



**Kimeli v Governor, Nandi County & 2 others; Lagat & 7 others  
(Interested Parties) (Employment and Labour Relations Petition  
E026 of 2022) [2023] KEELRC 2578 (KLR) (13 October 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2578 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET  
EMPLOYMENT AND LABOUR RELATIONS PETITION E026 OF 2022  
MA ONYANGO, J  
OCTOBER 13, 2023**

**BETWEEN**

**ONESMUS KIMELI ..... PETITIONER**

**AND**

**THE GOVERNOR, NANDI COUNTY & 2 OTHERS ..... RESPONDENT**

**AND**

**DR BENARD KIPLIMO LAGAT & 7 OTHERS ..... INTERESTED PARTY**

**JUDGMENT**

1. Onesmus Kimeli the Petitioner herein filed the instant petition on 22<sup>nd</sup> November 2022 against the Governor, Nandi County and 2 others. The Petitioner has invoked various articles of [the Constitution](#) and sections of the [County Governments Act](#) in seeking the following reliefs:
  - a. A declaration that the 1<sup>st</sup> Respondent has violated the Articles 1, 2, 3, 6, 10, 19, 20, 21, 22, 23, 27, 73, 174, 176, 179, 183, 185 and 196 of [the Constitution](#),
  - b. A declaration that the 2<sup>nd</sup> Respondent has violated the Articles 19, 20, 21, 22, 23, 27, 73, 174, 176, 178, 183, 185 and 196 of [the Constitution](#),
  - c. A declaration that the 1<sup>st</sup> & 2<sup>nd</sup> Respondents be held personally liable for the flagrant abuse of office and breach of the law,
  - d. An order of Certiorari be issued to bring into this court and quash the purported resolution of the County Assembly of Nandi dated 14<sup>th</sup> November 2022 approving the 6<sup>th</sup> to 8<sup>th</sup> interested parties for appointment as county executive committee members and the communiqué from the 1<sup>st</sup> Respondent dated 12<sup>th</sup> October 2022 purporting to re-appoint and re-assign the 1<sup>st</sup> to



5<sup>th</sup> interested parties as county executive committee members without vetting and approval by the county assembly,

- e. This court be pleased and do hereby grant an order of permanent injunction, restraining the 1<sup>st</sup> and 2<sup>nd</sup> Respondent, his representatives, employees, servants and/or agents or anybody working under or for him from purporting to nominate, approve and appoint county executive members without the strict requirement of a distinguished career as a list that reflects the cultural, gender and ethnic of the county,
  - f. Any other or further relief that this court may deem fit to grant,
  - g. The costs of this Petition be provided for.
2. The basis of the Petition is that on 12<sup>th</sup> October 2022, the 1<sup>st</sup> Respondent communicated to the 2<sup>nd</sup> Respondent that the 1<sup>st</sup> to 5<sup>th</sup> Interested Parties had been retained and redeployed by the 1<sup>st</sup> Respondent upon his re-election for a second term.
  3. The 2<sup>nd</sup> Respondent thereafter forwarded the names to the county assembly committee for appointments for vetting of only three nominees, that is the 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> Interested Parties. The curriculum vitae and other credentials for the 1<sup>st</sup> to 5<sup>th</sup> Interested Parties were not submitted for scrutiny, vetting and approval by the County Assembly of Nandi. The appointment of the 6<sup>th</sup> to 8<sup>th</sup> Interested Parties was approved by the county assembly for appointment on 14<sup>th</sup> November 2022.
  4. The Petitioner avers that the list submitted by the 1<sup>st</sup> Respondent for vetting offends section 35(1) of the [County Governments Act](#) which requires the Governor to ensure that the composition of the executive committee reflects the community and cultural diversity of the county and to consider the principles of affirmative action as provided by [the constitution](#).
  5. It is contended that the 2<sup>nd</sup> Respondent is prohibited under section 35(2) of the County Government Act from considering, vetting and approving appointment to the executive committee of a list of nominees that does not comply with the two thirds gender rule, representation of the minorities, marginalized groups and communities and the community and cultural diversity within the county.
  6. The Petitioner faulted the 1<sup>st</sup> Respondent's communication to the 2<sup>nd</sup> Respondent which referred to "retention" and "reassignment" of the 1<sup>st</sup> to 5<sup>th</sup> Interested Parties which according to the Petitioner are concepts alien in the applicable devolution dispensation under section 42(1) of the [County Governments Act](#) which states that the county executive only remains in office after a general election is held for a county government until a new county executive committee is constituted after the election which means that there can only be an appointment and not a reappointment and the need for fresh vetting.
  7. It is further averred that the 1<sup>st</sup> Respondent failed to comply with the requirement that the nominees be persons with a distinguished career and that the 2<sup>nd</sup> Respondent failed to offer proper guidance on the issue of the aforesaid requirements under [the Constitution](#).
  8. It is the Petitioner's case that the decisions of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents raise an important issue on the role of newly elected members of the county assembly after a general election in vetting the retained or reassigned county executive committee members whom they have not had the privilege of questioning and the impact on effective representation, legislation and oversight roles.
  9. The Petitioner contends that he has observed that such arbitrary and unlawful exercise of power by governors in appointments or redeployment of county executive committee members in their second term of office without adhering strictly to the constitutional and statutory standards is widespread



in the country and thus the public needs protection from adverse effects of these decisions which undermine devolution.

### **The 1<sup>st</sup> Respondent's and Interested Parties' case**

10. The 1<sup>st</sup> Respondent and the Interested Parties filed a Notice of Preliminary Objection and joint response to the Petition on 14<sup>th</sup> December 2022 in opposition to the Petition.
11. It is averred that the Petition has since been overtaken by events, that by the time the court order dated 28<sup>th</sup> November 2022 and the Petition were served upon the office of the County Attorney, the 1<sup>st</sup> to 8<sup>th</sup> Interested Parties had taken the oath of office for County Executive Committee member and assumed office on 24<sup>th</sup> November 2022.
12. The 1<sup>st</sup> Respondent has denied writing any letter to the 2<sup>nd</sup> Respondent and contends that the letter dated 12<sup>th</sup> October 2022 was addressed to the County Assembly which letter was on retention and reassignment of the 1<sup>st</sup> to 5<sup>th</sup> Interested Parties.
13. He avers that he also forwarded the names and credentials of the 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> Interested Parties to the County Assembly who vetted and approved all the Interested Parties.
14. It is further contended that the 1<sup>st</sup> to 5<sup>th</sup> Interested Parties served as county executive committee members of the County Government of Nandi under the leadership of the 1<sup>st</sup> Respondent after submission of all requirements, vetting and approval by the County Assembly. It was their case that the 1<sup>st</sup> to 5<sup>th</sup> Interested Parties were retained on the basis of competence, understanding of their offices, performance, satisfaction of the requirements of Chapter 6 of *the Constitution* and in compliance with the approval report by the previous county assembly and that no proof has been adduced to show that they are now unsuitable to hold offices.
15. It was their averment that the list submitted by the 1<sup>st</sup> Respondent to the county assembly was in compliance with section 35(1) of the County Government Act and the composition therein reflects the community and cultural diversity of Nandi County.
16. According to them, there is no express statutory or legal provision either from *the Constitution* or the County Government Act requiring fresh vetting after reassignment of a County Executive Committee member who was previously serving under the same capacity under the same regime.
17. It was further averred that the county executive committee members cease to hold office only when there is a vacancy in the office of the county governor as per Article 179(7) of *the Constitution* and that, the 1<sup>st</sup> to 5<sup>th</sup> Interested Parties had previously been vetted and approved during their first term in office where they held the executive committee offices for a period of 5 years without removal.
18. It was their position that the law does not require a county executive committee member to have a specific degree in order to be nominated to a particular department and that the functions of County Executive Committee member under article 183 of *the Constitution* as read together with section 36 of the *County Governments Act* are wide and framed in a manner that denotes them managerial and policy oriented.
19. They averred that the orders sought cannot issue as the County Executive Committee members have already taken the oath of office and assumed office.



### **The 2<sup>nd</sup> Respondent's case**

20. Although the 2<sup>nd</sup> Respondent filed a Memorandum of appearance on 6<sup>th</sup> December 2022, there is no response filed by the said 2<sup>nd</sup> Respondent on the court record.

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

21. The 3<sup>rd</sup> Respondent opposed the Petition vide grounds of opposition filed on 15<sup>th</sup> December 2020. In brief, it is contended that this court is being requested to issue orders which would amount to an infringement of the concept of separation of powers; that the Petition herein offends the doctrine of separation of powers as the same is inviting the court to direct Parliament and County Assemblies which are legislative branches of government on their procedures and how they ought to run their affairs; that the prayer for declaration to hold the 1<sup>st</sup> and the 2<sup>nd</sup> Respondents personally liable for alleged flagrant abuse of office and breach of law is prohibited by law pursuant to section 133(1) of the *County Governments Act*; that the prayer for permanent injunction against nominating, approving and appointing county executive committee is overtaken by events as the committee has since been constituted and sworn into office and; that the Petition does not disclose a real dispute capable of resolution by this court. Lastly, the 3<sup>rd</sup> Respondent contends that the jurisdiction to interpret *the Constitution* as conferred by Article 165(3) does not exist in a vacuum and that this court can only invoke its mandate to interpret any provisions of *the Constitution* if there is a real issue in controversy and not in a hypothetical or academic situation.
22. The Court was urged to dismiss the Petition with costs.

### **Submissions**

23. The Petitioner in his written submissions dated 29<sup>th</sup> June 2023 framed three issues which he asked this court to determine namely:
- i. Whether the court has jurisdiction to adjudicate the matter and the locus of the Petitioner,
  - ii. Whether the Respondents complied with the mandatory requirements of the law in the nomination, approval and the subsequent appointment of the Interested Parties to the Nandi County Executive Committee,
  - iii. Whether the Respondents are personally liable for breach of the applicable constitutional and legislative thresholds, and if so the quantum of costs thereof.
24. On the issue of jurisdiction of this court and the locus of the Petitioner, it was submitted that the jurisdiction of this court is provided for in section 12 of the *Employment and Labour Relations Court Act*, Article 162(2)(a) and 165(5) of *the Constitution* which provisions of the law confer to this court unlimited original and appellate jurisdiction in employment and labour relations disputes.
25. The Petitioner submitted that he instituted this Petition as a resident and voter in Nandi County to challenge the breach by the Respondent of the applicable constitutional and statutory standards in the nomination, approval, appointment and reappointment of the Interested Parties to the Nandi County Executive. The Petitioner submits that he has a right to lodge a claim in public interest without the need to demonstrate personal injury. To buttress this position, the Petitioner cited the cases of *Trusted Society of Human Rights Alliance v Mumo Matemu & 5 others* (2014)eKLR, *Geoffrey Agwera Ndubi v John Obiero Nyagarama & 6 others*; *Bladys Bogonko Momanyi & 4 others (Interested Parties)* [2020] eKLR, and *Law Society of Kenya Nairobi Branch Vs Malindi Law Society & 6 others*(2017)eKLR.



26. On the second issue, it was submitted that the requirement of distinguished career of at least five years in the relevant field was not adhered to and that the list of nominees falls afoul of diversity and gender considerations.
27. On the issue of compensation, the Petitioner submits that an award of compensation is available to serve as a deterrence to public officers who are in violation of the law. According to him an award of Kshs 2,000,000 would suffice.
28. The 1<sup>st</sup> Respondent and the Interested Parties filed joint submissions on 8<sup>th</sup> December 2022.
29. In the submissions the issues for determination were framed as:
  - i. Whether this court has jurisdiction to hear and determine this Petition
  - ii. Whether the Petition has met the threshold for constitutional petitions
  - iii. Whether the retention and reassignment of the 1<sup>st</sup> to 5<sup>th</sup> Respondent was contrary any constitutional or statutory provisions
  - iv. Whether the list of nominees reflects the current gender, community and cultural diversity of the county
  - v. Whether the Petitioner deserved the orders sought.
30. On the first issue, it was submitted that this court has no jurisdiction to hear and determine the instant Petition as the nomination of the Interested Parties is a matter solely vested on the 1<sup>st</sup> Respondent and the County Assembly and granting the orders sought would be acting in contravention of the doctrine of separation of powers.
31. It was further submitted that the Petition points a lacuna in law on whether county executive committee members who have been reassigned by the same regime and who had previously been vetted by a previous county assembly should be subjected to a fresh vetting. It is their position that inviting this court to provide guidance is akin to asking this court to give an advisory opinion which is a preserve of the Supreme Court.
32. On the question of whether the Petition meets the threshold for Constitutional Petitions, it was submitted that Rule 10 of *the Constitution* (Protection of Rights and Fundamental freedoms) practice and Procedure Rules, 2013, requires the disclosure of the constitutional provisions violated or threatened with violation, to be cited and the nature of injury caused or likely to be caused to the Petitioner or any other person in whose name the Petition has been instituted. Counsel for the parties placed reliance on the cases of International Centre for policy & conflict & 5 others vs Attorney General & 5 others (2013) eKLR, Anarita Karimi Njeru vs Republic (1976-1980) KLR 1272 and Mumo Matemu Vs Trusted Society of Human Rights Alliance (2014) eKLR.
33. The 1<sup>st</sup> Respondent and the Interested parties further submitted that the Petition not only lacks particularity but contains speculative disputes camouflaged as constitutional disputes that are unspecified.
34. On the issue whether the retention and reassignment of the 1<sup>st</sup> to 5<sup>th</sup> Interested Parties was contrary to any constitutional provisions, it was submitted that the said reassignment was legally done in accordance to section 31(b) of the County Government Act which provision gives the Governor powers to re-assign a county executive committee member. According to the 1<sup>st</sup> Respondent and the Interested Parties, the reassignment did not flout any constitutional or statutory provisions as alleged by the Petitioner.



35. On whether the list of nominees reflects the gender, community and cultural diversity, it was submitted that the list of nominees submitted by the 1<sup>st</sup> Respondent to the County Assembly for approval was in compliance with section 35(1) of the County Government Act and that the composition thereto reflects the gender, cultural and ethnic diversity of Nandi County. It was contended that the Petitioner had not proved the ethnicity of the Interested Parties and that the court should not be invited to presume their ethnicity solely on the basis of their names. In support of this position, the case of Brenda Achieng Ongalo & 2 others vs Speaker, County Assembly of Siaya & 3 others (2018) eKLR was cited.
36. Lastly, it was submitted that the Petitioner does not deserve the orders sought as the Interested Parties herein have already taken oath of office and that this Petition has been overtaken by events.
37. It was further submitted that the list of nominees as forwarded to the County Assembly was proper as the Petitioner has not demonstrated how it does not reflect the cultural and ethnic diversity of Nandi County.
38. Consequently, the court was urged to dismiss the Petition with costs

### **Determination**

39. From the Petition, the responses thereto and the submissions on record, the issues that fall for determination are:
  - i. Whether this court has jurisdiction to determine the instant petition
  - ii. Whether the petition satisfies the particularity and precision threshold required of constitutional petitions:
  - iii. Whether the re-appointment and reassignment of the 1<sup>st</sup> to 5<sup>th</sup> Respondent was done outside the statutory and constitutional requirements.
  - iv. Whether the petitioner is entitled to the reliefs sought.

### **Whether this court has jurisdiction to determine the instant petition**

40. The jurisdiction of courts is conferred by the Constitution, statute or both. Article 162 (2) (a) of the Constitution which provides:

“Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to:

  - a) employment and labour relations;”
41. Section 12 of the Employment and Labour Relations Court Act sets out the jurisdiction of the court as follows:

“ 12. Jurisdiction of the Court

  - (1) The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of the Constitution and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including—



- (a) disputes relating to or arising out of employment between an employer and an employee...”

42. Majanja J. in Petition No. 170 of 2012, United States International University (USIU) v The Attorney General and others while determining a similar issue on the jurisdiction of this court held as follows:

“49. A correspondent court to the High Court has now been established to deal with employment and labour matters. It follows that all employment and labour relations matters pending in the High Court shall now be heard by the Industrial Court which is now a court of the status of the High Court. The High Court therefore lacks jurisdiction to deal with matters of employment and labour matters whether filed in the High Court before or after the establishment of the Industrial Court”

43. The instant dispute questions the validity of the process of employment of the Interested Parties who are employees of the County Government of Nandi by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents herein. The Interested Parties, being employees within the meaning of section 2 of the [Employment Act](#), this court has jurisdiction to determine the instant petition. I therefore find and hold that this court is clothed with jurisdiction to hear and determine this matter.

#### **Whether the petition satisfies the particularity and precision threshold required of constitutional petitions**

44. Article 22 of [the Constitution](#) provides that every person has the right to institute court proceedings, claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed or is threatened. Article 258 of [the Constitution](#) also provides that every person has the right to institute court proceedings claiming that [the Constitution](#) has been contravened, or is threatened with contravention and that such person can do so in his own interest or in the interest of another person who cannot act in their own name, as a member of or in the interest of a group or class of persons, in the public interest or as an association acting in the interest of one or more of its members.

45. Article 22 of [the Constitution](#) is clear that every person has the right to institute court proceedings, claiming that a right of fundamental freedom in the Bill of Rights has been denied, violated or is threatened.

46. In the case of Sollo Nzuki ...Vs... Salaries and Remuneration Commission & 2 others [2019] eKLR the Court while considering the issue of locus to file a petition held that: -

It is therefore clear that over time the issue of standing, particularly in public law litigation has been greatly relaxed and in our case [the Constitution](#) has opened the doors of the Courts very wide to welcome any person who has bona fide grounds that [the Constitution](#) has been or is threatened with contravention to approach the Court for an appropriate relief. In fact, since Article 3(1) of [the Constitution](#) places an obligation on every person to respect, uphold and defend [the Constitution](#), the invitation to approach the Court for redress as long as the person hold bona fide grounds for believing that [the Constitution](#) is under threat ought to be welcome. I must however hasten to add that the liberal interpretation does not mean that the rule on locus standi is no longer relevant in constitutional Petitions. Where it is clear that the Petitioner has completely no business in bringing the matter to Court to permit such proceedings to be litigated would amount to the Court itself abetting abuse of its process.



36. In this case the Petitioner not only contends that there is not only a threat to the violation of *the Constitution* but that *the Constitution* has in fact been violated by the Respondents. In light of such allegations I cannot fault the Petitioner for instituting these proceedings and I hold that he was within his right to commence these proceedings. As to whether his case is merited is another matter. Locus standi is a totally different thing from the merits of the Petitioner's case.”
47. The Petitioner has stated that he has brought the instant Petition not only as a resident but also as a voter of Nandi County. I therefore find that this Petition has meet the constitutional threshold and also that the Petitioner has the requisite locus standi to file it.
48. The court of Appeal was even more direct when in the case of *Law Society of Kenya Nairobi Branch v Malindi Law Society & 6 Others* [2017] eKLR it pronounced itself as follows:
- “It seems to us from that interpretation that the issue as to who has locus standi before a court has now been crystallized. It is any aggrieved party.”
49. It is clear from the foregoing that the Petitioner has locus standi to file this petition in defence of *the Constitution* and did not have to prove the nature of injury caused or likely to be caused to himself or any person on whose behalf he instituted the petition as submitted for the 1<sup>st</sup> Respondent and Interested Parties. All he has to demonstrate is that there is violation or threatened violation of *the Constitution*, a matter for the court to determine.

**Whether the reappointment and reassignment of the 1<sup>st</sup> to 5<sup>th</sup> Interested Parties was contrary any constitutional or statutory provisions**

50. The Petitioner's main bone of contention is that in reappointing the 1<sup>st</sup> to 5<sup>th</sup> Interested Parties, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents did not allow the public to vet them so as to be satisfied that the nominees met the academic, moral stipulations and the requirement of a distinguished career.
51. He further contention is that the 1<sup>st</sup> Respondent never advertised for the position of the county executive committee members but instead opted to handpick the Interested Parties, therefore locking out competent and distinguished individuals who would have otherwise wished to apply to be appointed on merit.
52. The 1<sup>st</sup> Respondent in his rejoinder has contended that he was under no obligation to subject the 1<sup>st</sup> to 5<sup>th</sup> Interested parties to a fresh vetting as they had been vetted and served diligently in the previous county assembly.
53. Although the appointment of County Executive committee members is a political process and a prerogative of a sitting governor, Article 10(2) of *the Constitution* obligates the governor as a public officer to make such appointments with strict observation of the values and principles of governance, rule of law, accountability and participation of the people.
54. Article 73 of *the Constitution* provides for responsibilities of leadership among them as follows:
- (1) Authority assigned to a State officer—
    - (a) is a public trust to be exercised in a manner that—
      - (i) is consistent with the purposes and objects of this Constitution; (ii) demonstrates respect for the people;



- (iii) brings honour to the nation and dignity to the office; and
      - (iv) promotes public confidence in the integrity of the office; and
    - (b) vests in the State officer the responsibility to serve the people, rather than the power to rule them.
  - (2) The guiding principles of leadership and integrity include—
    - (a) selection on the basis of personal integrity, competence and suitability, or election in free and fair elections;
    - (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 for decisions and actions; and
    - (e) discipline and commitment in service to the people. In nominating the 1<sup>st</sup> to 5<sup>th</sup> I.P the 1<sup>st</sup> respondent violated the requirements of Article 73.
55. The term of office of county executive committee members is set by the law. Section 42 of the [County Governments Act](#) provides that:
- (1) When a general election is held for a county government, the outgoing county executive committee shall remain in office until a new county executive committee is constituted after the election.
  - (2) [The constitution](#) of a new executive committee after an election under subsection (1) shall be finalized within twenty-one days of the swearing in of the members of the county assembly.
56. The section provides that the outgoing county executive must vacate office upon a new executive committee being appointed to take over from the outgoing committee. The appointment is provided for in section 35 of the Act. There is no provision for reappointment or extension of the term of office of the outgoing county executive committee beyond the period referred to in section 42(1).
57. The appointments must be approved by the county assembly in office at the time of appointment as provided in section 35(2) of the Act. Such appointment must take into account the two thirds gender rule, representation of minorities, marginalized groups and communities, and community and cultural diversity of the county. The Act uses the term MUST denoting that this is a mandatory requirement without which the assembly actions would be a nullity.
58. There is no provision for endorsement of the outgoing executive committee members by the new county assembly. If they are to stay in office they must get a fresh mandate by being nominated, approved and appointed in the manner set out in section 42 of the Act. The Governor, having come into office after a fresh mandate by the people through the vote, must also subject the executive committee members to a fresh approval by the representatives of the people who have come into office under a fresh mandate through elections.
59. I hasten to add that the Governor has the power to nominate an outgoing county executive committee member but such a nominee must be presented for approval by the assembly before appointment.



60. The 1<sup>st</sup> Respondent and Interested Parties argued that the Governor has powers to reassign county executive committee members under section 31 of the Act. This is true but can only be done once the executive committee member has been properly appointed to the office in compliance with section 35 of the Act.

61. The assertion by the 1<sup>st</sup> Respondent and Interested Parties that there is a lacuna in the law on the issue of reappointment and reassignment of executive committee members by a governor who has been re-elected is not supported by the law. A governor's term ends on election date and the Governor stays in office only for purposes of handing over to the new governor or, if the governor seeks a new mandate, until the re-election. To this end, Articles 179(7), 180(1) and 182(6) provides-

Article 179

(7). If a vacancy arises in the office of the county governor, the members of the county executive committee appointed under clause (2)(b) cease to hold office.

Article 180

(1) The county governor shall be directly elected by the voters registered in the county, on the same day as a general election of Members of Parliament, being the second Tuesday in August, in every fifth year.

Article 182

(6). A person who assumes the office of county governor under this Article shall, unless otherwise removed from office under this Constitution, hold office until the newly elected county governor assumes office following the next election held under Article 180(1).

62. The import of the foregoing is that the governor holds office until the next election when his term end together with the term of office of the county executive committee. If the Governor is re-elected then he must constitute a fresh executive committee to take over from the outgoing committee. Such reconstitution must comply with section 35 of the [County Governments Act](#).

63. It is therefore the finding of this court that the failure to subject the 1<sup>st</sup> to 5<sup>th</sup> Interested Parties to a fresh approval by the county assembly flouted constitutional and statutory requirements and thus rendered the whole process of their appointment a nullity.

64. With respect to the issue of noncompliance with the requirement for a distinguished career, no evidence has been tabled before the court on the qualifications of the nominees. The court however frowns upon the assertions by the 1<sup>st</sup> Respondent and Interested Parties that the Petitioner has not proved this fact. If indeed the Interested Parties are qualified as asserted by them, there was no reason why they did not back their assertion by submitting to the court the proof of the same. This is however a moot issue, the court having already found that the appointments contravened both [the Constitution](#) and the [County Governments Act](#).

65. The other issue that has been raised is the allegation that the 1<sup>st</sup> Respondent did not consider gender and cultural diversity in reappointment of the interested parties. Although it is submitted for the 1<sup>st</sup> Respondent and the Interested Parties that this requirement was met, I have carefully scrutinized the responses to the petition, particularly the annexures to the affidavit of Dr. Benard Kiplimo Lagat, the 1<sup>st</sup> Interested Party sworn on 5<sup>th</sup> December, 2022. Both the letter dated 12<sup>th</sup> October 2022 addressed to the Clerk, Nandi County Assembly and the oath of office instruments annexed thereto reflect that out of the eight Interested Parties, only two are of the female gender.



66. Article 27 of *the Constitution* on the two-third gender principle was intended to address gender inequality between in leadership positions. Article 27(8) states that one gender should not occupy more than two-thirds of the members of any elective or appointive positions and the state is obligated to take legislative and other measures to ensure compliance with this principle.
67. Section 35(2) further prohibits the county assembly from approving nominations for appointment to the executive committee that do not take into account that not more than two-thirds of the nominees are of either gender.
68. In the case of *Katiba Institute v Independent Electoral & Boundaries Commission* [2017] eKLR the court observed:
- “The two- third gender principle should not be downgraded to a contest between men and women. It is about human dignity, equality, equity, social justice, human rights and fundamental freedoms, essential values in an open and democratic society. It is a right under Bill of Rights, and the Bill of Rights applies to all laws and binds all state organs and all persons, Political parties included. They are not exempt from observing the Bill of Rights, and Article 27 (8) in particular, as a way meant to secure equal rights for women, and address past gender discrimination.”
69. It is evident from the foregoing that the 1<sup>st</sup> Respondent was bound to promote gender parity by adhering to the two-thirds gender rule, and that noncompliance with the same rendered the nominations both unconstitutional and unlawful. The subsequent approval of the nomination list by the county assembly was thus also tainted by the same unconstitutionality and illegality. I accordingly find and declare the nominations by the 1<sup>st</sup> Respondent, the approval of the nominations by the assembly and the subsequent appointments unconstitutional and unlawful and therefore null and void.

#### **Whether the Petitioner is entitled to the reliefs sought**

70. Having found that the appointment of the Interested Parties was in violation of both *the Constitution* and the *County Governments Act*, I find that the Petition herein has merit and therefore make the following orders:
- i. A declaration be and is hereby made that the 1<sup>st</sup> Respondent has violated Articles 1, 2, 3, 10, 19, 20, 21, 22, 27, 73, 174, 179, 185 and 196 of *the Constitution*,
  - ii. An order of Certiorari be and is issued quashing the appointment of the 1<sup>st</sup> to 8<sup>th</sup> Interested Parties as county executive committee members of Nandi County,
  - iii. An order of mandamus be and is hereby issued compelling the 1<sup>st</sup> Respondent to advertise afresh the positions of county executive committee members,
  - iv. Any prayer not granted is declined.
  - v. The 1<sup>st</sup> Respondent to bear costs of the Petitioner.

**DATED AND DELIVERED VITUALLY AT ELDORET THIS 13<sup>TH</sup> DAY OF OCTOBER 2023.**

**MAUREEN ONYANGO**

**JUDGE**

