



**Mwatibo v County Assembly of Taita Taveta Committee on Appointment
& 2 others; Governor of Taita Taveta County (Interested Party) (Petition
E017 of 2022) [2023] KEELRC 3447 (KLR) (2 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3447 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
PETITION E017 OF 2022**

AK NZEI, J

NOVEMBER 2, 2023

**IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS OR FUNDAMENTAL
FREEDOMS UNDER ARTICLES 3, 10(2)(B), 19(2)(A), 20(2), 21(1)(3), 27(3), 41(1), 47,
54(2), 73(1)(A), 73(2)(A)(B) AND 179(1) (B) OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF THE PUBLIC APPOINTMENTS
(COUNTY ASSEMBLIES APPROVAL) ACT, NO. 5 OF 2017**

AND

IN THE MATTER OF THE COUNTY GOVERNMENTS ACT NO. 17 OF 2012

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT, NO. 4 OF 2015

BETWEEN

JOSEPHINE MARURA MWATIBO PETITIONER

AND

**COUNTY ASSEMBLY OF TAITA TAVETA COMMITTEE ON
APPOINTMENT 1ST RESPONDENT**

**THE SPEAKER OF THE COUNTY ASSEMBLY OF TAITA
TAVETA 2ND RESPONDENT**

COUNTY ASSEMBLY OF TAITA TAVETA 3RD RESPONDENT

AND

GOVERNOR OF TAITA TAVETA COUNTY INTERESTED PARTY



JUDGMENT

1. In the Petition dated 17/11/2022 and filed in this Court on even date, the Petitioner sought the following prayers:-
 - a. a declaration be, and is hereby issued that the proceedings of the 3rd Respondent on 1st November 2022, rejecting the nomination of the Petitioner for appointment to the position of County Executive Committee Member for Trade, Tourism, Co-operative Development and Industrialization breached Articles 3, 10, 27(3), 28, 41(1), 47, 54 of the Constitution and were therefore unconstitutional, null and void to that extent for all intents and purposes.
 - b. a declaration be, and is hereby issued that the proceedings of the 3rd Respondent to reject the Petitioner for appointment to the position of County Executive Committee Member for Trade, Tourism, Co-operative Development and Industrialization breached the constitutional rights of the residents of Taita Taveta under Article 43 of the Constitution of Kenya, and were null and void for all intents and purposes.
 - c. a declaration be, and is hereby issued that the proceedings of the 3rd Respondent to reject the Petitioner for appointment to the position of County Executive Committee Member for Trade, Tourism, Co-operative Development and Industrialization patently violated the provisions of Section 35 of the County Government Act No. 5 of 2017, and were null and void for all intents and purposes.
 - d. a declaration be, and is hereby issued that the proceedings of the 3rd Respondent to reject the Petitioner for appointment to the position of County Executive Committee Member for Trade, Tourism, Co-operative Development and Industrialization patently violated the provisions of Section 7 & 8 of the Public Appointments (County Assembly Approval) Act No. 5 of 2017, and were null and void for all intents and purposes.
 - e. an order of mandamus be and is hereby issued to remove into this Honourable Court and compel the 3rd Respondent to approve the nomination of the Petitioner as County Executive Committee Member for Trade, Tourism, Co-operative Development and Industrialization, there being no justification to reject the Petitioner from being appointed as such.
 - f. an order of prohibition be, and is hereby issued to remove into this Honourable Court barring the Interested Party from presenting to the Speaker of Taita Taveta Assembly a fresh name in the place of the Petitioner for vetting and approval.
 - g. an order annulling and expunging the offending observations of the 1st Respondent at page 8,9,48,49,65 and 66 of the Report titled “First Report of the County Assembly Committee on Appointment on approval hearings of persons nominated to the positions of County Executive Committee Members (October, 2022) for being unconstitutional and thus unlawful.
 - h. the cost of this petition be borne by the Respondents.
2. The Petition, which did not set out the material facts giving rise to the Petitioner’s cause of action, was indicated to be founded on facts set out in the Petitioner’s affidavit sworn in support of both the Petition and an application that was filed contemporaneously with the Petition. The application was dated 17/11/2022 and the following orders were sought thereby:-



- a. that pending the hearing and determination of the application inter-partes, the Court be pleased to issue a conservatory order staying the decision of the 3rd Respondent made on 1/11/2022 rejecting the nomination of the Petitioner/Applicant for appointment as County Executive Committee Member for Trade, Tourism, Co-operative Development and Industrialization.
 - b. that pending the hearing and determination of the application inter-partes, the Court be pleased to issue a prohibitory order barring the Interested Party from submitting a replacement of the Petitioner/Applicant for approval and/or vetting for the position of County Executive Committee Member for Trade, Tourism, Co-operative Development and Industrialization.
 - c. that pending hearing and determination of the Petition, the Court be pleased to issue a conservatory order staying the decision of the 3rd Respondent made on 1/11/2022 rejecting the nomination of the Petitioner/Applicant for appointment as County Executive Committee Member for Trade, Tourism, Co-operative Development and Industrialization.
 - d. that pending hearing and determination of the Petition, the Court do issue a prohibitory order barring the Interested Party from submitting a replacement of the Petitioner/Applicant for approval and/or vetting for the position of County Executive Committee Member for Trade, Tourism, Co-operative Development and Industrialization.
3. The application was expressed to be based on the Petitioner's affidavit sworn on 17/11/2022, on which the Petition herein is also shown to be founded. It is deponed in the said supporting affidavit:-
- a. that on 19/9/2022, the Petitioner/Applicant applied for the position of County Executive Committee Member for Trade, Tourism, Co-operative Development and Industrialization.
 - b. that on 5/11/2022, the Interested Party, His Excellency the Governor of Taita Taveta, nominated the Petitioner/Applicant for the position of County Executive Committee Member for Trade, Tourism, Co-operative Development and Industrialization, and forwarded her name and others to the 3rd Respondent for vetting and approval.
 - c. that on 12/10/2022, the clerk of the 3rd Respondent put a Notice in the Newspaper notifying the public of the nomination, and setting dates for approval hearings for 25th to 26th October 2022; and that according to the schedule therein, the Petitioner/Applicant was slotted to appear before the 1st Respondent on 26/11/2022 at 10.00 am to 11:00am. That the said Notice also invited interested members of the public to submit any information or comments on the suitability or otherwise of the nominees by way of affidavits with supporting evidence to the office of the Clerk.
 - d. that the Petitioner/Applicant dutifully attended her approval hearing on 26/10/2022, which took about 2 hours of intense questioning by members of the 1st Respondent. That the said hearing was televised live on the 3rd Respondent's Facebook page, which is still available and can be accessed via a link which the Petitioner/Applicant stated in the supporting affidavit as <http://shorturl.at/zCLM2>.
 - e. that on 1/11/2022, the 3rd Respondent debated the 1st Respondent's Report (First Report of the County Assembly Committee on Appointments and approval hearing of persons nominated to the positions of County Executive Committee Members – October 2022), and approved it without amendments.



- f. that in the said report, the Petitioner/Applicant was among four (4) nominees recommended for rejection for appointment to the position of CECM, Trade, Tourism, Co-operative Development and Industrialization.
- g. that the purported reasons for the Petitioner/Applicant’s rejection were as follows:

“...the Committee having considered the nominee’s filed questionnaire pursuant to the First Schedule of the Public Appointment (County Assembly Approval) Act No. 5 of 2017, her Curriculum Vitae, and having heard her oral submissions during the approval hearing, made the following observation on her suitability for appointment as County Executive Committee Member for Trade, Tourism, Co-operative Development and Industrialization:

That in accordance with Article 78(1) and (2) of the Constitution, the nominee is eligible for appointment to a state office since she is a Kenyan Citizen born on 29th March 1987 in Nairobi County and does not hold dual citizenship.

1. That the nominee meets the requirements of Chapter Six of the Constitution on leadership and integrity, having obtained clearance from the Ethics and Anti-corruption Commission (EACC), Kenya Revenue Authority (KRA), Directorate of Criminal Investigations (DCI) and the Higher Education Loans Board (HELB).
2. That the nominee has not been charged in a Court of law in the past three years.
3. That the nominee has never been dismissed from office under Article 75 of the Constitution for contravention of the provisions of Articles 75(1) (conflict of interest), Article 76 (Financial Probity), Article 77 (Restriction on activities), and Article 78 (2) (dual citizenship) of the Constitution.
4. That the nominee failed to demonstrate knowledge of topical administrative, and technical issues touching on the department of Trade, Tourism, Co-operative Development and Industrialization.
5. Members of the committee were dissatisfied with the competency with regards to the administrative and management abilities of Ms. Josephine Marura Mwatibo, nominee CECM for Trade, Tourism, Co-operative Development and Industrialization; that despite her Project Management Skills, the Department requires a more competent manager to run as it is a sensitive docket to the County of Taita Taveta. The nominee lacked requisite managerial skills and displayed lack of touch with the ground and the realities facing Mwananchi and showed poor problem solving skills in the way she tackled that segment of the hearing (pages 76-77)

.....
The Committee also observed that the following nominees FAILED to meet the Integrity threshold, failed to demonstrate knowledge of



topical administrative and technical issues touching on the Portfolios to which they had been nominated, or did not have requisite abilities, academic qualifications and professional experience to be approved for appointment as County Executive Committee Members in accordance with Section 35 of the *County Governments Act* (CGA) and Section 6 of the *Public Appointments Act (County Assemblies Approval) Act* No. 5 of 2017

.....

The Committee was dissatisfied with the competency with regard to the administrative and management abilities of Ms. Josephine Marura Mwatibo, nominee CECM for Trade, Tourism, Co-operative Development and Industrialization; that despite her Project Management Skills, the department requires a more competent manager to run as it is a sensitive docket to the County of Taita Taveta. The nominee lacked requisite managerial skills and displayed lack of touch with the ground and the realities facing Mwananchi and showed poor problem solving skills in the way she tackled that segment of the hearing (pages 91 and 92)”

- h. that based on the Petitioner/Applicant’s responses to various questions as captured in the body of the 1st Respondent’s Report at pages 73-74(exhibited by the Petitioner/Applicant as “JMM-1”) and on the 3rd Respondent’s official Facebook page, the 1st Respondent’s observations on the Petitioner/Applicant’s suitability are not based on responses to their questions and the law, and are therefore not valid, are baseless, discriminatory, opaque, unreasonable and/or probably motivated by undisclosed ulterior motives.
- i. that the reasons are not based on the law as the 1st Respondent purported to set new qualifications for the position that are ultra-vires provisions of Section 35(3) of the *County Government Act*.
- j. that the Section 35(3) of the said *Act* provides that for one to qualify for appointment to the position of CECM, one is required to be a Kenyan Citizen, hold a First Degree from a University recognized in Kenya, satisfy the requirements of Chapter Six of the *Constitution*, and have knowledge, experience and a distinguished career of not less than 5 years in the field relevant to the portfolio of the department to which the person is being appointed.
- k. that the Petitioner/Applicant is a PhD Student in Gender and Development Studies, holder of a Master’s Degree in Gender and Development, Bachelor of Arts in International Relations with a Minor in Gender Studies with several professional trainings.
- l. that the Petitioner/Applicant has over 12 years of professional experience, working for different organizations including Coalition on Violence Against Women, Amnesty International, Amref Health Africa, African Population and Health Research Centre and National Gender and Equality Commission.
- m. that the Petitioner/Applicant was more than qualified and demonstrated knowledge and experience in matters relevant to the position she was nominated for, and could only be rejected if she did not satisfy the requirements of Chapter Six of the *Constitution*, which was not the position in the Petitioner’s case.



- n. that by making comments such as “sensitive docket” and “more competent manager” the 1st Respondent committee misapprehended the law on qualifications for appointment to the position of County Executive Committee Member.
4. The application and Petition were opposed by the Respondents vide grounds of opposition dated 21/11/2022 whereby it was stated:-
- a. that this Court lacks jurisdiction to entertain the matter since the matter in issue is vetting and approval of the Petitioner.
- b. that by virtue of Article 117 of the Constitution of Kenya 2010, Sections 16, 17 and 35(2) of the County Government Act, the Court lacks jurisdiction to entertain the Petition.
5. On 21/11/2022, I granted interim orders which were subsequently confirmed by consent of all the parties herein, to obtain pending hearing and determination of the Petition herein.
6. The Respondents further filed a replying affidavit of one Daniel M. Mganga, the 3rd Respondent’s Clerk sworn on 8/12/2022. It was deponed in the said affidavit:-
- a. that it was not contested that the Petitioner/Applicant was accorded fair and equal opportunity during the vetting process to explain her education background, work experience and suitability for the position to which she was nominated.
- b. that the Interested Party forwarded to the 3rd Respondent a list of 10 nominees for different portfolios, out of whom 6 nominees were approved and 4, including the Petitioner/Applicant, were not approved by the County Assembly.
- c. that according to the Report, the Petitioner was found to be unsuitable for the reason that she lacks managerial skills and problem solving skills.
- d. that it is not disputed that the Petitioner has no experience working in Trade, Tourism, Cooperatives and Industrialization Sectors in the economy. That the Petitioner’s academic and work experience is on gender, foreign affairs and social development.
- e. that the Respondents have a duty to recommend for appointment the best person for the job, in compliance with the Constitution and the enabling statutes.
- f. that allegations of discrimination on account of disability are unfounded, as the Petitioner was accorded all the facility and opportunity, and even extra time on this account.
- g. that Article 56 of the Constitution is not a right but a principle on how state organs shall put in place affirmative action programs.
- h. that the Petition offends the doctrine of separation of powers. That the Court cannot, in exercise of Judicial Power, arrogate itself the powers of the County Assembly and/or subjugate the powers exercisable by any other arm of government.
- i. that the Petitioner has not demonstrated how Article 179 of the Constitution and Section 35 of the County Governments Act were not met in the vetting process.
- j. that the Petitioner is not challenging the integrity of the vetting process, but contrary to the law seeks to have this Court substitute the findings of the appointment committee.
- k. that orders sought cannot issue as the discretion to approve nominee vests in the Respondents.



7. On his part, the Interested Party filed a replying affidavit sworn by himself on 28/11/2022 and stated that in the circumstances of the case herein, and respecting the principle of separation of powers, he will abide with the decision that this Court will render.
8. The Petitioner filed a further affidavit, sworn by herself on 15/11/2022, in response to the Respondents' replying affidavit.
9. The Petitioner and the Respondents filed written submissions on the Petition pursuant to the Court's directions in that regard, which I have considered.
10. It is worthy noting that from the Petitioner's pleadings and averments therein, the Petitioner is not challenging the legality, constitutionality or the integrity of the vetting/approval hearing process by the Respondents, but is challenging the decision reached at the tail end of the process. The Petitioner is asking the Court to declare the decision as illegal and unconstitutional, and to issue orders annulling and expunging the 1st Respondent's offending observations in its Report for being unconstitutional and illegal, and compelling the 3rd Respondent to approve the nomination of the Petitioner as the County Executive Committee Member for Trade, Tourism, Co-operative Development and Industrialization.
11. Having considered the pleadings filed herein and submissions filed by the Petitioner and the Respondents, issues that present for determination, in my view, are:-
 - a. whether this Court is seized of jurisdiction to grant the orders sought.
 - b. whether reliefs sought by the Petitioner are deserved.
12. On the first issue, and as already stated in this judgment, the Petitioner is not challenging the legality, constitutionality or integrity of her vetting/approval hearing process by the 1st Respondent, but is challenging the decision made upon conclusion of that process. The decision to reject her nomination. Indeed, the Petitioner gave a link in her pleadings vide which the vetting/approval hearing proceedings which she was not challenging, can be accessed on the 3rd Respondent's official Facebook page.
13. The Petitioner's grievances and prayers as set out in the Petition and in the affidavit sworn in support thereof amount, in my view, to an appeal to this Court against the 1st Respondent's decision to reject the Petitioner's nomination, and the 3rd Respondent's approval of that decision. I say so because according to the Petitioner, the Respondents' decision did not accord with the Petitioner's answers given during the vetting process.
14. The Petitioner pleaded that given her academic qualification and work experience, she is over qualified for the position for which she had been nominated. It ought to be noted, however, that as deponed by the Respondents, it is not disputed that the Petitioner did not demonstrate experience working in the Trade, Tourism, Co-operatives and Industrialization. It is also not disputed that the Petitioner's academic and work experience is on gender, foreign affairs/international relations and social development. Indeed, Section 35(3) (d) of the [County Government Act](#) provides that one of the qualifications that one must have in order to qualify as a member of the County Executive Committee is:-

“... knowledge, experience and a distinguished career of not less than five years in the field relevant to the portfolio of the department to which the person is being appointed.”
15. In my view, the Petitioner has not demonstrated that her academic qualifications and work experience are in any way relevant to the portfolio of the department to which she had been nominated.



16. Further, in the absence of any evidence of either Constitutional or statutory breaches by the Respondents during the vetting/approval hearing process leading to the decision being challenged by the Petitioner, this Court cannot, and has no jurisdiction to annul the 1st Respondent's decision rejecting the Petitioner's nomination and to compel the 3rd Respondent to approve the Petitioner's nomination as County Executive Committee Member for Trade, Tourism, Co-operative Development and Industrialization.

17. In an almost similar situation in the case of *Moses Kiprotich Langat v Kericho County Assembly Committee On Appointments & 2 Others*, the Supreme Court of Kenya stated as follows:-

“31. We have carefully considered the reasons given by the County Assembly of Kericho in rejecting the Appellant's name, namely that is lack of experience in ECDE and Village Polytechnics and being related to a nominee for Finance and Economic Planning Docket, and agree with the appellate Court's decision that the Appellant did not fault the vetting process (which we find meets the constitutional and statutory threshold required) but the outcome. For the above reasons, we see no reason to depart from the Court of Appeal's findings.”

18. In *Mumo Matemu v Trusted Society Of Human Rights Alliance & 5 Others* [2013] eKLR, the Court of Appeal stated as follows:-

“55. This Court reiterates, for the avoidance of doubt, the holding of the High Court in *Kenya Youth Parliament & 2 Others v Attorney General & Another*, Constitutional Petition No. 10 of 2011, that:

“We state here with certain affirmation that in an appropriate case, each case depending on its own peculiar circumstances, facts and evidence, this Court clothed with jurisdiction as earlier stated, would not hesitate to nullify and revoke an appointment that violates the spirit and letter of the constitution, but the Court will hesitate to enter into the arena of merit review of a constitutionally mandated function by another organ of state that has proceeded with due regard to procedure.

The Court's intervention would of necessity be pursuant to a high threshold.”

19. As I preceded to point out in this judgment, the petitioner did not, in her Petition, fault the constitutionality or legality of the vetting process, which she pleaded was aired live on the 3rd Respondent's official Facebook page. She only faulted the decision made by the Respondents upon conclusion of the process. No illegality or unconstitutionality in that decision has been demonstrated. Under the circumstances, this Court will be hesitant to interfere with the Respondents' decision by way of annulling it and substituting it with a decision of the Court as sought by the Petitioner. Doing so would be a transgression against the doctrine of separation of powers.

20. The Supreme Court of Kenya stated as follows in the *Moses Kiprotich Langat case (supra)*:-

“32. This Court has numerous in its previous decisions emphasized on the need to respect and uphold the Principle of Separation of Powers, a doctrine that



is entrenched in our Constitution. *In the matter of the Interim Independent Electoral Commission*, Constitutional Application No. 2 of 2011, [2011] eKLR, (the matter of Interim Independent Electoral Commission); this Court affirmed that separation of powers is an integral principle in *Kenya's Constitution* as follows:-

“53. Separation of powers is an integral principle in *Kenya's Constitution*:

For instance, Chapter 8 is devoted to the Legislature; Chapter 9 to the Executive; and Chapter 10, on the Judiciary, provides (Article 160(1) that:-

“In the exercise of Judicial authority, the Judiciary as constituted by Article 161, shall be subject only to this Constitution and the law and shall not be subject to the control or direction of any person or authority.”

21. Although the Petitioner pleaded violation by the Respondents of Articles 3,10,27(3),28,41(1), 47 and 54 of the *Constitution of Kenya*, she did not articulate or specifically state and/or plead how those constitutional provisions were violated, and which of her rights was infringed by the Respondents vide the decision rejecting her nomination. It is to be noted that, particulars of the six nominees approved by the Respondents and the three other rejected nominees were not stated by the Petitioner in her pleadings. Blanket allegations of violations of constitutional and statutory provisions without particulars and proof cannot be the basis of this Court's intervention. The Court of Appeal stated as follows in *Anarita Karimi Njeru v Attorney General* [1979] KLR 154:

“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 in his case) that he should set out with reasonable degree of precision that of which he complains, the provision said to be infringed and the manner in which they are alleged to be infringed.”

22. On the second issue, and in view of all that is stated in this judgment, and having fully considered submissions filed by Counsel for the Petitioner and Counsel for the Respondents, I find and hold that orders sought by the Petitioner are not deserved, cannot be granted, and are, indeed, incapable of being granted.

23. Consequently, the Petition is hereby dismissed.

24. Each party will bear its own costs of the Petition and the proceedings herein.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 2ND NOVEMBER 2023

AGNES KITIKU NZEI

JUDGE

ORDER

This Judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable Court fees.



AGNES KITIKU NZEI

JUDGE

Appearance:-

..... for Petitioner

..... Respondent

