



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

PETITION NO. 39 OF 2019

(Originally Siaya High Court Petition No. 37 of 2019)

**IN THE MATTER OF ARTICLES 1, 2, 3, 10, 73, 124, 159, 165,
179, 196, 232 AND 259 OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF SECTIONS 3, 4, 7, 8 AND 9 OF THE
LEADERSHIP & INTEGRITY ACT NO. 19 OF 2012**

AND

**IN THE MATTER OF SECTIONS 30(2) & (3) AND 35 OF THE
COUNTY GOVERNMENTS ACT, 2012 ACT NO. 17 OF 2012**

AND

**IN THE MATTER OF SECTIONS 4, 5 AND 10 OF THE
PUBLIC SERVICE (VALUES AND PRINCIPLES) ACT, 2015**

AND

**IN THE MATTER OF SECTIONS 8, 10 AND 11 OF THE PUBLIC
APPOINTMENTS (COUNTY ASSEMBLY APPROVAL) ACT NO. 5 OF 2017**

BETWEEN

GEORGE OCHIENG.....PETITIONER

v

GOVERNOR, COUNTY GOVERNMENT OF SIAYA.....1st RESPONDENT

COUNTY GOVERNMENT OF SIAYA.....2nd RESPONDENT

SPEAKER, COUNTY ASSEMBLY OF SIAYA.....3rd RESPONDENT

COUNTY ASSEMBLY OF SIAYA.....4th RESPONDENT

AND

DR ELIZABETH A ADHIAMBO.....	1st INTERESTED PARTY
JAOKO OBURU ODINGA.....	2nd INTERESTED PARTY
ENG ADRIAN OUMA.....	3rd INTERESTED PARTY
DISMAS OMONDI WAKLA.....	4th INTERESTED PARTY
GEORGE MISORE.....	5th INTERESTED PARTY
BENHARD O. MBOHA.....	6th INTERESTED PARTY
CHARLES ODUOR OGADA.....	7th INTERESTED PARTY
DOROTHY OWINO.....	8th INTERESTED PARTY

JUDGMENT

1. George Ochieng (the Petitioner) lodged a Petition with the Court on 13 August 2019, alleging that the Interested Parties did not meet the legal criteria for appointment as County Executive Committee members because the County Assembly of Siaya had earlier on rejected their nomination and the same resolution of the County Assembly to reject the nominations had been upheld by the High Court in *Brenda Achieng Ongalo & 2 Ors v Speaker, County Assembly of Siaya & 3 Ors* (2018) eKLR.

2. The Petitioner sought the following remedies:

(i) A declaration that the resubmission of the names of Dr Elizabeth A. Adhiambo, Jaoko Oburu Odinga, Eng. Adrian Ouma, Dismas Omondi Wakla, George Misore and Dorothy Owino or any other name and their subsequent appointment other than in compliance with the Constitution and the Court order and judgment in Kisumu High Court Constitutional Petition No. 24 of 2017 (*Brenda Achieng Ongalo & Ors v Speaker, County Assembly of Siaya & Ors*) delivered on 6 December 2018 by the 1st Respondent to the 3rd, and 4th Respondents for approval is unconstitutional and hence unlawful, null and void.

(ii) An order of certiorari to bring to this Court for purposes of quashing the decision of the Respondents appointing Dr Elizabeth A. Adhiambo, Jaoko Oburu Odinga, Eng. Adrian Ouma, Dismas Omondi Wakla, George Misore and Dorothy Owino as County Executive Committee members of the Siaya County Government, for outrightly violating the Constitution of the Republic of Kenya, the County Governments Act and the Court order and judgment in Kisumu High Court Constitutional Petition No. 24 of 2017, (*Brenda Achieng Ongalo & Ors v Speaker, County Assembly of Siaya & Ors*) delivered on 6 December 2018.

(iii) An order of certiorari to bring to this Court for purposes of quashing the decision of approving the appointment of Dr Elizabeth A. Adhiambo, Jaoko Oburu Odinga, Eng. Adrian Ouma, Dismas Omondi Wakla, George Misore and Dorothy Owino as County Executive Committee members of the Siaya County Government, after their names were resubmitted to the 3rd and 4th Respondents by the 1st Respondent.

(iv) An order of certiorari to bring to this Court for purposes of quashing the report by the Committee of Appointments of the 4th Respondent approving the appointment of Dr Elizabeth A. Adhiambo, Jaoko Oburu Odinga, Eng. Adrian Ouma, Dismas Omondi Wakla, George Misore and Dorothy Owino as the County Executive Committee members of the Siaya County Government after their names were resubmitted to the 3rd and 4th Respondents by the 1st Respondent.

(v) A declaration that the appointment of Dr Elizabeth A. Adhiambo, Jaoko Oburu Odinga, Eng. Adrian Ouma, Dismas Omondi Wakla, George Misore and Dorothy Owino as County Executive Committee members of the 2nd Respondent responsible for the dockets of:

- (a) Agriculture, Food Security, Irrigation, Livestock and Fisheries
- (b) Public Works, Roads and Infrastructure
- (c) Land, Physical Planning, Housing and Urban Development
- (d) Governance and Administration
- (e) Water, Environment and Natural Resources
- (f) Enterprise and Industrial Development
- (g) Tourism, Culture, ICT, Sports and Arts respectively is unconstitutional and unlawful, hence null and void.

(vi) An order of certiorari to bring to this Court for purposes of quashing the appointment of Dr Elizabeth A. Adhiambo, Jaoko Oburu Odinga, Eng. Adrian Ouma, Dismas Omondi Wakla, George Misore and Dorothy Owino as County Executive Committee members of the 2nd Respondent responsible for the dockets of:

- (a) Agriculture, Food Security, Irrigation, Livestock and Fisheries.
- (b) Public Works, Roads and Infrastructure.
- (c) Land, Physical Planning, Housing and Urban Development.
- (d) Governance and Administration.
- (e) Water, Environment and Natural Resources.
- (f) Enterprise and Industrial Development.
- (g) Tourism, Culture, ICT, Sports and Arts respectively is unconstitutional and unlawful, hence null and void.

(vii) An order of prohibition to issue barring and prohibiting Dr Elizabeth A. Adhiambo, Jaoko Oburu Odinga, Eng. Adrian Ouma, Dismas Omondi Wakla, George Misore and Dorothy Owino from assuming office and taking up duties as County Executive Committee members of the 2nd Respondent responsible for the dockets of:

- (a) Agriculture, Food Security, Irrigation, Livestock and Fisheries.
- (b) Public Works, Roads and Infrastructure.
- (c) Land, Physical Planning, Housing and Urban Development.
- (d) Governance and Administration.
- (e) Water, Environment and Natural Resources.
- (f) Enterprise and Industrial Development.
- (g) Tourism, Culture, ICT, Sports and Arts respectively.

(viii) Any order that the Court may deem fit to grant.

(ix) The Petitioner be paid costs.

3. Filed with the Petition was an application under a certificate of urgency seeking conservatory orders.

4. The High Court directed the Petitioner to serve the Motion and Petition.

5. Upon service, the Governor and the County Government filed Grounds of Opposition and a Notice of Preliminary Objection to both the Motion and Petition on 18 September 2019, questioning the jurisdiction of the High Court.

6. When the parties appeared before the High Court for *an inter-partes* hearing of the Motion on 19 September 2019, the Court declined jurisdiction and ordered that the Petition be transferred to this Court.

7. On 16 October 2019, this Court (differently constituted), upon hearing brief oral submissions, directed that the Petition be heard on the merits.

8. Accordingly, the Court directed the filing of responses to the Petition as well as submissions within defined timelines.

9. The Court scheduled a mention for 11 February 2020 to confirm compliance.

10. The parties did not comply.

11. The next time the file was placed before the Court was on 1 February 2021.

12. Since the Petitioner was absent, the Court issued a Notice to Show Cause why the Petition should not be dismissed.

13. On the return date for the Notice to Show Cause, the Petitioner appeared and informed the Court that he had filed his submissions on 5 March 2021.

14. The Court directed the Respondents and Interested Parties to file and serve their submissions, and in this respect, the Governor, County Government and Interested Parties filed joint submissions on 23 March 2021.

15. Apart from the Grounds of Opposition filed on 5 March 2021, the Speaker and County Assembly did not file submissions.

16. The Court has considered the Petition, Grounds of Opposition and the submissions.

Background

17. On or around 18 September 2017, the Governor submitted to the County Assembly the names of some 10 persons he had nominated to serve as County Executive Committee members.

18. The names submitted included those of the 1st to 5th as well as the 8th Interested Party.

19. The 10 nominees were vetted by a Committee of the County Assembly, and it recommended the approval of only one person on or around 3 October 2017.

20. The County Assembly debated the Committee Report the same day, and it approved it, meaning that out of the 10 nominees, only 1 was approved.

21. The Governor did not agree with the resolution of the County Assembly, and he resubmitted the names of the 9 nominees who had been rejected in two batches, on 23 November 2017 and 5 February 2018.

22. In the resubmissions, the Governor assigned the 9 new ministerial dockets.

23. By the time the Governor was resubmitting the names, a concerned citizen had commenced an action at the High Court in Kisumu being Petition No. 24 of 2017, *Brenda Achieng Ongalo & Ors v Speaker, County Assembly of Siaya & Ors* challenging the constitutionality or qualification of the 1st to 5th and 8th Interested Parties to serve as County Executive Committee members.

24. The decision of the Governor to resubmit the names prompted the Petitioner to file a fresh Motion before the High Court on 13 February 2018, challenging the resubmission of the names.

25. The High Court issued interim conservatory orders on 15 February 2018, prohibiting the Governor from resubmitting the names to the County Assembly.

26. However, because the Petitioner did not amend the Petition to include the new facts, the High Court ultimately declined to address the legality of the resubmission of the names of the nominees in the judgment delivered on 5 December 2018.

27. Nevertheless, the High Court stated *obiter* that:

the governor had no power or authority to resubmit the name of a candidate whose nomination has been rejected by the County Assembly unless the circumstances relied on for the rejection of the appointment of the candidate did not exist or ceased to exist at the time of rejecting the nomination of the candidate.

28. On the merits of the Petition, the High Court stated:

In the end, we cannot state with confidence that the original list of 10 nominees was unconstitutional....

29. The High Court partially allowed the Petition on the ground that the County Assembly could lawfully reject nominees for appointment as County Executive Committee members in the exercise of its mandate under section 35 of the County Governments Act and the Siaya County Public Appointments (Approval) Act, 2014.

30. The Petitioner herein then lodged this Petition in Court to challenge the resubmission of the names of the Interested Parties.

31. The Court will now address the emerging issues as set out in the Petitioner's submissions.

Illegal exercise of power/resubmission of rejected names

32. The Petitioner contended that the Governor and the County Assembly violated the provisions of sections 8 and 10 of the Public Appointments (County Assemblies Approval) Act as read with sections 4, 5 and 10 of the Public Service (Values and Principles) Act as well as sections 30 and 35 of the County Governments Act.

33. The Petitioner asserted that the Governor did not have the authority or power to resubmit the names of the 1st to 5th and 8th Interested Parties for consideration as County Executive Committee members.

34. In making the assertion, the Petitioner relied on the judgment of the High Court in *Brenda Achieng Ongalo* case.

35. This Court has keenly perused the High Court decision.

36. As the Court has already outlined in the background, the High Court dealt with the initial nomination of the 1st to 5th and 8th Interested Parties (which culminated in a rejection by the County Assembly 3 October 2017) but declined to determine the question of the resubmission of the names of the Interested Parties because the Petition had not been amended.

37. The High Court, while making reference to the new developments, made *obiter* observations that a Governor could not resubmit the names of rejected nominees unless *the circumstances for rejection had ceased to exist*.

38. In this Court's view, such *obiter* remarks without more cannot form a foundation for making a finding that the Governor did not have the authority to resubmit the names of the Interested Parties.

Res judicata

39. The Speaker and the County Assembly filed Grounds of opposition contending that the Petition was *res judicata*.

40. However, they did not file any submissions to advance or develop their argument that the Petition was *res judicata*.

41. Despite that unexplained failure, it is the view of the Court that *res judicata* could only have arisen had the Petition before the High Court been amended to incorporate as an issue in dispute, the resubmission of names of the Interested Parties by the Governor.

Vetting upon a redeployment

42. As part of the challenge to the appointment of the Interested Parties, the Petitioner took the view that upon a re-deployment or transfer of a County Executive Committee member, a vetting was necessary.

43. In the view of the Petitioner once appointed, a County Executive Committee member subscribes to an oath for a specific office and therefore, when re-assigned, it was necessary for a fresh vetting by the County Assembly to determine suitability for the new docket.

44. According to the Petitioner, there was also a need for public participation in terms of Article 10(2) whenever a County Executive Committee member was re-assigned.

45. The Governor and the County Government took the position that the Governor has a free hand as the Chief Executive Officer to re-evaluate his ministers and reshuffle them whenever a need arose.

46. To support the position, the Governor invoked section 30(2)(b) of the County Governments Act as read with Article 179 of the Constitution as well as a passage from the decision of the Court of Appeal in *County Government of Nyeri & Ar v Cecilia Wangechi Ndungu* (2015) eKLR:

Firstly, By dint of **Article 179(1)** of the **Constitution** and **Section 34** of the **County Governments Act**, the executive authority of a County is vested in the County Executive Committee. The County Executive Committee comprises the Governor, Deputy Governor, members of the County Executive Committee who are appointed by the Governor. The members of the County Executive Committee assist the Governor to carry out his mandate under the law. It is the Governor who assigns to every member of the County Executive Committee responsibility to ensure the discharge of any function in the County. This is the reason why the County Executive Committee members are individually and collectively accountable to the Governor in the exercise of their powers and performance of their duties and responsibilities. (See **Article 179 (6)** of the **Constitution** and **Section 39** of the **County Governments Act**.) A County Executive Committee member is the Governor's right hand in his/her respective office. Hence the Governor has to have confidence in the County Executive Committee member. Where such confidence is lost, the Governor ought to have the capability of removing such a member without undue delay so as to enable the County Executive Committee to function for the benefit of the County.

47. The Court does not find section 30(2)(b) of the County Governments Act applicable in the present case as it addresses the delegation of certain state functions by the President to a Governor within the county.

48. The County Governments Act has not expressly provided for fresh vetting upon a redeployment of a County Executive Committee member.

49. Indeed, the Petitioner did not draw the attention of the Court to any express statutory or legal provision requiring that a County Executive Committee member be vetted afresh upon a redeployment (to a new docket).

50. Even the reference to the oath of office of a County Executive Committee member cannot support the argument by the Petitioner.

51. The oath of office is in the following form:

OATH OF OFFICE FOR COUNTY EXECUTIVE COMMITTEE MEMBER

I, do swear/solemnly affirm that I shall always truly and diligently serve the people and the Republic of Kenya in the office the executive committee member of county; that I shall diligently discharge my duties and perform my

functions in the said office, to the best of my judgment; that I shall at all times, when so required, faithfully and truly give my counsel and advice to the governor of thecounty; that I shall do justice to all. (So help me, God)

52. The oath taken by a County Executive Committee member is not to a specific ministerial docket.

53. This Court is therefore not ready to find a requirement for fresh vetting merely on the basis that a County Executive Committee member took a specific oath of office.

Whether the Interested Parties meet the requirements of section 35(3) of the County Governments Act

54. The Petitioner attempted to rely on the judgment of the High Court to advance the argument that the Interested Parties did not meet the requirements of section 35(3) of the County Governments Act.

55. The Petitioner also contended that according to the Committee Report dated 15 February 2018, Eng. Adrian Ouma and Dismas Wakla were not vetted after the resubmission of their names.

56. Section 35(3) provides that:

(3) A person may be appointed as a member of the county executive committee if that person—

(a) is a Kenyan citizen;

(b) is a holder of at least a first degree from a university recognised in Kenya;

(c) satisfies the requirements of Chapter Six of the Constitution; and

(d) has 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.

57. The Court has looked at the Hansard of the Vetting Committee dated 15 February 2018. The Committee declined to admit the resubmitted names of Eng. Adrian Ouma and Dismas Omondi Wakla.

58. However, the County Assembly passed a Motion on 30 May 2018 to rescind the decision to reject the names of the Interested Parties.

59. The question, therefore, whether the Interested Parties met the requirements of section 35(3) of the County Governments Act is moot as the County Assembly passed a resolution rescinding its earlier decision.

Conclusion and Orders

60. From the foregoing, the Court finds no merit in the Petition, and it is dismissed.

61. The Petition was in the public interest. The Court also notes that the Respondents did not file substantive responses to the Petition. Each party to bear its own costs.

DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN MOMBASA ON THIS 2ND DAY OF MARCH 2022.

Radido Stephen, MCI Arb

Judge

Appearances

For Petitioner W.O. Ochuka & Co. Advocates

For 1st and 2nd Respondent Manyonge, Wanyama Associates Advocates

For 3rd and 4th Respondents Maxwell O. Ogonda & Associates

For Interested Parties Manyonge, Wanyama Associates Advocates

Court Assistant Chrispo Aura