



**Oyaro v Governor Nandi County & 2 others (Petition E029 of 2022)
[2023] KEELRC 2047 (KLR) (31 July 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2047 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
PETITION E029 OF 2022**

MA ONYANGO, J

JULY 31, 2023

**IN THE MATTER OF ALLEGED VIOLATION AND INFRINGEMENT OF
THE RIGHTS AND FREEDOMS IN ARTICLES 1,2,3,6,10,19 20 21 23 27 73
174 176 179 183 185 196, 392,258(1) OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF VIOLATION AND INFRINGEMENT OF THE
RIGHTS AND FUNDAMENTAL FREEDOMS IN ARTICLE 19 20 21 23 27
73 174 176 179 183 185 196, OF THE CONSTITUTION OF KENYA 2010**

AND

**IN THE MATTER OF VIOLATION OF INFRINGEMENT OF THE PROVISIONS
OF SECTIONS 30. 58A(1) AND 58A (3) OF THE COUNTY GOVERNMENT
(AMENDMENT) ACT NO. 11 OF 2020 OF THE LAWS OF KENYA**

BETWEEN

PETER OYARO PETITIONER

AND

GOVERNOR NANDI COUNTY 1ST RESPONDENT

SPEAKER NANDI COUNTY 2ND RESPONDENT

COUNTY ATTORNEY NANDI COUNTY 3RD RESPONDENT

JUDGMENT

1. Section 58A of the [County Government Act](#) provides for the procedure for nomination and appointment of members of the County Public Service Board as follows-

Procedure for nomination and appointment of members of the Board



1. Whenever a vacancy arises in a county public service board, the governor shall nominate and, with the approval of the county assembly, appoint members to a selection panel for the purpose of selecting suitable candidates for appointment as members of the county public service board
2. The selection panel under subsection (1) shall consist of the following persons—
 - a. a chairperson, not being a public officer;
 - b. one person from the private sector;
 - c. an Advocate of the High Court of Kenya, who is a member of the Law Society of Kenya;
 - d. an accountant who is a member of the Institute of Certified Public Accountants of Kenya; and
 - e. one person from an association representing workers.
3. The governor shall, in nominating members to the selection panel, ensure that not more than two-thirds of the nominees are of the same gender.
4. The chairperson shall convene the first meeting of the selection panel within five days of his or her appointment.
5. The selection panel shall, within seven days of convening, invite applications from persons who qualify for nomination and appointment as chairperson or member of the county public service board by advertisement in at least two daily newspapers of national circulation.
6. The selection panel shall within seven days of receipt of applications under subsection (5)—
 - a. consider the applications to determine their compliance with the provisions of *the Constitution* and this *Act*;
 - b. shortlist the applicants;
 - c. interview the shortlisted applicants; and
 - d. submit the names of three qualified applicants for the position of chairperson, six qualified applicants for the position of a member and two qualified applicants for the position secretary to the Governor.
7. The Governor shall, within seven days of receipt of the names forwarded under subsection (6), nominate one person, and at least three but not more than five others for appointment as chairperson and members of the county public service board, respectively, and forward the names to the county assembly for approval.
8. The county assembly shall, within twenty one days of receipt of the names of the nominees from the Governor, consider each nomination received under subsection (7) and approve or reject any of them.
9. Where the county assembly approves the nominees, the Speaker of the county assembly shall, within five days, forward the names of the approved applicants to the Governor for appointment.
10. Where the county assembly rejects any nominee, the Speaker shall within five days communicate the decision of the county assembly to the Governor and request the Governor



to submit fresh nominations from amongst the persons shortlisted and forwarded by the selection panel under subsection (6).

11. If the county assembly rejects any or all of the subsequent nominees submitted by the Governor for approval under subsection (9), the provisions of subsections (6) and (7) shall apply.
 12. The selection panel shall stand dissolved upon the appointment of the chairperson and members under subsection (9).
 13. Where the provisions of subsection (10) apply, the selection panel shall continue to exist but shall stand dissolved upon the requisite appointments being made.
 14. The department responsible for public service shall provide secretariat services to the selection panel.
 15. In nominating or appointing a person as a member of the Board, the selection panel and the Governor shall—
 - a. observe the principle of gender equity, ethnic and other diversities of the people of Kenya, and shall ensure equality of opportunity for persons with disabilities; and
 - b. take into account the national values and principles set out in Articles 10, 27 and 232 of *the Constitution*.
 16. Despite the foregoing provisions of this section, the Governor may extend the period specified in respect of any matter under this section by a period not exceeding fourteen days.
 17. Subject to this section, the selection panel may determine its own procedure. [Act No. 11 of 2020, s. 18.]
2. The petitioner herein describes himself in the petition as a resident and voter in Nandi County, and hence interested and affected by the governance affairs in Nandi County. It is his position that *the Constitution* of Kenya mandates every citizen of Kenya, including himself, to defend, protect and uphold *the Constitution*.
 3. The 1st Respondent is the Governor, Nandi County. The 2nd and 3rd Respondents are the speaker of the Nandi County Assembly and the County Attorney, Nandi County, respectively.
 4. The 1st to 5th Interested Parties were selected and appointed as members of the Selection Panel for the appointment of the Chairperson, Secretary, and members of the Nandi County Public Service Board.
 5. It is the Petitioner's case that the 1st Respondent submitted names of the Interested Parties to the 2nd Respondent as nominees to serve on the Selection Panel on 26th October 2022. That the 2nd Respondent forwarded the names to the County Assembly for vetting.
 6. The petitioner avers that in a report dated 5th November 2022 and presented to the County Assembly on 15th November 2023, it was noted that the names of the nominees did not comply with section 58A of the *County Governments Act*, that the Committee noted in its findings that only three nominees qualified for appointment by virtue of the interests they represent as provided under the *Act*. That is:
 - a. Hon John Cheruiyot, nominated for the position of the Chairman (A chairperson, not being a public officer);
 - b. Mr. Willy Cheruiyot, nominated for the position of a member (An advocate of the High Court of Kenya, who is a member of the Law Society of Kenya) and currently a serving magistrate;



- c. Mr Josphat Serem, nominated for the position of member (One person from an association representing workers);
7. The Petitioner avers that Committee rejected the nomination of Ms. Irene Cheptanui Mutai and Mr Nicholas Kemei as they are not members of the private sector nor the Institute of Certified Accountants. The Petitioner notes that it is also questionable how the committee did not observe potential for conflict of interest and judicial ethics and conduct on the part of the 3rd Interested Party.
8. _____ It is the Petitioner's case that despite the correct recommendations of the committee, the County Assembly under the guidance of the 2nd Respondent proposed an amendment to appoint all the nominees as submitted by the 1st Respondent, the net effect being that unqualified nominees were approved for appointment during the county assembly plenary held on 17th November 2022.
9. The Petitioner avers that the list of the nominees submitted by the 1st Respondent for vetting and approval for appointment as chairman and members of the County Public Service Board Selection Panel offends Section 58A(1) and (3) of the County Governments (Amendment) Act which requires the Governor to act diligently and ensure that the list complies with the mandatory qualifications as well as factor in the gender balance requirement.
10. The Petitioner states that the 2nd and 3rd Respondents, being public officers, are required to protect and uphold *the Constitution* and all laws of the land by ensuring compliance with the law in exercising their respective mandates. That they were not diligent when such a blatant abuse of the law happened in their presence.
11. The petitioner avers that the 2nd and 3rd Respondents also failed to offer proper guidance on the requirements under *the Constitution* and the relevant statutes in offering guidance on whether the nominations met the required procedural and substantive provisions. The Petitioner avers that in particular, the 2nd and 3rd Respondents failed to advise the 1st Respondent to submit a compliant list of nominees
12. The Petitioner posits that the actions of the Respondents were also in complete disregard of the expected standards under *the Constitution* and the enabling legislation and amount to abuse of public office and acting in excess of lawful authority and are thus ultra vires ab initio.
13. It is the Petitioners position that the court's intervention is necessary to protect devolution and safeguard public interest in the face of such blatant, arbitrary and unlawful exercise of power by the 1st Respondent in public appointments in complete disregard of the constitutional statutory provisions.
14. The petitioner states that he is legitimately apprehensive that the Respondents, and the entire county governance system in the country will continue acting in excess of lawful authority in similar appointments which have the potential of inflicting irreversible damage to devolution for which the public must be protected.
15. The Petitioner avers that the role of the Interested Parties will have widespread effect in the entire Nandi County public service ecosystem as they have sweeping powers in employments, promotions as well as deployments within the entire public service network affecting thousands of people hence the protection of this Honorable Court.
16. The Petitioners prays for the following orders
- a. A declaration that the 1st Respondent has violated the articles 19, 20, 21, 22, 23, 27, 73, 174, 176, 179, 183, 185 and 196 of *the Constitution* of Kenya, 2010.



- b. A declaration that the 1st Respondent Party has violated the articles 19, 20, 21, 22, 23, 27, 73, 174, 176, 178, 183, 185 and 196 of the Constitution of Kenya, 2010.
 - c. A declaration that the 3rd Respondent Party has violated the articles 19, 20, 21, 22, 23, 27, 73, 174, 176, 178, 183, 185 and 196 of the Constitution of Kenya, 2010.
 - d. A declaration that the 1st 2nd & 1st Respondents be held personally liable for the flagrant abuse of office and breach of the law.
 - e. An order of Certiorari be issued to bring into this Court and quash the purported resolution of the county assembly of Nandi dated 15th November 2022 approving the interested parties for appointment as County Public Service Board Selection Panel chairperson and members.
 - f. An order of Certiorari be issued to bring into this Court and quash the purported decision of the 1st Respondent appointing the interested parties as County Public Service Board Selection Panel chairperson and members.
 - g. Any other or further relief that this Court may deem fit to grant.
 - h. The costs of this Petition be provided for.
17. The petition is supported by the Petitioner's affidavit sworn on 19th December, 2023 in which he reiterates the averments in the petition.
18. The petition was filed together with an application under certificate of urgency in which the petitioner sought the following orders.
1. Spent,
 2. That pending the hearing and determination of this Application, the honourable court be pleased to issue an order of injunction against the interested parties whether by themselves agents and servants and whomsoever acting under their authority or instruction from commencing and/or proceeding with the recruitment of the chairman, chief executive officer/ secretary and members of the Nandi County Public Service Board.
 3. Any other relief that this honourable court may deem fit and just to grant in the interest of justice.
 4. That costs be provided for.
19. In the response to the Petition, Tororei & Company Advocates on behalf of the 1st and 3rd Respondents and the 1st to 5th Interested Parties aver that the Petitioner did not demonstrate the violation of his constitutional rights. They aver that:
- a. The 1st and the 3rd Respondents complied with the law in the appointment of the interested parties.
 - b. The appointment of the interested parties was approved after going through a rigorous vetting process by the County Assembly of Nandi, who unfortunately, has not been joined in these proceedings. To the extent that the Petition challenges the decision by the County Assembly of Nandi, in approving the appointment of the interested parties, this Petition is incurably defective and ought to be dismissed.



- c. The 1st and the 3^d Respondents do not exercise oversight function over the county Assembly. It is however noteworthy that the decision of Assembly's plenary binds its committees and is in that respect final.
 - d. That so soon after the appointment process was completed, the interested parties have executed their task as required by statute.
 - e. That any delay in the execution of this important task by the interested parties, militates against public interest, and prejudices the people of Nandi County who are entitled to efficient service delivery.
20. They further aver that the Interested Parties were properly appointed and qualified to hold their positions, that their appointment was approved after a rigorous vetting process by the County Assembly which had powers to vary or amend the report presented at plenary before adoption and the fact that the assembly departed from the recommendation of its committee at the Plenary does not of itself render the resolution of the assembly illegal or irregular.
21. It is further their averment that the Speaker of the County Assembly has no mandate to consider, vet or approve appointments under Section 58A of the [County Governments Act](#).
22. The pray that the Petition be dismissed.
23. Directions were given for disposal of the Petition by way of written submissions. Only the Petitioner filed submissions.

Analysis and determination

24. Having considered the pleadings and submissions on record the issues arising for determination are the following:
- i. Whether this court has jurisdiction to hear the Petition;
 - ii. whether the appointments of the Interested Parties was irregular.
 - iii. Whether the Petitioner is entitled to the prayers sought.

Jurisdiction

25. The Jurisdiction of this court is set out under Article 162 (2)(a) of [the Constitution](#) and Section 12 of the [Employment and Labour Relations Court Act](#).
26. In his submissions the case on jurisdiction the petitioner referred to several decisions.
27. In his submissions on jurisdiction the Petitioner referred to several decisions. He submitted that in the case of [Trusted Society of Human Rights Alliance –v- Nakuru Water and Sanitation Services Company & Another](#) [2013] eKLR Ongaya J. opined as follows:

“The court has considered the provision and finds that under the section, parties to the proceedings before the court are not limited to those in an employee-employer relationship. In particular, under section 12(2,) of the Act. any person can bring before the court a case against an employer. employee. a trade union: an employer's organization. a federation. the Registrar of Trade Unions. the Cabinet Secretary or any office established under any written law...As relates to jurisdiction by subject matter, Article 162(2)(a) of [the Constitution](#) and section 12(1) of are elaborate that jurisdiction attaches to this court with respect to disputes



relating to employment and labour relations. In the instant case, the dispute is about a recruitment process undertaken by the respondent. The court finds that recruitment is a proper element of employment and therefore the court has jurisdiction in view of that subject matter...” [emphasis added]

28. The Petitioner also relied on the decision in Republic –v- Clerk County Assembly of Baringo Exparte William Kassait Kamket [2015] eKLR where the Court held:

“it matters not that they are employees or servants of the people or the respective commissions or county Assemblies.”

29. He further relied on the decision in Naqvi Syed Omar –v- Paramount Bank Limited & Another [2015] eKLR, where Rika J. held that

“The jurisdiction of this court extends to all disputes relating to employment and labour relations. Personal jurisdiction is no longer confirmed to Employers and Employees as was the case under the Trade Disputes Act Cap 234, but to all persons implicated in an employment and labour relations dispute.

30. The Petitioner further referred this court to the decision of the Court of Appeal in Law Society of Kenya Nairobi Branch -v- Malindi Law Society & 6 Others [2017] in which the court stated.

“it seems to us that from that interpretation that the issue as to who has locus standi before a court of law has now been crystallised. It is any aggrieved party.”

31. Although the petitioner has elaborately submitted on this court’s jurisdiction, none of the Respondents or Interested Parties raised any objection to the same.

32. It is my finding that in view of the fact that the role of the selection panel is the recruitment of members of the County Public Service Board who are employees, disputes over the appointment of the selection panel are within the jurisdiction of this court. The Petition herein is therefore properly within the jurisdiction of this court.

Whether the Appointment of the Selection Panel Irregular

33. On whether the appointment of the selection panel was irregular, section 58A of the County Governments Act sets out the qualifications of the Chairperson and members of the selection panel for the recruitment of the County Government Public Service Board. The wording of the section is couched in mandatory terms meaning that any deviation from the provisions thereof would be unlawful and any selection panel appointed in violation of the provisions of section 58A would be illegally constituted.

34. In the report of the Committee of the Assembly on Administration and Public Service dated 14th November, 2022, the committee states that pursuant to the provisions of Standing Order 194 as read together with item (ix) of the Second Schedule of Nandi County Assembly Standing Orders, the Committee states that it carried out the vetting of the nominees to the selection panel.

35. The Report of the Committee on each of the nominees was as follows:-

- i. Hon. John Kiplagat Cheruiyot nominated for the position of the Chairperson.

The nominee qualifies for appointment for the position of Chairperson in accordance with Section 58A(2)(c) of the County Governments (Amendment) Act 2020, cognisant that he



is an advocate of the High Court of Kenya thus satisfying the requirement of the law for appointment.

- ii. Ms. Irene Cheptanui Mutai, nominee for the position of member:

The committee observed that the nominee was neither a member of the private sector nor the Institute of Public Accountants of Kenya (ICPAK) as contemplated under section 58A(2)(b) and (d) of the *County Government (Amendment) Act 2020*.

- iii. Mr. Willy Kipkoech Cheruiyot nominee for the position of member:

The Committee observed that the nominee qualified for appointment for the position of member in accordance with section 58(2)(c) of the *County Governments Amendment Act 2020*, cognizant that he is an advocate of the High Court of Kenya thus satisfying the requirement of the law for appointment.

The committee further observed that the nominee is seeing magistrate at the judiciary of Kenya

- iv. Mr. Josphat Kiprop Serem, Nominee for the position of a member, selection panel.

The Committee observed that the nominee qualified for appointment in accordance with Section 58A(2)(e) of the *County Governments (Amendment) Act 2020* and by virtue that he holds membership with Kenya National Union of Teachers and is substantive Secretary–Kenya National Union of Teachers, Nandi North Branch.

- v. Mr. Nicholas Kimutai Kemei, Nominee for the position of a member, selection panel.

The committee observed that the nominee is neither a member of the private sector nor the Institute of Public Accountants of Kenya (ICPAK) as contemplated under section 58A(2)(b) of the *County Governments (Amendment) Act 2020*.

36. The committee further observed that the Act provides that the Governor in nominating members to the Selection Panel shall ensure that not more than two-thirds of the nominees are the same gender. That the names in the list as received by the committee was in contravention of the *County Government (Amendment) Act 2020* section 58A(2)(b) and (d) and section 58A(3).

37. The conclusion in the Report of the Committee was as follows:-

1. The Committee having considered the Public Appointments (*County Assemblies) Approval Act 2017* as regards the suitability of the nominees, the committee applied the conditions set under section 58A(2) of the County Government(Amendment) Act 2020, therefore the Committee recommends the approval of the following nominees for appointment in accordance with Section 9(2) of *Public Appointments (County Assemblies) Approval Act 2017*
 - i. Hon John Cheruiyot, nominated for the position of the Chairperson
 - ii. Mr. Willy Cheruiyot, nominated for the position of a member
 - iii. Mr. Josphat Kiprop Serem, nominated for the position of a member
2. In respect to Ms Irene Cheptanui Mutai, nominee for the position of a member of selection Panel, the committee observed that she is neither a member of the private sector nor the Institute of Public Accountants of Kenya (ICPAK) as contemplated under Section 58A(2)(b) and (d) of the *County Government (Amendment) Act 2020* and basing on this provision of the law the committee declines her approval in accordance with section 9(2) of



Public Appointments (County Assemblies) Approval Act 2017. Regarding Mr. Nicholas Kemei, nominated for the position of a member of the selection Panel, the committee observed that he is not a member of the private sector or the Institute of Public Accountants of Kenya (ICPAK) as contemplated under Section 58A(2)(b) and (d) of the *County Government (Amendment) Act* 2020 and basing on this requirement of the law, the committee declines his approval in accordance with section 9(2) of *Public Appointments (County Assemblies) Approval Act*2017.

3. That in accordance with Section 58A(3) of the County Government (Amendment) Act 2020 which provides that the appointing authority shall in nominating members to the selection panel ensure that no more than two thirds of the nominee are of the same gender, the Committee resolves recommends to the appointing authority to comply with section 58A(3) of the *County Government (Amendment) Act* 2020. As such the panel stands not fully constituted.
38. In spite of the observations by the Committee that two nominees did not meet the requirements under Section 58(2)A of the *County Government Act* and the entire Committee did not meet the requirement of Section 58A(3) on the gender balance requirements under section 58A(3), the Assembly amended the committee's report and approved all the nominees for appointments to the Selection Panel. The Governor thereafter appointed all the nominees to the Selection Panel.
39. Article 2(1) of *the Constitution* of Kenya 2010 provides that *the Constitution* is the supreme law of the Republic and binds all persons and all state organs at both levels of Government. Sub Article (2) thereof provides that no person may claim or exercise state authority except as authorised under *the Constitution*.
40. Article 3 obligates every person to respect, uphold and defend *the Constitution*.
41. Article 27(8) provides that the state shall take legislative and other measures to implement the principle that not more than two thirds of the members of elective and appointive bodies shall be of the same gender.
42. Section 58A(3) of the *County Governments Act* is one of the legislative measures taken by Parliament to ensure that not more than two-thirds of the members of the selection panel are of the same gender to comply with Article 27(8) of *the Constitution*.
43. The 3rd Interested Party, being a serving Magistrate, was not qualified for nomination under section 58A(2)(c) as he is not an active member of the LSK and is a state officer serving as a magistrate.
44. Article 10 of *the Constitution* provides for national values and principles of governance that are binding on all state organs, state officers, public officers and all persons whenever they are enacting, applying or interpreting *the Constitution*.
45. By approving for appointment a selection Panel that was clearly not constituted as provided in Section 58A of the *County Governments Act*, both the Assembly and the Governor of Nandi County violated the provisions of the said section 58A of the *Act* and articles 10 and 27 of *the Constitution*.
46. Article 73(2) of *the Constitution* further sets out guiding principles of leadership and integrity to include:
 - a. Selection on the basis of personal integrity, competence and suitability, or selection in free and fair election
 - b. Objectivity and impartiality in decision making, and in ensuring that decisions are not influenced by nepotism, favouritism, other improper motives or corrupt practices



- c. Selfless service based solely on the public interest, demonstrated by:-
 - i. Honesty in the execution of public duties, and
 - ii. The declaration of any personal interest that may conflict with public duties.
 - d. Accountability to the public and decisions and actions, and
 - (e) Discipline and commitment in service to the people
47. Article 75 provides for the manner in which state officers should conduct themselves both in public and private life. By deliberately ignoring the provisions of section 58A of the County Governments Act and the Report of the Committee of the Assembly on Administration and Public Service, and in approving the nominees for appointment of the County Public Service Board to the Selection Panel as nominated by the Governor, members the Assembly and the Governor acted contrary to Articles 73 and 75 of the Constitution.
48. Further, the role of the Speaker of a county assembly include among others, presiding over the debates of the County Assembly and enforcement of the observance of the Constitution, the standing orders, the relevant statues and Assembly traditions, procedures and practices. The Speaker is the final authority on all matters touching on the interpretation and application of the practice and procedures of the Assembly. By failing to interpret both Section 58A of the County Governments Act and the requirements of the Constitution in the approval of the selection Panel, the 2nd Respondent violated the provisions of Articles 2, 3, 10, 27, 73 and 75 of the Constitution.
49. The County Attorney likewise was under obligation to observe the provisions of Articles 2, 3, 10, 27, 73 and 75 of the Constitution and to advise the Governor on the correct interpretation and application of the provisions of Section 58A of the County Governments Act. He therefore violated the Constitution by his failure to properly advise the Governor.

Remedies

50. Having found as above, I declare that the 1st, 2nd and 3rd Respondents violated Article 2, 3, 27, 73 and 75 of the Constitution.
51. An order of certiorari do and is hereby issued bringing into this Court and quashing the resolution of the County Assembly of Nandi dated 15th November 2022 approving the appointment of the Interested Parties for appointment as chairperson and members of the selection Panel for appointment of the Nandi County Public Service Board.
52. An order of Certiorari be and is hereby issued bringing into this Court and quashing the appointment of the Interested Parties as chairperson and members of the Selection Panel for the members of the Nandi County Public Service Board.
53. The Respondents shall bear the costs of the Petitioner.
54. The prayer for payment of damages to the petitioner having not been made in the petition, is declined.
55. The prayer to hold the Respondents personally liable for the flagrant abuse of office and breach of the law is also declined as it was not quantified by the Petitioner.
56. For the avoidance of doubt, any appointments made or action taken by the Selection Panel, having been in violation of section 58A of the County Governments Act and the Constitution, are void ab initio as the Selection Panel as constituted did not have authority or powers to tract any business.



DATED, DELIVERED AND SIGNED AT ELDORET THIS 31ST DAY OF JULY, 2023.

M. ONYANGO

JUDGE

