



REPUBLIC OF KENYA



**KENYA LAW**  
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**Onsomu & another v Nyaribo & 3 others; Ongaga & 9 others (Interested Parties)  
(Petition E040 of 2022) [2023] KEELRC 2599 (KLR) (26 October 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2599 (KLR)

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU**  
**PETITION E040 OF 2022**  
**CN BAARI, J**  
**OCTOBER 26, 2023**

**BETWEEN**

**GILBERT ATEI ONSOMU ..... 1<sup>ST</sup> PETITIONER**

**PETERSON AREBA ONDIEKI ..... 2<sup>ND</sup> PETITIONER**

**AND**

**HON. AMOS NYARIBO, GOVERNOR, NYAMIRA COUNTY**

**GOVERNMENT ..... 1<sup>ST</sup> RESPONDENT**

**THE COUNTY GOVERNMENT OF NYAMIRA ..... 2<sup>ND</sup> RESPONDENT**

**THE COUNTY ASSEMBLY OF NYAMIRA ..... 3<sup>RD</sup> RESPONDENT**

**NYAMIRA COUNTY GOVERNMENT ..... 4<sup>TH</sup> RESPONDENT**

**AND**

**EMILY ONGAGA ..... INTERESTED PARTY**

**JONES OMWENGA ..... INTERESTED PARTY**

**DR. GRACE NYAMONGO ..... INTERESTED PARTY**

**JOHN MATIANGI ..... INTERESTED PARTY**

**DR. GEOFFREY M. NYAKOE ..... INTERESTED PARTY**

**ALICE MANOTI ..... INTERESTED PARTY**

**DR. TIMOTHY OMBATI ..... INTERESTED PARTY**

**BENARD MAINA ..... INTERESTED PARTY**

**STEPHEN K. OBOSO ..... INTERESTED PARTY**

**KENNEDY ANGWENYI ..... INTERESTED PARTY**



## JUDGMENT

### Introduction

1. The Petitioners filed a Petition dated 27<sup>th</sup> October, 2022, wherein, they sought grant of the following orders;
  - a. A declaration that the purported/skewed nomination/appointment of the interested parties herein as County Executive Committee Members of Nyamira County Government done by the Respondents without adhering to Constitutional, statutory and all enabling provisions of the law inter alia Section 35 of the County Government Act No. 17 of 2012 and Article 10,73,75 and 232 of the Constitution is unconstitutional, *ultra vires* and therefore invalid, null and void ab initio.
  - b. A declaration that the approval and appointment of the Interested Parties herein, was unconstitutional and hence unlawful, null and void *ab initio*.
  - c. An order directing the Respondent to conduct fresh nomination, vetting, approval, and appointment in strict conformity with the Constitution and the governing statutes.
  - d. The Honourable Court be pleased to issue an order directing the Respondents to avail to the Petitioners and/or to Court and/or all other parties all the information, and any other relevant materials/documents leading to the nomination of the interested parties herein, and all other Applicants for County Executive Committee Members of Nyamira County Government.
  - e. That any other order/modification of the petitioners' prayers in which this Honourable Court may deem fit to grant for purposes of attaining justice for Nyamira County residents and all Kenyans at large.
2. The 2<sup>nd</sup> Respondent entered an appearance through the Firm of Omwenga & Company Advocates on 10<sup>th</sup> November, 2022, while the 3<sup>rd</sup> Respondent appointed Mahinda Makori & Co. Advocates who entered appearance on their behalf on 11<sup>th</sup> November, 2022.
3. A notice of motion application filed in the matter dated 25<sup>th</sup> October, 2022, was withdrawn by the Applicant on 14<sup>th</sup> November, 2022, paving way for the hearing of the main petition.
4. Parties sought to canvass the petition by way of written submissions. Submissions were filed for both parties.

### The Petition

5. The Petitioners' case is that the Interested Parties were appointed by the 1<sup>st</sup> Respondent to the office of County Executive Committee Member of the 2<sup>nd</sup> Respondent, without following the statutory requirements in relation to ethnic representation, leading to marginalization.
6. It is their position that the 1<sup>st</sup> Respondent advertised the positions in the year 2022, pursuant to Section 35 and 36 of the County Government Act.
7. It is the Petitioners' assertion that a total of 111 persons were shortlisted for the positions, and the list with the names of the interested parties herein, was forwarded to the 3<sup>rd</sup> Respondent for vetting.



8. It is the Petitioners' position that the 3<sup>rd</sup> Respondent vetted an illegal list, which is unconstitutional and does not reflect the principle of good governance. It is their further assertion that there was no public participation as the notice given was inadequate and contravenes Section 7 (5) of the *Public Appointments (County Assemblies Approval) Act*, that demands that the committee gives seven days prior to the hearing.
9. The Petitioners further states that the appointments discriminate against other communities and regions contrary to Articles 10, 27, 73, and 232 of the *Constitution*.
10. It is their case that the appointees ought to have been recruited through a fair, open and competitive process and in consideration of ethnic balance.
11. The Respondents and the Interested Parties filed a response to the petition, wherein, they argue that the petition is devoid of merit on the basis that the Petitioners have not annexed any documents to it and/or filed a supporting affidavit with the documents to be relied on, and as such the averments made in the petition are mere speculations.
12. It is the Respondents' position that the Petitioners have no locus standi to institute this petition as the same is not filed in the public interest.
13. It is their further assertion that the principles of governance were applied in appointing and vetting the Interested Parties herein, and therefore the list of the nominated County Executive Members is legal.
14. They further state that the County Government of Nyamira advertised for the positions of the Executive Committee Members pursuant to Sections 35 and 36 of the *County Government Act*.
15. It is the Respondents' case that members of the public applied for the positions advertised, and the qualified members were nominated and shortlisted for vetting interviews before the relevant County Assembly Committees.
16. The Respondents states that after vetting, the Interested Parties were nominated and a nomination notice published in the Standard newspaper on 15/10/2022, as required under Section 91 of the *County Government Act*, 2012, informing the Interested Parties and the public on the approval hearings.
17. It is their case that the advertisement was made 7 days before the approval interviews were conducted as required under Section 7(5) of the *Public Appointments (County Assembly) Act*, and that the public was given an opportunity to tender their comments and/or views as to the sustainability of the nominated candidates, before the approval hearings were conducted.
18. They further state that the approval hearings were conducted as scheduled, in an open manner with the main focus being the candidate's academic credentials, professional training and experience, personal integrity and background as per Section 7(8) of the *Public Appointments (County Assembly Approval) Act*.
19. The Respondents states that this Honourable Court does not have jurisdiction to hear and determine this Petition as the petition does not fit into the list outlined in Section 12 of the *Employment and Labour Relations Court Act*.
20. It is their case that the petition dated 27/10/2022, and the supporting affidavit thereof does not meet the threshold of a Constitutional petition and is bad in law and defective.



### **The Petitioners' submissions**

21. The Petitioners submitted that they are residents of Nyamira County and Kenyan citizens. It is their further submission that Articles 22 and 258 of the Constitution gives any person on his own accord or on behalf of another, authority to file such a petition claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed or is threatened. They had reliance in the case of Michael Osundwa Sakwa v Chief Justice and President of the Supreme Court of Kenya and Another (2016) eKLR which referred to the case of Ms. Priscilla Nyokabi Kanyua v Attorney General and Interim Independent Electoral Commission Nairobi HCCP No. 1 of 2010 where the Court stated that:

...In Kenya the Court has emphatically stated that what gives locus standi is a minimal personal interest and such interest gives a person standing, even though it is quite clear that he would not be more affected than any other member of the population.'
22. The Petitioners submit that the petition meets the threshold for a constitutional petition. They sought to rely in the case Anarita Karimi Njeru v Republic (1979) eKLR to support this position.
23. The Petitioners relied in the case of Kitale Shuttle Ltd and 5 Others v County Government of T/Nzoia (2005) eKLR to support the assertion that the petition is not overtaken by events.
24. The Petitioners submit that the 10 interested parties did not take into consideration the ethnic representation of all the people within Nyamira County.

### **The 1<sup>st</sup>, 2<sup>nd</sup> & 4<sup>th</sup> Respondents and Interested Parties' Submissions**

25. The 1<sup>st</sup>, 2<sup>nd</sup> & 4<sup>th</sup> Respondents and the Interested Parties submit that the petition does not meet the *locus classicus* case of Anarita Karimi Njeru V Republic (1976-1980) KLR1272 which requires a Constitutional petition to be pleaded with reasonable precision.
26. They submit that the appointment of the Nyamira County Executive Committee members by the Respondents, was done in adherence to the provisions of the Constitution, the County Government Act and the Public Appointment (County Assemblies Approval) Act No. 5 of 2015.
27. They further submit that the burden of proving violation or threat of violation of Constitutional rights, is upon the Petitioners, as was established in the case of Anarita Karimi Njeru and the Court of appeal decision in Mumo Matemu v trusted Society of Human Rights Alliance and 5 Others.
28. It is their submission that the Petitioners have not placed before Court any tangible evidence in support of the allegations raised in the Petition, but have in fact filed the Petition without a supporting affidavit or annexures.

### **The 3<sup>rd</sup> Respondent's Submissions**

29. The 3<sup>rd</sup> Respondent submits that the Petitioners lack *locus* to bring the Petition to Court. It sought to rely in the case of Mumo Matemu v Trusted Society of Human Rights Alliance & 5 other [2013] eKLR to buttress this position.
30. The 3<sup>rd</sup> Respondent further submitted that a petition filed without a supporting affidavit is fatally defective because the requirement for a supporting affidavit is mandatory as it contains whatever evidence a party wishes to rely on in the course of the petition. They relied on the case of Patrick Ochiengo Obachi & 6 Others v Kenya Anti - Corruption Commission (2010) eKLR to support this assertion.



31. The 3<sup>rd</sup> Respondent submit that the Petition has been overtaken by events and it is therefore unnecessary to proceed with the hearing of the Petition
32. The 3<sup>rd</sup> Respondent submits that the petition should be dismissed with costs.

### **Analysis and Determination**

33. Upon careful consideration of the petition, the responses and the Parties' submissions, I distil the following issues for determination:
  - i. Whether the petition is overtaken by events.
  - ii. Whether the petition meets the threshold for Constitutional petitions.
  - iii. Whether the Petitioners deserve the reliefs sought.

### **Whether the petition is overtaken by events**

34. The Respondents' and the Interested Parties' assertion is that for reason that the Interested Parties have been appointed and have assumed office, the petition herein, is overtaken by events.
35. In the case of *Kitale Shuttle Ltd and 5 Others v County Government of T/Nzoia* (2005) eKLR also cited by the Petitioners, the Court held thus: "To begin with, the contention that the petition has been overtaken by events is far-fetched for reasons that a matter touching on fundamental rights, in the opinion of this Court, cannot and will never be overtaken by events as that would curtail the Constitutional right to access to justice provided under Article 48 of the *Constitution* and also encourage public organs to flout the Constitutional provisions with impunity knowing too well that by the time the matter reaches Court the action complained of would have come to pass and be given legal justification by the phrase "overtaken by events."
36. The foregone holding aptly explains why a violation of Fundamental Rights and Freedoms cannot be overtaken by events. That the Interested Parties have been appointed and actually assumed office, is not reason to allow violation of rights if indeed, it is shown that the appointment of the Interested Party and their assumption of office contravenes the *Constitution*.
37. I therefore, decline to terminate these proceedings on the basis only, that the Interested Parties have assumed office.

### **Whether the petition meets the threshold for Constitutional Petitions**

38. It is now settled that allegations of Constitutional violations must be pleaded with reasonable precision. In the case of *Anarita Karimi Njeru v Republic* (1979) eKLR cited in *Sostenah Ogero Taracha v Ethics and Anti-Corruption Commission and Attorney General* (2017) eKLR it was stated:-

"We would, however, again stress 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 only 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 matter in which they are alleged to be infringed."



39. Further, in the case of Sostenab Ogero Taracha (supra) the Court held that: -

‘It is not however, enough to allege that one’s fundamental freedoms or rights have been violated. The violation must be proved.....’

40. Again in Sella Rose Anyango v Attorney General and 2 Others (2021) eKLR the Court held: -

‘The case of Anarita Karimi Njeru (supra) has been relied upon from time and time again to demonstrate the threshold of a successful Constitutional Petition. It should be appreciated the requirements for a successful Constitutional Petition are simple and are thus; the Petitioner should set out the Constitutional provisions, which he believes have been violated or threatened, and the manner in which the Respondent(s) have violated those provisions. It is not enough for the Petitioner to just list the Constitutional provisions without demonstrating how they were infringed upon.’

41. The Petitioners have alleged violation of the law on ethnic balance, and which they assert has resulted in marginalization. They have however, not proceeded to show what ethnic groups the persons appointed represent and which ethnic group within Nyamira County is unrepresented.

42. Further, the Petitioners have provided a list of names of the County Executive Committee Members, the Interested Parties, subject of this proceedings, together with the administrative wards where they come from. None of the appointees, at least from the Petitioners’ list come from the same ward.

43. It is also true, that the County Executive Committee Member positions, having by law been capped at only ten (10), would not be sufficient to accommodate all the ethnic groups residing within a county. In the case of Simba Hasheem Gedow v Ali Ibrahim Roba -County Government of Mandera and 2 Others (2018) eKLR the Court held that: -

‘Given the limited number of members of the executive committee, it is quite difficult to satisfy the expectations of the local community as well as fully quench the demands of cultural diversity. Under Article 179(3) the members of the Executive Committee should not exceed ten if the County Assembly has thirty or more members or should not be more than one-third if the maximum number of Executive Committee members is ten even for the large County Assemblies.’

44. In my view, although the Petitioners have listed Constitutional provisions which they believe have been violated or threatened, they have failed to explain with reasonable precision the manner in which the Respondents have violated those provisions. This petition therefore fails the test of a Constitutional petition on this account.

45. The Petitioners’ petition fails, and is dismissed with no orders on costs.

46. Judgment of the Court.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 26<sup>TH</sup> DAY OF OCTOBER, 2023.**

**C. N. BAARI**

**JUDGE**

Appearance:

Mr. Marita h/b for Ms. Gogi for the Petitioners



Mr. Khaemba h/b for Mr. Omwenga for the 1<sup>st</sup>, 2<sup>nd</sup> & 4<sup>th</sup> Respondent and All Interested Parties

Mr. Makori present for the 3<sup>rd</sup> Respondent

MS. Christine Omolo & Arwin - Court Assistant.

