



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

ELRC JR NO. 10 OF 2021

CLIVE NYAAGA OGWORA.....APPLICANT

VERSUS

THE GOVERNOR NYAMIRA COUNTY.....1ST RESPONDENT

THE COUNTY GOVERNMENT OF NYAMIRA.....2ND RESPONDENT

THE COUNTY ASSEMBLY OF NYAMIRA.....3RD RESPONDENT

JUDGMENT.

1. Pursuant to this court's leave granted on 21st July, 2021, the *ex parte* Applicant seeks an order of Mandamus compelling the 1st Respondent to appoint the Applicant to the position of Nyamira County Executive Committee Member; Environment, Water, Mining and Natural Resources, and for the 2nd Respondent to pay the Applicant Salaries, Emoluments and benefits from the date he was due for appointment.

2. The *ex parte* Applicant further seeks an Order of Prohibition, prohibiting the 3rd Respondent from considering any name forwarded to it by the 1st Respondent either before or after the institution of these proceedings, for the position of Nyamira County Executive Committee Member; Environment, Water, Mining and Natural Resources.

3. Parties canvassed the application by written submissions, and all parties filed their submissions.

The Applicant's Case

4. The facts giving rise to the application are that the applicant was nominated by the 1st Respondent for appointment to the position of Nyamira County Executive Committee Member (CEC); Environment, Water, Mining and Natural Resources in February, 2021, whereupon he went through the requisite vetting process culminating in the approval of his appointment by the 3rd Respondent's Committee on appointment, and his name tabled for final approval by the 3rd Respondent.

5. It is the Applicant's case that the names of his Co-nominees were debated and approved by the Assembly, while his nomination was neither debated nor approved by the 3rd Respondent, even though it had been placed before the 3rd Respondent Assembly, and no communication was made to him for the failure of the 3rd Respondent to perform her statutory duty.

6. The application is premised on the provisions of Section 9 of the Public Appointments (County Assemblies Approval) Act no. 5 of 2015, which requires that the names of persons nominated for appointment ought to be debated and approved or rejected within 21 days. It is the Applicant's assertion that the failure to debate and approve or reject his nomination, is breach of his legitimate expectation.

7. The Applicant's further case is that once the 21 days lapsed and the name of the Applicant has not been debated and approved or rejected, the 1st Respondent is under duty to presume the name of the Applicant as having been approved, and what remains is for him to appoint the Applicant to the position for which he was nominated.

8. The Applicant avers that the failure of the Nyamira County Assembly to debate and either approve or reject his name amounted to a violation of the Applicant's Right to legitimate expectation and Fair administrative action, contrary to Article 47 of the Constitution. The Applicant cited the holding in *County Assembly of Machakos v Alfred Nganga Mutua, Governor, Machakos County & Another; James Timothy Gutetah & 24 Others (Interested Parties) (2019) eKLR* to buttress this position.

9. The Applicant states that the nominees who were debated, approved and appointed, did not meet the threshold set under Section 35 of the

County Government Act and Article 174 of the Constitution, as only the Applicant was within the youth bracket, and which is a requirement under the afore stated provisions of the law.

10. It is the Applicant's position that in proceeding to debate, approve and appoint his Co-nominees and leaving his name out without explanation, amounts to discrimination and which is contrary to Article 27 of the Constitution.

11. The Applicant further states that the provisions of the law relating to the appointment were brought to the attention of the 1st Respondent, but who blatantly refused, ignored and/or declined to appoint the Applicant to the position of Nyamira County Executive Committee Member (CEC); Environment, Water, Mining and Natural Resources.

The Respondents' Case

12. The 1st and 2nd Respondent filed grounds of opposition and a Notice of Preliminary Objection dated 28th September, 2021. The Preliminary Objection was heard and dispensed with vide a ruling rendered on 25th November, 2021, wherein the Preliminary Objection was dismissed, setting the matter to proceed on the merits.

13. The 1st and 2nd Respondent stated vide their grounds of opposition that the application does not raise justiciable issues for reason that the Applicant had only been nominated but not appointed.

14. The 1st and 2nd Respondent further state that the Applicant has not demonstrated a *prima facie* case to warrant the issuance of Judicial Review Orders as the court cannot compel the 1st Respondent to exercise his discretion.

15. The 3rd Respondent filed a replying affidavit in opposition to the application. The 3rd Respondent states that her role in the appointment of CEC members is to vet and establish the suitability or otherwise of the candidates nominated for appointment in strict adherence to the Constitution and the Public Appointments (County Assemblies) Approval Act, 2015.

16. The 3rd Respondent avers that indeed, the 1st Respondent forwarded to her four names for approval, which included that of the Applicant herein. The 3rd Respondent further states that on 8th and 13th January, 2021, and 24th February, 2021, the Clerk of the 3rd Respondent notified the nominees and members of the public in two Newspapers of nationwide circulation, of the time and place for holding of the approval hearings.

17. It is the 3rd Respondent's position that it complied with the Constitution, the law and the vetting procedures. She avers that she will abide by whatever decision the court will make if the decision is within the law and does not prejudice the working of the Respondent.

The Applicant's Submissions.

18. It is submitted for the *ex parte* Applicant that the court finds and holds that the role played by a county Executive Committee member is crucial in the delivery of services to the people of Nyamira County and the same cannot be left to the whims of the Respondents, and order that the Applicant is deemed approved for appointment with effect from April, 2021 when the 21 days sittings lapsed. The Applicant cited the holding in *Re Speaker, County Assembly of Embu (2018) eKLR* and the decision of Justice Odunga in *County Assembly of Machakos v Alfred Nganga Mutua, Governor, Machakos County & Another; James Timothy Gutetah & 24 Others (Interested Parties) (2019) eKLR* to support this position.

19. It is submitted for the *ex parte* Applicant that upon approval by the Assembly or at the lapse of 21 days, the 1st Respondent was under duty to appoint the Applicant to the position of Nyamira County Executive Committee Member; Environment, Water, Mining and Natural Resources within 7 days.

20. It is submitted for the *ex parte* Applicant that the nomination and the subsequent vetting process, aroused a legitimate expectation of appoint of the Applicant to the position of Nyamira County Executive Committee Member; Environment, Water, Mining and Natural Resources, and which expectation was violated by the Respondents' inaction, and which violation, warrants the issuance of the Judicial review orders sought in this matter.

The Respondents' Submissions.

21. It is submitted for the 1st and 2nd Respondents that the 1st Respondent nominated and submitted the name of the Applicant to the 3rd Respondent for vetting and approval. It is further submitted in that in the absence of communication from the 3rd Respondent in regard to approval or otherwise, the 1st Respondent's hands are tied and has no authority to appoint a candidate to the position for which he was nominated to, and should not be blamed for the errors and omissions of other persons or entities.

22. It is submitted for the 1st Respondent that he acted with expediency and in accordance with Article 47 of the Constitution in submitting the *ex parte* Applicant's name to the 3rd Respondent for consideration. It is further submitted that the 1st Respondent cannot overstep the mandate of the 3rd Respondent due to the doctrine of separation of powers. They sought to rely on the Supreme Court of Kenya holding in *Dr. Moses Kiprotich Langat v Kericho County Assembly Committee on Appointments & Others Petition No. 28 of 2019* to support this position.

23. It is submitted for the 1st Respondent that the *ex parte* Applicant did not join the Clerk of the 3rd Respondent to this suit yet it is the role

of the Clerk to notify the appointing authority of the decision of the 3rd Respondent. It is further submitted that the *ex parte* Applicant did not petition the 1st and 3rd Respondent regarding the status of his nomination.

24. It is the 1st and 2nd Respondents' submission that the *ex parte* applicant has not made out a case against them to warrant the grant of judicial review orders.

Analysis and Determination

25. I have considered the application, the verifying affidavit and submissions filed on behalf of the parties herein.

26. The Applicant herein has alleged violation of Articles 22, 23(1)(f), 25(c), 27, 28, 29, 47(1) & (2), 48, 49(1) and 50(2) of the Constitution, Sections 8 and 9 of the Law Reform Act and the Public Appointment (County Assemblies Approval) Act, 2017.

27. The *ex parte* Applicant's case is that he was nominated for appointment to the position of Nyamira County Executive Committee Member (CEC); Environment, Water, Mining and Natural Resources in February, 2021. It is his position that the vetting and approval process commenced and was to end by April, 2021, being 21 days after the commencement of the vetting process. He states that he was recommended for approval by the 3rd Respondent's Assembly but upon such recommendation, his name was not placed before the Assembly for debate and neither did he receive any communication on whether or not he was approved for appointment, resulting in the institution of this suit.

28. Article 47 of the Constitution provides for the right to a fair Administrative Action. The Fair Administrative Action Act, in its Section 2, defines an "administrative action" to include the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates.

29. By dint of the foregoing definition, the acts or decisions and even omissions of a body or authority that affects the rights and interests of a party is covered under the Act.

30. The 3rd Respondent's averments were clear that once the nominees and the public were notified of the approval hearings, nothing happened in relation to the Applicant's approval for appointment or rejection. It simply did not address the court on what transpired after the hearings. The 3rd Respondent only stated that her committee facilitated public participation and openness in the vetting process as well as adherence to provisions of the Public Appointments (County Assemblies) Act. No mention of the result of the vetting process, the recommendations of the committee, or the tabling of the Applicant's name for debating by the Assembly. It is clear that none of these happened and no reasons were given for the inaction of the 3rd Respondent.

31. It is now trite that Article 47 codifies every person's right to fair administrative action, which is defined, as action that is expeditious, efficient, lawful, reasonable and procedurally fair.

32. Although the 1st Respondent deems his authority to appoint the Applicant discretionary, his discretion terminated at the point of nomination. The moment he nominated the Applicant for vetting, it became mandatory that he appoints the Applicant either upon approval or at the expiry of 21 days from the date the name was forwarded to the County Assembly, except **ONLY**, if the Assembly rejected the names during the vetting process either at the Committee level or during debate on the floor of the Assembly.

33. The Constitution recognizes a duty to accord a person procedural fairness when a decision is made that affects his rights, interests or legitimate expectations. The *ex parte* Applicant had legitimate expectation to be appointed to the position of Nyamira County Executive Committee Member (CEC); Environment, Water, Mining and Natural Resources. The Supreme Court in ***Communications Commission of Kenya & 5 Others v Royal Media Services & 5 Others (2016) eKLR*** stated as follows on what constitutes legitimate expectation:

"Legitimate expectation would arise when a body, by representation or by past practice, has aroused an expectation that is within its power to fulfill. Therefore, for an expectation to be legitimate, it must be founded upon a promise or practice by public authority that is expected to fulfill the expectation."

34. The *ex parte* Applicant has in my view demonstrated that the inaction of the 1st and 3rd Respondents violated his constitutional rights. The *ex parte* applicant has cited violation of Articles 22, 23(1)(f), 25(c), 27, 28, 29, 47(1) & (2), 48, 49(1) and 50(2) of the Constitution, which warrants the issuance of Judicial Review orders. In ***President of the Republic of South Africa and Others vs. South African Rugby Football Union and Others*** the court held as follows in respect of fair administrative action:

"...The right to just administrative action is now entrenched as a constitutional control over the exercise of power. Principles previously established by the common law will be important though not necessarily decisive, in determining not only the scope of section 33, but also its content. The principal function of section 33 is to regulate conduct of the public administration, and, in particular, to ensure that where action taken by the administration affects or threatens individuals, the procedures followed comply with the constitutional standards of administrative justice. These standards will, of course, be informed by the common law principles developed over decades..."

35. In view of the foregoing, the conclusion is that the *ex parte* applicant has demonstrated sufficient grounds to warrant this court to grant the Judicial Review orders sought. Accordingly, I find and hold that the *ex parte* Applicant's Application dated 13th September, 2021 succeeds, following which, I grant the following orders:

i. An order of Mandamus be and is hereby issued compelling the 1st Respondent to appoint the Applicant to the position of Nyamira County Executive Committee Member; Environment, Water, Mining and Natural Resources.

ii. An order of Mandamus be and is hereby issued directing the 2nd Respondent to pay salaries, emoluments and benefits to the Applicant effective 13th April, 2021.

iii. An order of Prohibition be and is hereby issued prohibiting the 3rd Respondent from considering any name forwarded to it by the 1st Respondent, for the position of Nyamira County Executive Committee Member; Environment, Water, Mining and Natural Resources.

iv. That the costs of the proceedings be borne by the 3rd Respondents.

36. Judgment accordingly.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 24TH DAY OF MARCH, 2022.

CHRISTINE N. BAARI

JUDGE

Appearance:

Ms. Juma h/b for Mr. Maloba for the Applicant.

Mr. Abdi Hassan Present for the 1st and 2nd Respondents

Mr. Makori present for the 3rd Respondent

Christine Omollo – C/A