed for the respondent to disregard the appeal mechanism provided by section 77 of the County Government Act and initiate judicial review proceedings in court.
47. In a brief rejoinder, Mr.Githinji Advocate for the petitioners, submitted that Article 22 of *the Constitution* has no limit to the jurisdiction of the court. Further, the petitioners have locus standi and there is no restriction to petition the court. Besides the petitioners have filed authority to bring a representative suit.
48. As regards the merits of the case, the counsel submitted that it has highlighted under paragraph 10, the communities and the nominees, he clarified that the issue of suitability is not the issue in dispute but rather that the petitioners are missing out in the list forwarded to the Assembly for vetting and on that basis they cannot wait for the Assembly to vet.



## Determination

49. There is no dispute that the Board advertised vacancies for CCOs, interviewed candidates and recommended the most qualified and experienced candidates to the Governor for consideration and appointment. There is further no dispute that the list forwarded to the Governor was comprehensive and it included successful candidates from all communities. There is also no dispute that the Governor exercised his executive powers by nominating 24 of the recommended candidates and forwarded the list to the County Assembly for vetting and approval as required by the law. It is also common ground that the vetting of the nominated candidates has not been done after the petitioners obtained court orders.
50. The issues for determination are:-
- a. Whether the petition meets the competence threshold.
  - b. Whether the petition offends the doctrine of exhaustion.
  - c. Whether the petition has merits.
  - d. Whether the reliefs sought are merited.

## Competence threshold

51. The petition before the court sets out the Articles of *the Constitution* which are alleged to have been violated. Paragraph 36 of the Petition cites Article 27 (a), 56 (a) & (c), 174 (e) and 177 (1) (c) of *the Constitution* as having been violated by the respondents failure to nominate candidates from the minority communities of Marsabit County. Besides PWDs were also excluded from the nominations for the position of CCOs. By so doing it was alleged that the respondents violated Article 73 of *the Constitution* which requires that authority be exercised in a manner which is consistent with the purpose and object of *the Constitution*. On the face value, there is an apparent case of violation of fundamental freedoms and rights.
52. The summary of the facts of the matter is that the respondents violated *the constitution* by excluding the minorities and PWDs while nominating candidates for appointment as CCOs. The case is about discrimination of minorities and PWDs in nominations to employment position, and opportunities for employment. Consequently, I am satisfied that the petition meets the competence threshold for seeking relief under *the Constitution* as it was enunciated in the Anarita Karimi Njeru case where the court held that:-

“If a person is seeking redress from the High Court on a matter which involves a reference to *the Constitution*, it is important (if any to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they were alleged to be infringed.”

## Exhaustion doctrine

53. The doctrine of exhaustion espouses the view that where there is an effective and alternative procedure for remedy, provided by *the Constitution* or legislation, that procedure ought to be exhausted before litigation is commenced in a court of law. Therefore no person should bypass the alternative procedure and invoke the court’s jurisdiction.



54. The Court of Appeal in *Geoffrey Muthiga Kabiru & 2 others v Samuel Munga Henry 1756 others* (2015) eKLR affirmed the doctrine when it held that:-

“It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews... The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanism in place for resolution outside the courts.”

55. The respondents contend that the petitioners did not exhaust the procedure laid down by legislation, namely appeal to the PSC, and objection to the County Assembly during the vetting of the nominated candidates. The petitioners are of a different view, that is, they have locus to petition the court for violation of their rights and when *the Constitution* is breached. Secondly, they see no relevance of presenting their petition to the Assembly, during suitability vetting of the nominees, because none of the nominees is from their communities or PWDs.

56. Section 9 (2) of the FAA Act bars the court from reviewing an administrative action or decision unless internal mechanism for appeal or review and all remedies available under any other law are first exhausted. The same position obtains under section 87 (2) of the PSC Act which bars any person from filing any legal proceedings in any court of law with respect to matters within the jurisdiction of the PSC to hear and determine appeals from County Government Public service unless the procedure provided under the Act is exhausted.

57. Section 85 of the *Public Service Commission Act* provides:-

“The commission shall, in order to discharge its mandate under Article 234 (2) (i) of *the Constitution*, hear and determine appeals in respect of any decision relating to engagement of any person in a County Government, including decision in respect of-

- a. Recruitment, selection, appointment and disqualification attached to any office;
- b. ...”

58. There is no doubt that the matter before the court involves a decision made in respect of recruitment, selections and appointment of candidates to public office as CCOs. Such exercise or decision is supposed to be done or made in strict adherence to *the constitution* and attendant legislation. According to the above cited provisions of the law, it is apparent that such decisions or process is subject to an alternative process by way of an appeal under section 85 of the PSC Act read with Article 234 (2) (i) of *the Constitution*.

59. Further to the avenue of appeal, there is also a second avenue of challenging the nominations before the County Assembly during the vetting of the nominees. Section 45 of the County Government Act provides that:-

“Whenever a vacancy arises in the office of a County Chief Officer, the respective governor shall within fourteen days-

- a. Nominate qualified and experienced County officers from among persons competitively sourced and recommended by the County Public Service Board;



- b. With the approval of the County assembly, appoint County chief officers.”
60. Section 7 of the Public Appointment (County Assembly Approval) Act provides that any person may prior to the approval hearing and by 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. Oxford dictionary defines suitability as:-
- “The quality of seeing right or appropriate for a particular person, purpose or situation.”
61. Law Insider has given several meanings to the term suitability. The relevant ones are:-
- “Suitability means the person in question has the expertise and professional antiquity (fit proper), as specified in the Manual on Assessment of Fitness and Propriety.”
- “Suitability means determination based on an individuals’ character or conduct that may impact the efficiency of the service by jeopardizing an agency’s accomplishment of its duties or responsibilities, or by interfering with or preventing effective service in the competitive, expected or SES position applied for or employed in, and determination that there is a statutory or regulatory bar to employment.”
62. It follows that vetting nominees for appointment to the position of CCOs, the factors to consider include their academic and professional qualifications, their integrity and character, and whether they meet all the constitutional, legal and regulatory requirements for the appointment. Section 7 of the *Public Appointments (County Assemblies Approval) Act*, aforesaid, allows any person to contest the suitability of a candidate by filing a statement on oath with the clerk of the County Assembly before the approval hearing starts.
63. In view of the highlighted alternative processes provided by the PSC Act and the *Public Appointments (County Assemblies Approval) Act*, which can effectively remedy the petitioners’ grievances, I find that the petition herein is premature vis-à-vis the exhaustion doctrine. The petitioners ought to exhaust the said alternative procedure provided by the legislation before invoking the jurisdiction of the court.
64. I gather support from the case of *Law Society of Kenya & Others v Attorney General & others (UR)* where the court held that-
- “Accordingly, the consolidated petitions have been filed prematurely. The petitioners must await the conclusion of the process as the National Assembly is now seized of. That process is participatory and the court only hopes that appropriate presentations were made to the National Assembly by members of the public in terms of the Act to enrich the process.”
65. The petitioners allege that the grievance will not be remedied by the vetting of the impugned nominees but that is not valid argument because they are free to challenge suitability of all or any of the nominees individually. The Assembly will also receive the report and all information about the nomination process. Consequently, I decline jurisdiction over the petition for the reasons highlighted above. I also eschew from commenting on the merits of the petition to avoid prejudicing the vetting proceedings before the County Assembly.
66. In the end I strike out the petition for being filed prematurely before exhausting the alternative mechanism provided by legislation. I direct each party to bear own costs since the petition is a public interest case.

**DATED, SIGNED AND DELIVERED AT NYERI THIS 13TH DAY OF APRIL, 2023.**



**Onesmus N Makau**

**Judge**

**Order**

**In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.**

**ONESMUS N. MAKAU**

**JUDGE**

