



**Benjamin & another v Kihika & 3 others; Maara & 14 others
(Interested Parties) (Petition E013 & E014 of 2022 (Consolidated))
[2022] KEELRC 13361 (KLR) (5 December 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13361 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
PETITION E013 & E014 OF 2022 (CONSOLIDATED)**

HS WASILWA, J

DECEMBER 5, 2022

**IN THE MATTER OF SKEWED NOMINATIONS/APPOINTMENT OF COUNTY
EXECUTIVE COMMITTEE MEMBERS-2022, NAKURU COUNTY GOVERNMENT,**

AND

IN THE MATTER OF SECTION 35 & 36 OF COUNTY GOVERNMENT ACT, NO 17 OF 2012

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF ARTICLE
3,10,27,73, 75 AND 232 OF THE CONSTITUTION (2010)**

AND

**IN THE MATTER OF ARTICLES 1,2, 3, 10, 23, 27,28,41 73, 75,
159,162,179,232,258 AND 259 OF THE CONSTITUTION OF KENYA (2010)**

AND

**IN THE MATTER OF RIGHT TO INCLUSIVITY, NON-
ETHNIC MARGINALIZATION AND NON-DISCRIMINATION.**

BETWEEN

DR. MAGARE GIKENYI J BENJAMIN 1ST PETITIONER

DANIEL KIPNGETICH ARAP BETT 2ND PETITIONER

AND

**HON. SUSAN WAKARURA KIHICA GOVERNOR NAKURU
COUNTY 1ST RESPONDENT**

COUNTY GOVERNMENT OF NAKURU 2ND RESPONDENT

**COUNTY ASSEMBLY, NAKURU COUNTY GOVERNMENT 3RD
RESPONDENT**



NAKURU COUNTY ATTORNEY 4TH RESPONDENT

AND

HON. NELSO TANUI MAARA INTERESTED PARTY
DR. SAMUEL MWANGI MWAURA INTERESTED PARTY
HON. STEPHEN MUIRURI KURIA INTERESTED PARTY
HON. JOHN KARANJA KIHAGI INTERESTED PARTY
LEONARD KIPKOECH BOR INTERESTED PARTY
ROSELYN WANJIRU MUNGAI INTERESTED PARTY
JOSEPHINE ATIENO ACHIENG INTERESTED PARTY
HON. ZIPPORAH WAMBUI INTERESTED PARTY
STEPHEN IRIBE NJOGU INTERESTED PARTY
ENG. MICHAELKAMAU KARANJA INTERESTED PARTY
MICHAEL NANDELA SHIKAT INTERESTED PARTY
SAMUEL KARANJA WAHUGA INTERESTED PARTY
WAJEFF WILSON MWANGI INTERESTED PARTY
STANLEY KARANJA INTERESTED PARTY
ISABELA MAKORI INTERESTED PARTY

JUDGMENT

Introduction.

1. The two Petitions herein were filed on 18th October, 2022 and 25th October, 2022 respectively but they were consolidated on 31st October, 2022, with Petition E013 of 2022 marked as the lead file. Both Petitioners contest the nomination of the County Executive Committee Members, on the basis that the majority are drawn from one ethnic group to the exclusion of other ethnic groups when Nakuru County is a cosmopolitan County with tribes from all over Kenya residing therein.
2. The 1st Respondent, Susan Wakarura Kihika, Governor Nakuru County Government, is a governor appointed pursuant to article 180 of the *constitution* for county number 32 as per the 1st schedule of the *constitution*. The said Respondent is the head of the executive arm of the county government. She is the one who made the impugned nominations subject to these proceedings.
3. The 2nd Respondent, the County Government of Nakuru is a body established pursuant to article 176 of the *constitution*.
4. The 3rd Respondent, County Assembly, Nakuru County Government is a body established pursuant to article 177 of the *constitution*. It's the body that vets/processes the County Executive Committee nominees once received from the 1st Respondent before final appointments.



5. The 4th Respondent, is the County Attorney and the chief county government legal advisor who represents the Nakuru county government in civil or quasi-civil matters. He also advises the county governor on legal matters.
6. The 1st to 10th Interested Parties are the proposed County Executive Committee members, appointed by the 1st Respondent as County Executive Committee Members, Nakuru County Government. The 11th to 15th Interested parties are members of Nakuru County assembly representing various wards within Nakuru County.

Petition E013 of 2022.

7. The 1st Petitioner, Dr. Magare Gikenyi J Benjamin, describes himself as a law abiding citizen, a public spirited individual and a human rights defender who looks into the future of Kenya where society strictly follows the rule of law for the betterment of the society. He states that he brings this petition on the strength of Article 3(1) as read with Article 22 (1) &(2)(c) of the constitution.
8. In his petition dated 18th October, 2022, he seeks for the following reliefs.
 - a. A declaration that the purported/skewed nominations /appointments of the 1st to 10th interested parties as the County Executive Committee Members of Nakuru County Government done by the 1st Respondent on or around 13th October, 2022 without constitutional, statutory and all enabling Provisions of the law inter alia section 35 of the County Government Act and Articles 10, 73, 75 and 232 of the constitution is unconstitutional, *ultra vires* and therefore invalid, null and void *ab initio*.
 - b. The court be pleased to issue an order of Judicial review by way of *Certiorari*, quashing the 1st Respondent's press release or any document of the purported nomination/appointment of the interested parties and or any other person nominated without consideration of statutory and constitutional provisions as County Executive Committee member of Nakuru County Government.
 - c. An order of Judicial Review by way of Mandamus compelling the Respondents herein to initiate a proper/ legal process of filling the County Executive Committee members of Nakuru County Government position as contemplated in the constitution, the County Government Act and all enabling provisions of the constitution and the law.
 - d. An order of judicial review by way of Prohibition, prohibiting the Respondents and all persons from processing the nomination/appointments of the interested parties or any other person nominated in contravention of statutory and constitutional except as provide under the law.
 - e. A declaration that the skewed nomination/appointment or action by the 1st Respondent on or about 13th October, 2022 of purported nomination/appointments of interested parties and or any other person as County Executive Committee members of Nakuru County Government without constitutional and statutory provisions is contrary to Articles 1,2,3,27,10,73,75 and 232 of the constitution.
 - f. An order of Judicial Review by way of Mandamus to the 1st Respondent to perform her duties according to the laws and the constitution and protect, defend this constitution as per the oath of office she took.
 - g. Declaration that the Respondents' actions, omissions and or commissions amount to discrimination contrary to Articles 27 and 28 of the constitution.



- h. That any other order and modification of the Petitioners prayers which this Honourable Court may deem fit to grant so as to achieve objects of Justice for majority of Nakuru Residents and Kenyans as a whole.
 - i. Costs of this Petition be borne by the Respondents.
9. The petition herein is based on the following grounds; -
- a. That on 30th August, 2022, the 1st Respondent, Governor Susan W. Kihika in conjunction with the other Respondents advertised for the positions of County Executive Committee Members (CECs), pursuant to sections 35 and 36 of the [County Government Act](#).
 - b. Subsequently, on 13th September, 2022, the 1st Respondent through a press release communicated that after receiving 478 applications and processing them, the Select committee proposed 10 names (the 1st to 10th interested parties herein) to take up the position of County Executive Committee Members. Unfortunately, the selection did not reflect ethnic and cultural diversity of Nakuru County, because the list contained 7 persons of Kikuyu community, 2 Kalenjins and 1 Luo, leaving out all the other communities such as Luhya, Kisii, Kamba, Maasai, Somali, among others who contribute heavily to the development of Nakuru County.
 - c. That the move by the Respondents to appoint 70% of her tribesmen is an outright abuse of political power, which action leads to ethnic marginalization and unfair labour practices as envisaged under Article 41 of the [constitution](#). Further that it violated Article 232 of the [constitution](#) as read with section 35 of the [County Government Act](#).
 - d. That the list has already been forwarded to the 3rd Respondent for vetting and unless this Court stops the Respondent from further dealing with the said appointment, the 3rd Respondent will proceed to nominate persons who do not reflect diverse ethnicity within the county to the detriment of the people of Nakuru County.
 - e. That the nominations of the interested parties do not take into consideration ethnic representation and thus disregarded the rule of law, equity, inclusivity and governance, transparency and accountability contemplated under Articles 10, 73, 75 and 232 of the [constitution](#).
 - f. That the nominated persons will be sitting in position that hold high fiduciary and policy interest for the people of Nakuru County and will make decisions that not only bind the public but incur expenditure against public interest if the Court finally nullifies the said appointments.
 - g. That the County Executive Committee Members are public officers who are remunerated from public coffers as such their nomination/appointment should be done in a fair open, competitive, merit-based manner and in consideration of ethnic balances.
 - h. In addition, that the constitutional and statutory values and principles governing public appointment are critical safeguards against bribery, cronyism, nepotism, tribalism, favoritism, incompetence's, discrimination among others suchlike vices bedeviling Public employment.
 - i. That it is in the public interest that the positions of County Executive Committee Members be opened to unemployed and deserving Kenyans from other ethnic communities.
10. The Petition is supported by the Affidavit of the Petitioner sworn on 18th October, 2022 in which he reiterates the averments in the Petition.



Petition E014 of 2022.

11. The second petition is one by Daniel Kipngetch Arap Bett Alias Selembu. This Petitioner also sought relatively similar prayers as the 1st Petitioner. He prays for the following reliefs; -
 1. That a permanent injunction be issued staying the press release dated 13th October, 2022, or any other directive giving effect to the nomination and appointment of the interested parties herein as County Executive Committee members of Nakuru County Government.
 2. That a declaration is hereby issued and made that the purported nomination of the interested parties as County Executive Committee members of Nakuru County Government done by the Respondent on 13th October, 2022 without constitutional statutory and all enabling provisions of the law inter alia section 35 of the [County Government Act](#) and Articles 10, 73, 75 and 232 of the [constitution](#) is unconstitutional, *ultra vires* and therefore invalid.
 3. That a conservatory order is hereby issued to the 2nd Respondent, Nakuru County Assembly from receiving or if already received the list of nominees, staying the process of vetting or in any other way proceedings to vet and process the nomination of the interested parties herein as members of Executive to Nakuru County Executive Committee pending the hearing of this petition interpartes.
 4. A declaration that the tribal appointment of the interested parties as County Executive Committee members of Nakuru County Government done by the 1st Respondent on and or around 13th October, 2022 offends all enabling provisions of the law inter among others, sections 35 of the [County Government Act](#) and Articles 10, 73, 75 and 232 of the [constitution](#) of Kenya; is unconstitutional, *ultra vires* and therefore invalid, null and void.
 5. A permanent conservatory, restraining order is hereby issued to the 1st-10th interested parties from taking up respective positions as members of executive to Nakuru County Executive Committee of whatsoever called, pending the hearing and determination of this petition interpartes.
12. The basis upon which this Petition is made is similar to the grounds of those founded in the first petition in that the Petitioner based its locus standi on Article, 3 and 22 of the [constitution](#) of Kenya. It was similarly stated that the nominations of the proposed nominated County Executive Committee Members failed to consider the ethnic distribution of the communities living in Nakuru County and instead that the 1st Respondent has opted to nominate seven of her tribesmen in contravention of the [constitution](#) and section 35 as read with section 36 of the [County Government Act](#).
13. The Petitioner herein maintained that the nominations if left as it is is likely to promote vices such as nepotism, tribalism, cronyism, favoritism, incompetence, non-inclusivity, unfair competition and such like vices bedeviling the public employment.
14. He urged this Court in conclusion to allow the petition as prayed.

Legal basis of the Petitions.

15. In both petitions, the legal basis of the Petitions was listed to include;
 - a. That Kenya is a sovereign nation governed by the rule law with the 2010 [Constitution](#) adopted and promulgated on 27th August 2010 being the supreme law of the land.



- b. That the constitution of Kenya envisions a society based on the rule of law, non-discrimination, social justice and constitutionalism.
- c. That the constitution envisioned a society follows rule of law regardless of status in society.
- d. That Article 1(1) of the constitution provides that all sovereign power belongs to the people of Kenya and shall be exercised only in accordance with the constitution.
- e. That Article 2 (1) of the constitution provides.” This constitution is the supreme law of the Republic and binds all persons and all state organs at both levels of Government. As such the constitution binds the Respondents and the Interested Parties herein.
- f. That Under Article 3, every person has an obligation to respect, uphold and defend this Constitution.
- g. That these rights and fundamental freedoms (Bill of Rights) belong to each individual and are not granted by the Respondents/State.
- h. That Article 10 of the constitution sets out national values and principles of governance that bind all state officers, state organs, public officers and all persons are required to apply the national values and principles of governance, including inter alia the rule of law, participation of the people, social justice, equity, non-discrimination, protection of the marginalized, good governance, integrity, transparency, accountability and sustainable development. The Respondents in the issues herein are bound to apply the aforesaid values and principles.
- i. That Article 21(1) on Implementation of rights and fundamental freedoms is a fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfill the rights and fundamental freedoms in the Bill of Rights.
- j. That Article 22(1) on Enforcement of Bill of Right 20(1) 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. Page 6 of 19 21.
- k. That Article 22(2)(c) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by person acting in the public interest;
- l. That Article 23(1) The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.
- m. That Article 73(2)(b) & (d). Responsibilities of leadership (2) The guiding principles of leadership and integrity include objectivity and impartiality in decision making, and in ensuring that decisions are not influenced by nepotism, favoritism, other improper motives or corrupt practices; and (d) accountability to the public for decisions and actions;
- n. That Article 159 and 162(2). Judicial authority- 159(2) and 162(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles (a) justice shall be done to all, irrespective of status; (3) Subject to clause (5), the High Court shall have (b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;
- o. That Article 232 on values and Principles of Public Service especially of ensuring representation of Kenya's diverse communities.



- p. That Article 259 provides that in Construing this Constitution, the constitution shall be interpreted in a manner that (a) promotes its purposes, values and principles; (b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights; (c) permits the development of the law; and (d) contributes to good governance
16. The Respondents and the interested parties made responses to Petition E013 of 2022, and since the petition herein is similar in substance and reliefs sought to petition E014 of 2022, all parties relied on the Responses already made in the petition E013 of 2022 to apply to the subsequent petition.

1st and 2nd Respondent's response.

17. The County Secretary Mr. Benjamin Njoroge, swore a replying affidavit on behalf of the 1st and 2nd Respondent, on the 28th October, 2022. In the said affidavit, the affiant avers that the advertisement of position of County Executive Committee Members was done in daily nation on the 30th August, 2022 and no reservation as to ethnic requirements was mentioned therein as such all Kenyans of all works of lives made applications to fill the said positions.
18. That the select committee tasked with receiving the said application and sieving through for qualified persons, received 478 out of which only 46 applicants met all qualifications for appointment to the said position and shortlisted for interviews. After the said interviews were carried out, 10 applicants emerged the best in the different field and their names forwarded to the 1st Respondent for onward transmission to the 3rd Respondent for vetting.
19. Before the said nominees could be vetted by the county assembly, the Petitioners herein stopped the said procedure by filling this petitions, which in the opinion of the Respondents was pre-maturely filed.
20. The Respondents took issue with the fact that the petitions filed is not based on qualifications or competence of the interested parties but on tribal alienation.
21. It is stated that the Petitioners are not objecting to the process in which the said names were arrived at, neither are they decrying discrimination in the selection of the 10 County Executive Committee Members but merely appointment which was arrived at purely on merit and based on diversity of the County, with each County Executive Committee member coming from each of the sub-counties in Nakuru County. Furthermore, that the 10 Nominated County Executive Committee Members emerged the best in the interviews as such deserved to be vetted for the said positions and not appoint unqualified persons for the sake of encompassing all tribes within the County.
22. It is stated that the allegations of favoritism, tribalism, and unfair labour practices leveled against the Respondents has not been backed up with any evidence in any event that the entire process was carried out by Select Committee whose competence, legitimacy and impartiality has not been challenged by the Petitioners.
23. The Respondents maintained that there was no illegality in the appointment of the 10 County Executive Committee Members and therefore urged this Court to dismiss the petition for lacking merit.
24. It is stated that the orders sought in the petitions cannot be allowed because to allow the reliefs sought would mean the Court will be usurping powers of the Country Government and in the end interfering with a constitutional process.



4th Respondent's response.

25. The 4th Respondent in response to the Petitions filed grounds of opposition dated 2nd November, 2022 based on the following grounds; -
- a. That the 4th Respondent is neither the nominating nor the appointing authority of members of the County Executive Committee under section 35 and 36 of the [County Government Act](#).
 - b. That the petition does not disclose any or any reasonable cause of action against the 4th Respondent.
 - c. That no orders and or prayers are sought against the 4th Respondent in the Petition.
 - d. Other grounds to be adduces at the hearing of the said Petition.

1st to 10th interested parties Response.

26. In opposition to the Petition, the interested parties filed a replying affidavit deposed upon by Dr. Samuel Mwangi Mwaura, the 2nd Interested party on his behalf and on behalf of the other interested parties, on the 28th October, 2022.
27. In the said affidavit the affiant avers that upon election of the 1st Respondent as the Governor for Nakuru County and taking oath, she caused to be advertised on 30th August, 2022 for the position of County Executive Committee Members Nakuru County which attracted application from persons of all works of live and the committee shortlisted 46 people for interviews to fill in the 10 positions for County Executive Committee Members. That after interviews, the interested parties emerged the best and their names forwarded to the 3rd Respondent for vetting.
28. It is stated that the only issue raised in the petition was ethnic balance in the nomination process and not competence, integrity or qualifications questions of the interested parties as such that no constitutional provisions has been broken by the Respondents in the interviewing and eventual nominations of the interested parties.
29. The affiant avers that, it is impossible to appoint all person of all the tribes listed in the petition for the 10 position of County Executive Committee Members therefore the claim that the nomination does not reflect the ethnic communities living in Nakuru County is archaic, outmoded and obsolete.
30. He added that the 10 County Executive Committee Members who were nominated represented all the sub- counties of Nakuru County except for Kuresoi south where the Deputy Governor hails from, showing the true face of Nakuru county.
31. It is stated that the prayers sought in the Petitions, is seeking to embarrass the 1st Respondent and usurp the powers conferred upon the 1st Respondent and the select committee to appoint County Executive Committee Members to aid in driving her agenda for the County.
32. That the appointment of the said County Executive Committee Members has not infringed on any one particulars person's rights under the [constitution](#), or violated any law but that it is basically aimed at creating animosity and hatred among the communities living in Nakuru and therefore should not be allowed to see the light of day.
33. It is averred that the election of the Governor was overwhelmingly done by the people of Nakuru County, which cannot now be taken away by the Petitioners who did not even apply for the said positions or demonstrated any interests they have in the said positions.



11th to 13th Interested parties' response to Petitioner.

34. The interested parties herein are the members of County Assembly duly elected to represent the interest of various wards within Nakuru County Government. They swore a replying affidavit deposed upon by the 11th Interested party, Wajeff Wilson Mwangi, on the 11th November, 2022.
35. According to the interested party herein the suspension of the appointment of the proposed County Executive Committee Members has far reaching impact on the constitutional and statutory timelines more so on assumption of office and further appointments that will impair on basic and essential services of the residents owing to the stalemate.
36. That the delay in vetting of the proposed County Executive Committee Members will affect the County assembly calendar of events. Furthermore, that the petitions have taken ethnic trajectory with consequential effect of ethnic flare-up, undertones and suspicions and outright ostracization of the nominees.
37. They aver that the Respondents have duly complied with Articles 10, 174 and 232 of the constitution as such no provisions of the constitution has been violated to warrant the filling of these petitions.
38. That the stopping of the nominees before they are vetted is curtailing the powers of the Respondents and usurp the role of the county assembly in vetting and approval process, where the Petitioners have an opportunity to raise any concerns with regards to individual nominees.
39. The interested parties herein also took issue with the fact that the petitions capitalized on ethnic issue and not on competence and qualification of any of the nominees. They added that the nominations were based on merit that is regional/sub-county based as such the nominees are drawn from the diverse parts of Nakuru County with each of the nominees drawn from each sub county with exception of Kuresoi South where the Deputy Governor hails from.
40. They contend that the appointment of the proposed County Executive Committee Members was done in accordance with the set down procedure. Furthermore, that the allegation that there was favoritism for the Kikuyu, Kalenjin and Luo tribe failed to considered the sub-county distribution and selection that the select committee consider in their selection.
41. The affiant herein avers that the Petitioners lack standi to bring this suit on behalf of the communities they allege to be acting on their behalf because they are not leaders in their respective communities.
42. The affiant maintained that the advertisement, interviews and nomination was done in a transparent manner. On that basis the interested parties herein aver that the Petitioners have not established any prima facie case and urged this court to dismiss the same to pave way for vetting and eventual appointment of the nominees.
43. It is stated that the county assembly has not received any complaint or petition with regard to appropriateness of the nomination of the said County Executive Committee Members as such the petitions were prematurely filed before the internal dispute resolution mechanism was exhausted.
44. Directions were then taken for the petitions to be disposed of by way of written submission with the Petitioners filing joint submission on the 15th November, 2022, the Respondents also filed joint submission on the 14th November, 2022 and the 1st -10th interested parties filed their submissions on the 11th November, 2022, which the 11th to 15th interested parties relied on.



Petitioner's submissions.

45. The Petitioner submitted that this Court has jurisdiction to hear and determine this petition by dint of Article 165 & 162(2) of the constitution as read with Section 12 of the Employment and Labour Relations Court Act. It was argued that this Court is established under Article 162(2) of the constitution as a special court with status of the High Court to hear and determine all employment and labour relations Cases. In this they relied on the case of Clive Nyaaga Ogwora v Governor Nyamira County and 2 others [2021] eKLR where the Court found ELRC court with jurisdiction to hear the concerns of nominated County Executive Committee Members who had been nominated, vetted but not appointed. The Court found ELRC had jurisdiction to hear the matter because it was employment related.

46. A similar finding was arrived at in the case of Dr. Magare Gikenyi J Benjamin v Ministry of Labour and 3 others [2022] eKLR where the Court cited the case of Daniel B Mugendi v Kenyatta University and 3 others [2013] eKLR where the Court held that; -

“indeed, in my view, the drafters of the Employment and Labour Relations Court Act, did not intend to limit the Court jurisdictions to matters arising within an employment relationship or put is in another way, where there is employer-employee contract. I believe that it is for this reason that the rider.....and for connected purposes...was incorporated into the preamble of the Act.”

47. Similarly, that issues for determination before this Court are constitutional issues with disputes relating to employment and connected purposes as such this Court has jurisdiction to hear and determine the same.

48. On whether the Petitioners have locus standi to institute the petitions herein, it was argued that the Petitioner being citizen of this Country have a duty under Article 3 of the constitution to respect, uphold and defend the constitution and Article 22 empowers them further to institute proceedings to raise any concerns with regard to violation of the constitution. On that basis the Petitioner submitted that they instituted this Petitions on the basis of their concern as Kenya citizen and residents of Nakuru County.

49. On whether the adjudication of the petitions herein violate the separation of powers doctrine between the county assembly and this Court, it was submitted that the vetting process to be undertaken by the county assembly is a quasi-judicial duty which this Court can interfere with when reason is given. They relied on the case of Apollo Mboya v Attorney General and 2 others [2018] eKLR where the Court held that; -

“Under both constitutional and administrative law, the Court possess supervisory jurisdiction over the exercise of executive powers and also has powers to determine constitutionality of legislation and decision made by the parliament, when carrying out judicial review of administrative action, the Court scrutinizes the legality and not the substantive merit of an act, or decision made by a public authority under the three broad headings of illegality, irrationality and procedural impropriety. In jurisdictions which have written constitutions like ours, the Courts also assess the constitutionality of legislation, executive actions and governmental policy. Therefore, part of the role of the judiciary is to ensure that public authorities act lawfully and serve as a check and balances on the Government power.”



50. To emphasize on that argument the Petitioner cited a plethora of case including the case of *James Opiyo Wandayi v Kenya National Assembly and 2 others* [2016] eKLR the supreme Court decision of *Speaker of National Assembly v Attorney General and 3 others* [2013] eKLR , the Supreme Court case of *Zacharia Okoth Obado v Edward Akongo Oyugi and 2 others* [2014] eKLR and argued that the Courts can easily interfere with legislature when they violate or threaten to violate constitutional rights and quasi-judicial functions like parliamentary vetting committee are directly under the armpit of the Court. Therefore, the petitions do not interfere with the separation of powers between the arms of the government.
51. On the substratum of the Petitions herein, that is on violation of Section 35 of the *County Government Act* as read with Article 10, 27, 73, 75 and 232 of the *constitution*, the Petitioners submitted by citing the case of *Republic v Vice chancellor Moi University and 2 others Ex-parte Benjamin J Gikenyi Magare*[2019] eKLR where the Court quoted court of Appeal case of *Council of Civil Union v Minister for Civil Service* [1985] AC which held that that;-
- “illegality is when the decision-making authority commits an error of law in the process of taking the act, the subject of the complaint acting without jurisdiction or ultra vires or contrary to the provisions of a law or its principles are instances of illegality.... irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards.... Procedural impropriety is when there is failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be its none observance of the rules of natural justice or to act with o=procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislature instrument by which such authority exercises jurisdiction to make a decision”.
52. They submitted that section 35 of the *County Government Act*, mandates the Governor to nominate Members of the County Executive Committee who reflect the community and cultural diversity of the County, therefore that the failure by the Governor to nominate County Executive Committee Members that reflect most if not all communities in Nakuru County is in perpetuation of an illegality because the nominations failed to reflect the communities in the County. Furthermore, that the section 35 above is reinforced by Article 232(1)(a), (e) (h) & (i) of the *constitution* which provides for values and principles of public service to include inter alia; High standards of Professional ethics, accountability for administrative actions, representation of Kenya diverse Communities and adequate and equal opportunity for appointment. Article 73 provides for responsibilities of leadership, while Article 75 puts emphasize on the conduct of a state office.
53. On that basis, the Petitioner submitted that the nomination of the County Executive Committee Members should not be arbitrary and or irrational as was stated in *John Waweru Wanjobi and 27 others v Attorney General and 6 others* [2012] eKLR where the Court held that; -
- “...I do not think it would be realistic to expect the Commission to have representation of all the 42 ethnic groups. What the appointing authorities are required to do is do the best they can to accommodate the requirement of diversity in all its form.”
54. It was submitted that the appointment of 7 out of 10 persons from one ethnic group, without consideration of person living with disability, or cultural diversity failed the reasonableness test



- and instead that the 1st Respondent had discriminated upon the other ethnic communities in her nomination in blatant violation of Article 27 of the constitution.
55. It is submitted further that the discrimination against the other communities violates the human dignity contrary to Article 28 of the constitution because the other communities feel that they are not important in the eyes of the Governor. Infact that the actions of the Governor has already brought animosity among the Community members living in the County of Nakuru.
56. It is further submitted that the residence of Nakuru County have legitimate expectation that public officer such as the 1st Respondent would respect the law and obey the constitution and in doing so nominate person that reflect their cultural and ethnic diversity reflected in County. He then listed the requirements of legitimate expectation as was state in Communications Commission of Kenya and 5 others v Royal Media Services Limited and 5 others, where the Court relied on the decisions of South African Veterinary Council v Szymanski 2003(4) S.A 42 (SCA) at paragraph 28, to include; clear and unambiguous qualification, the requirement is a sensible one, the expectations must be reasonable, the representation must have been induced by the decision maker and the representation must be one which it was competent and lawful for the decision-maker to make without which the reliance cannot be legitimate.
57. In conclusion, the Petitioners urged this Court to allow the prayers sought in the Petitions and stop the illegal actions by the Respondents.

Respondents' submissions.

58. The Respondents submitted on three main issue; jurisdiction of this Court; the doctrine of separation of powers and whether the petitions are merited.
59. On the jurisdiction, the Respondents submitted that the Petitioners ought to have first raised the concerns in their respective petition before the County Assembly whose decision would have been brought before this court for quashing. It was argued that the process of appointment of the nominated County Executive Committee Members is underway and the process has not been completed as such the petitions as filed are premature. It is submitted further that the provisions of section 35(2) of the County Government Act, vest the County Assembly with powers to determine whether the nominations meet the threshold of gender, minority marginalization's and community and cultural diversity which issue were yet to be determined in the vetting exercise to warrant the filling of these petitions. It is submitted that to interfere with such process would amount to usurping of County Assembly powers as was held in Shadrack Kosgei and another v Governor of Nakuru County and 2 others [2016] eKLR where the Court held that; -
- “ the Court is not required to reappraise the decision of the appointing authority nor may it institute its own determination of who the most suitable and or competent candidate would be. The Court’s purpose is to ensure that the appointment process there has been fidelity to the law and to the constitution...in exercise of their oversight role, the Courts must carry out a fine balancing act and be careful not to usurp the powers and functions of the appointing authority.”
60. Accordingly, that the interested parties herein have not been appointed by the County assembly to warrant the interference by this Court and that the interference by this Court can only be done after appointment of the nominated County Executive Committee Members as was stated in Trusted Society of Human Rights Alliance v Attorney General and others [2013] eKLR.



61. It was submitted that the Petitioners have prematurely filed these petitions instead of seeking redress from the County Assembly in accordance with section 35(2) of the County Government Act. Furthermore, that the County Assembly is tasked with carrying out oversight authority over the 1st Respondent and its cabinet as provided for under Article 185(3) of the constitution as such the Petitioners ought to have first petitioned the County assembly before coming to this Court as expressly provided for under Section 15 of the County Government Act and reiterated under Standing Order number 197 to 207 of Nakuru County Standing Orders. The need to petition the county assembly before filing a suit in Court was reinstated in the case of Christopher Mutinda Mutua and another v Alfred Nganga Mutua and 11 others Interested parties, County Assembly of Machakos [2019] eKLR where the Court held that;
- “ there is no evidence that the Petitioner submitted a petition as provided for under standing order number 194 to 199 of Machakos County Assembly standing Orders of 9th July, 2014. Alternative dispute resolutions mechanisms are under Article 159(2)(c) of the constitution complimentary to Court processes and the Court is under s duty to promote the same. it is in that spirit couple up with doctrine of separation of powers and avoidance in usurping the powers of such tribunals that the courts keep its hands-off matter in which internal dispute resolution mechanism have not been fully explored.”
62. The Respondents on that note, submitted that where a statute has provided for a remedy to a party, the Courts must exercise restraint and first give the said bodies or state organs opportunity to deal with the dispute. This was stated in Anthony Miano & others v Attorney General and others [2021] eKLR where the Court re-stated the doctrine of Exhaustion and constitutional avoidance.
63. On that basis, the Respondent submitted that the jurisdiction of this Court would only be invoked after the County assembly has failed and or refused to admit and consider the issues raised by the Petitioners or after the County assembly has completed the approval process and a notification of the decision by the County Assembly has been communicated to the appointing Authority under section 11 of Public Appointment (County Assemblies Approval) Act, 2017. The procedure and sequence of proceedings on that regard was stated in the case of John Kipngeno Koech and 2 others v Nakuru County Assembly and 5 others [2013] eKLR.
64. They therefore submitted that since a remedy on the issues raised by the Petitioner in their petition is provided for under the Act and the standing Orders, the Court should take a back seat and allow for the said remedies to be explored first before invoking its jurisdiction.
65. It was further submitted that the nomination of the interested parties as County Executive Committee Members did not create employment relationship between the interested parties and the Respondent to clothe this Court with jurisdiction to determine the issues raised in this Petition. It was submitted that the constitutional petitions that are heard in this Court are those matter that are provided for under section 12 of the Employment Act and other matters that are ancillary ad incidental to the matters contemplated under section 12. To support this argument, they relied on the case of Public service Commission and 4 others v Cheruiyot and 20 others 9Civil Appeal 119 and 139 of 2017) Consolidated [2022] KECA 15 (KLR).
66. Consequently, the Respondent submitted that the petitions herein are based on speculations that the interested parties will be appointed as County Executive Committee Members for Nakuru County Executive and thus should be disregarded by this Court.



67. On whether the petitions offend the doctrine of separation of powers, the Respondent submitted in the affirmative, arguing that when the court is invited to interfere with a live process of recruitment which is before the Nakuru County Assembly, the court is in essence interfering with legislative process which final decision has not been arrived at to determine whether the process was proper or not. It was argued that the county government operates with relatively similar structures as those of the national government as such the doctrine of separation of powers apply with equal measure. In this they cited several cases such as *Simon Wachira Kagiri v County Assembly of Nyeri and 2 others* [2013] eKLR, the case of *Trusted Society of Human Rights v The Attorney General and others* [2012] eKLR.
68. It is submitted that the county assembly is empowered under Article 185(1) of the constitution to carry out its legislative role, while Standing Order 187(1) gives the Select Committee powers to vet and approve nominees for appointment to County Public offices as may be provided for in the Act or any other law. On that basis, the Respondents submitted that the vetting process began as soon as the 1st Respondent announced in the press release the candidates up for vetting and therefore the Court should exercise restraint from interfering with the process of recruitment unless to correct errors of procedure. In this they relied on the case of *Faith Syokau Wathome Kitbu(MBS) and others v Machakos County Assembly and 3 others* [2018] eKLR where Justice Odunga held on a similar matter that:-
- “This however does not mean that the Judiciary should superintend the other two arms of government in all their undertakings in order to determine whether their decisions are “right” or “wrong”. As was appreciated by the Court of Appeal in *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others*, Civil Appeal No. 290 of 2012; eKLR [2012]:
- “It is not in doubt that the doctrine of separation of powers is a feature of our Constitutional design and a per-commitment in our Constitutional edifice. However, separation of power does not only proscribe organs of Government from interfering with the other's functions. It also entails empowering each organ of Government with countervailing powers which provide checks and balances on actions taken by other organs of Government. Such powers are, however, not a licence to take over functions vested elsewhere. There must be judicial, legislative and executive deference to the repository of the function. We therefore cannot agree with the High Court's dicta in the Petition, subject of this Petition that -“Separation of powers must mean that the courts must show deference to the Independence of the legislature as an important institution in the maintenance of our constitutional democracy as well as accord the executive sufficient latitude to implement legislative intent. Yet as the Respondents concede, the courts have an interpretive role including the last word in determining the constitutionality of all government actions.”
69. The rationale of exercising restraint was further elaborated in *Okiya Omtatah Okiiti & 3 others v Attorney General and 5 others* [2014] eKLR where the Court held that; -
- “in our view, members of parliament should not look over their shoulders when conducting debates in parliament. They must express their opinions without any fear. The Court should be hesitant to interfere, except in very clear circumstances, in matters that are before the two houses of parliament and even those before the County Assemblies.”
70. On that note, the Respondent submitted that the process of vetting had kick started in the county assembly and the interference by this Court in stopping such a constitutional process went against the



very tenets of separation of powers as such the Court should exercise restrained and await the outcome of the vetting for its jurisdiction to be invoked to correct any procedure not followed.

71. It was submitted that, there are safeguards that have been provided under section 35(2) of the County Government Act with regards to things the County Assembly will look at in the vetting exercise, while Section 6, 8 & 11 of the Public Appointments (County Assemblies Approval) Act provides for avenues within which the public can raise concerns to the County assembly of any issue affecting the recruitment and vetting process of the County Executive Committee Members like the case herein. It was argued that since the law has provided for avenues to address issue that may arise in the said process, it behooves upon this Court to allow due process to take its course. This was the holding in Law Society of Kenya v Attorney General and another; National Commission for Human Rights and Another (Interested parties) [2020] eKLR where the Court held that;-

“I find that even though this Court has jurisdiction to review the manner in which the national assembly may carry out the parliamentary scrutiny process in respect of the impugned rules, in view of the doctrine of Judicial restraint and lack of the conclusiveness of the process, I will not intervene with the ongoing process nor question the committee’s findings unless there is evidence that the national assembly disregarded the constitution and the law.”

72. On whether the Petitioner have proved their case to the required standard, the Respondents submitted that the burden of proof is on the Petitioners to demonstrate the illegality of the process of nomination of the proposed County Executive Committee Members, which they have failed in this case because no evidence has been tabled before this Court to show any illegality in the process undertaken by the Respondents in coming up with the lists of the 10 interested parties herein as proposed County Executive Committee members. It is submitted that the Petitions herein are biased towards the ethnic diversity but ignorant on other factors for consideration such as regional diversification which criteria was used by the Select Committee in narrowing down the nominees from the shortlisted 46 to 10.
73. In conclusion, the Respondents maintained that this Court lacks jurisdiction to adjudicate on the issues before Court based on their Submissions above and urged this Court to down its tools by striking out the suits before it.

Interested parties Submissions.

74. The interested parties on the other hand identified four issue for determination, whether the petitions herein are premature, whether the process of recruitment of the proposed County Executive Committee Members violated the law, whether the rights of the Petitioner have been violated and whether the prayers sought should be granted.
75. On the first issue it was submitted that section 35(1) of the County Government Act gives the Governor powers to nominate their cabinet but the same section under sub-section 2 qualifies the said powers and gives he County Assembly powers to ensure the nominations are done in accordance with the law, considering the gender rule, Ethnic and cultural diversity, special groups representation among others. The Respondent argued that to ask this Court to stop the vetting process is tantamount to asking the court to vet the said nominees and nullify their nomination when the vetting process had merely started and yet to conclude to determine whether, if at all, the law was breached by the Respondents.



To support this argument they cited the case of *Alex Arani Kabinga v Governor, Nyamira County and another* [2021] eKLR where the Court held that ;-

“From the foregoing it is clear that it is not the place of this court to select or nominate a candidate to fill the office of the Deputy Governor and neither is it its place to vet the candidate nominated. That power belongs to the Governor and the County Assembly respectively. This court would therefore be hesitant to grant the order stopping the nomination as that would be usurping the power vested in the 1st Respondent by law. It would also be hesitant to stop submission of the Governor’s choice to the County Assembly for vetting and approval. I do not have a licence to do so. This court would only come in to review the process of the appointment for procedural infirmities as well as for legality and I believe this is what the Petitioner intended to ask this court to do in prayer (b) of the Amended Petition.”

76. Accordingly, that courts in most cases are ceased of jurisdiction to determine legality after the process is concluded and not before and the petitions ought to have been filed after the vetting of the appointees.
77. According to the interested parties, intervening the constitutional process at this stage will be similar to what the court of appeal in the celebrated case of *Mumo Mutemu v Trusted Society of Human Rights Alliance and 5 others* [2013] eKLR describe as undermining the doctrine of separation of powers.
78. On the second issue, the interested parties submitted that despite the allegations of bribery, cronyism, nepotism, tribalism, favoritism, incompetence, non-inclusivity, unfair competition, discrimination among others listed by the Petitioners, nothing has been placed before this Court, in form of evidence, to justify the said allegations as such the allegations are lacking basis. Furthermore, that the Petitioners have not demonstrated by evidence the allegation of breach of the constitutional provisions and statute in the advertisement, interviewing and their nomination to warrant the intervention by this Court.
79. On whether the rights of the Petitioner were violated, the interested parties cited the case of *Anarita Karimi Njeru v Republic* [1979] KLR 154 and argued that the Petitioner have failed to state how their constitutional rights have been violated in the nomination process of the proposed County Executive Committee Members.
80. On the prayers sought, the Interested parties submitted that the petitions herein as presented lack merit because the allegations in the petitions have not been backed up with any evidence to warrant the issuance of the reliefs sought, as such the Petitions are ripe for dismissal because the issues raised therein have other avenue before the County assembly for redress.
81. I have considered the averments and submissions of the Petitioners, Respondents and Interested Parties herein and the issues for this court’s determination are as follows;-
 1. Whether the court has jurisdiction to handle this matter.
 2. Whether the Petitioners have locus to file this petition.
 3. Whether the Petitioners are entitled to the remedies sought.

1. Jurisdiction

82. Indeed as held in *Owners of Motor vessel “Lilian S” vs Caltex Oil Kenya Ltd*, jurisdiction is everything and without jurisdiction, this court has no business proceeding further in the matter.



83. The matter of jurisdiction as raised by the Respondents is that, the matter is currently before the County Assembly of Nakuru and this court in the spirit of separation of powers should not proceed any further.
84. The Respondents have also submitted that the Petitioners have approached this court prematurely and have not exhausted all administrative and legal avenues provided in law before approaching this court.
85. On this issue of jurisdiction, Article 162 of the constitution of Kenya provides as follows;
162. System of courts
- (1) The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts referred to in clause (2).
 - (2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—
 - (a) employment and labour relations; and
 - (b) the environment and the use and occupation of, and title to, land.
 - (3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).
 - (4) The subordinate courts are the courts established under Article 169, or by Parliament in accordance with that Article.
86. In its attempt to actualize the provision of article 162 (2) of the constitution, Parliament enacted the Employment and Labour Relations Act which at Section 12 provides for the jurisdiction of this 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;
 - (b) disputes between an employer and a trade union;
 - (c) disputes between an employers’ organisation and a trade union’s organisation;
 - (d) disputes between trade unions;
 - (e) disputes between employer organisations;
 - (f) disputes between an employers’ organisation and a trade union;
 - (g) disputes between a trade union and a member thereof;



- (h) disputes between an employer's organisation or a federation and a member thereof;
 - (i) disputes concerning the registration and election of trade union officials; and
 - (j) disputes relating to the registration and enforcement of collective agreements.
- (2) An application, claim or complaint may be lodged with the Court by or against an employee, an employer, a trade union, an employer's organisation, a federation, the Registrar of Trade Unions, the Cabinet Secretary or any office established under any written law for such purpose.
- (3) In exercise of its jurisdiction under this Act, the Court shall have power to make any of the following orders—
- (i) interim preservation orders including injunctions in cases of urgency;
 - (ii) a prohibitory order;
 - (iii) an order for specific performance;
 - (iv) a declaratory order;
 - (v) an award of compensation in any circumstances contemplated under this Act or any written law;
 - (vi) an award of damages in any circumstances contemplated under this Act or any written law;
 - (vii) an order for reinstatement of any employee within three years of dismissal, subject to such conditions as the Court thinks fit to impose under circumstances contemplated under any written law; or
 - (viii) any other appropriate relief as the Court may deem fit to grant.
- (4) In proceedings under this Act, the Court may, subject to the rules, make such orders as to costs as the Court considers just. (5) The Court shall have jurisdiction to hear and determine appeals arising from-
- (a) decisions of the Registrar of Trade Unions; and
 - (b) decisions of any other local tribunal or commission as may be prescribed under any written law”.



87. In regard to whether this court can deal with this matter as an Employment and Labour Relations matter the preamble to the ELRC Act states as follows;
- “An Act of Parliament to establish the Employment and Labour Relations Court to hear and determine disputes relating to employment and labour relations and for connected purposes”.
88. This court not only deals with Employment and Labour Relations matters only but also for connected purposes which purposes extend to handling any matter that flows or may flow out of or will in future flow out of an employment relationship.
89. The issue before court relates to whether the nomination of the Interested Parties to serve as County Executive Committee members of the 2nd Respondent was done within the law and therefore justly.
90. The nomination of the Interested Parties is in my view a recruitment process which is intended to create an employer-employee relationship between the Interested Parties and the 2nd Respondent.
91. The recruitment process is the process of identifying, attracting, screening, shortlisting, interviewing, selecting, hiring an
92. or boarding employees.
93. This process is in my view part and parcel of a Human Resource function of an employee and which matters falls squarely within the jurisdiction of this court.

2. Locus Standi

94. The Respondents also submitted that the Petitioners herein lack locus standi to bring this matter before court.
95. The 1st Petitioner herein described himself as a law abiding citizen, a public spouted individual and a human rights defender looking into the future of Kenya which society strictly follows the rule of law for the betterment of society.
96. The 2nd Petitioner describes himself in similar terms. In determining the issue of locus, I draw my strength from Article 22 and 258 of the constitution which states as follows;
- “22. Enforcement of Bill of Rights
- (1) 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.
- (2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—
- (a) a person acting on behalf of another person who cannot act in their own name;
- (b) a person acting as a member of, or in the interest of, a group or class of persons;
- (c) a person acting in the public interest; or
- (d) an association acting in the interest of one or more of its members”.
97. Article 258 (1) & (2) on the other end states as follows;



“258. Enforcement of this Constitution

- (1) Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.
- (2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—
 - (a) a person acting on behalf of another person who cannot act in their own name;
 - (b) a person acting as a member of, or in the interest of, a group or class of persons;
 - (c) a person acting in the public interest; or
 - (d) one or more of its members”.

98. My reading of both articles show that any person on his own accord or on behalf of another is free to file such a petition claiming that the *constitution* has been contravened or is threatened.
99. The Petitioners herein are residents of Nakuru County, Kenya citizens who have approached this court claiming breach or threatened breach of the *constitution*.
100. This court cannot lock out the Petitioners on issue of locus as they have demonstrated their interest as Kenyans and with a legitimate interest in the welfare of Nakuru County.
101. The submission that the Petitioners lack locus to institute this petition is found without merit and is therefore disregarded.

3. Remedies

102. The petition herein is premised on a number of factors. The Petitioner has averred that the selection process was done hurriedly and without consideration of the varied nature of various ethnic groups of the 2nd Respondent.
103. Indeed the advertisements were done on 30/8/2022. By 13th September, 2022, the 1st Respondent averred that they had received 478 applicants and 10 had been selected.
104. The modulation of the selection process is not indicated but the Respondents and interested parties submitted that this was based on merit and a member each selected from each Sub-County of Nakuru.
105. The Petitioners submitted that the selection process breached Section 35(1) & (2) of the *County Government Act*. Section 35 of the *County Government Act* 2012 states as follows;

“ 35. Appointment of county executive members

- (1) The governor shall, when nominating members of the executive committee—
 - (a) ensure that to the fullest extent possible, the composition of the executive committee reflects the community and cultural diversity of the county; and
 - (b) take into account the principles of affirmative action as provided for in the *constitution*.



- (2) The county assembly shall not approve nominations for appointment to the executive committee that do not take into account—
 - (a) not more than two thirds of either gender;
 - (b) representation of the minorities, marginalized groups and communities; and
 - (c) community and cultural diversity within the county”.

106. Indeed the 1st Respondent is mandated by law to consider to the extent possible, that the composition reflects the community and actual diversity of the County and also consider affirmative action as provided for in the constitution.

107. The Petitioners have lamented that the 2nd Respondent chose 7 members from her own ethnic community, 2 from the Kalenjin community and 1 from the Luo. This position has not been denied by the Respondents.

108. The Petitioners have also submitted that the Nakuru County is populated by varied ethnic groups which position the Respondents have not disputed.

109. Indeed Nakuru is a cosmopolitan County with a population of over 2,162,202 (2019 census) populated with various tribes being Kikuyu, Kalenjin, Kisii, Luo, Luyha, Kamba amongst others.

110. As per the nomination issued by the 2nd Respondents, only 3 ethnic tribes were considered with the Kikuyu taking 70% of the slots.

111. Article 10 of the constitution of Kenya states as follows;

“10. National values and principles of governance

- (1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them—
 - (a) applies or interprets this Constitution;
 - (b) enacts, applies or interprets any law; or
 - (c) makes or implements public policy decisions.
- (2) The national values and principles of governance include—
 - (a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;
 - (b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;
 - (c) good governance, integrity, transparency and accountability; and
 - (d) sustainable development”.

112. Indeed the values above bind all state organs and state officers and all persons when they apply or interpret this constitution.



113. Article 73 of the constitution also provide as follows;

“73. Responsibilities of leadership

- (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”.

114. In the same vein, Article 75 of the constitution provides as follows;

“75. Conduct of State officers

- (1) A State officer shall behave, whether in public and official life, in private life, or in association with other persons, in a manner that avoids—
 - (a) any conflict between personal interests and public or official duties;
 - (b) compromising any public or official interest in favour of a personal interest; or
 - (c) demeaning the office the officer holds.
- (2) A person who contravenes clause (1), or Article 76, 77 or 78(2)—
 - (a) shall be subject to the applicable disciplinary procedure for the relevant office; and
 - (b) may, in accordance with the disciplinary procedure referred to in paragraph (a), be dismissed or otherwise removed from office.



- (3) A person who has been dismissed or otherwise removed from office for a contravention of the provisions specified in clause (2) is disqualified from holding any other State office”.

115. In all these provisions, the constitution mandates all state officers to avoid any conduct that is not consistent with the constitution.

116. Article 232 of the constitution on the other hand provides as follows as values and principles of public service;

“232. values and principles of public service

- (1) The values and principles of public service include—

- (a) high standards of professional ethics;
- (b) efficient, effective and economic use of resources;
- (c) responsive, prompt, effective, impartial and equitable provision of services;
- (d) involvement of the people in the process of policy making;
- (e) accountability for administrative acts;
- (f) transparency and provision to the public of timely, accurate information;
- (g) subject to paragraphs (h) and (i), fair competition and merit as the basis of appointments and promotions;
- (h) representation of Kenya’s diverse communities; and
- (i) affording adequate and equal opportunities for appointment, training and advancement, at all levels of the public service, of—
 - (i) men and women;
 - (ii) the members of all ethnic groups; and
 - (iii) persons with disabilities.

- (2) The values and principles of public service apply to public service in—

- (a) all State organs in both levels of government; and
- (b) all State corporations.

- (3) Parliament shall enact legislation to give full effect to this Article”.

117. Indeed in making any decision in the public service, the people must be involved, there must be transparency and provision to the public of timely, accurate information. Under (i) above, there is need for fair competition and merit as basis for appointment and promotions and under (h) representation of Kenya’s diverse communities and affording equal opportunity for all must be considered.

118. In the current petition, the Respondents have averred that the selection process was above board. Whereas that may have been the position, there is no clear information provided on how this was done, there is no transparency in the selection process and the outcome of the process show skewed nomination process leaning towards one ethnic group to the detriment of the others. There is no indication that affirmative action was considered and the marginalized considered.



119. The 2nd Respondent released a press conference on 13th October, 2022 which stated as follows;

“Press Release

Proposed County Executive Committee Members

Pursuant to the provision of the County Government Act, No. 17 of 2012 Section 35 and 36, the County ran an advert calling on qualified applicants to apply for the positions of County Executive Committee Members. In total, we advertised for ten positions on the 30th August 2022.

Following this, we received 478 applications from highly qualified Kenyas interested in filing the positions. The select committee tasked with short listing and running the interviews then embarked on getting the most suitable candidates who would be part of the team that would as the Cabinet, help me fulfil my promises to the people of Nakuru.

While keeping in mind the requirements for gender balancing, cultural diversity and age consideration, I had tasked the select committee to give me individuals who are focused, self-driven and results-oriented. The select committee has submitted to me the names of men and women, who hopefully, will form the next Government.

Below are the names of the individuals proposed to various dockets that I will be forwarding to the County Assembly for vetting and approval”.



	Name	Department	Sub-county
1	DR. Nelson Tanui Maara	Cec Water And Environment	Rongai
2	Dr. Samuel Mwangi Mwaura	Health	Gilgil
3	Hon. Stephen Muiruri Kuria	Trade, Culture And Tourism	Nakuru Town East
4	Hon. John Karanja Kihagi	Lands, Physical Planning, Housing And Urban Development	Naivasha
5	Leonard Kipkoech Bor	Agriculture, Fisheries And Co-operatives	Kuresoi North
6	Roselyn Wanjiru Mungai, Hsc	Public Service Management	Bahati
7	Josephine Atieno Achieng	Sports, Gender, Culture And Social Services	Nakuru Town West
8	Hon. Zipporah Wambui	Education, Youth And Ict	Molo
9	Stephen Iribe Njogu	Finance And Economic Planning	Njoro
10	Eng. Michael Kamau Karanja	Infrastructure	Subukia

120. Indeed the list was said to be one to be forwarded to the County Assembly for vetting and approval.



121. The process of forwarding the said nominees had not been initiated when this petition was filed. The court issued interim orders stopping any intended vetting of the nominees.
122. The Respondents had submitted that the process for vetting has not been exhausted. Indeed the process had not even begun because the petition was filed before the nominees list had been forwarded to the County Assembly.
123. This court is alive to the principle of separation of powers. It will not interfere with the mandate of the parliament nor the county assemblies unless it is necessary and within the acceptable norms.
124. This is in tune with the law as in case law cited – see *Mumo Matemo Case & Okiya Omtata Okoiti & 3 others vs AG & Another* (2014) eKLR.
125. Having concluded as above, it is my finding that indeed the process so initiated for appointment of County Executive Committee Members of Nakuru County Government is skewed and does not reflect the ethnic diversity of the county. Indeed the process did not also consider the marginalized as the case should be. The same should not be allowed to proceed.
126. In the circumstances this court issues the following orders:-
 - a. The court is hereby pleased to issue an order of Judicial review by way of Certiorari, quashing the 1st Respondent’s press release or any document of the purported nomination/appointment of the interested parties and or any other person nominated without consideration of statutory and constitutional provisions as County Executive Committee member of Nakuru County Government.
 - b. An order of Judicial Review by way of Mandamus compelling the Respondents herein to initiate a proper/ legal process of filling the County Executive Committee members of Nakuru County Government position as contemplated in the constitution, the County Government Act and all enabling provisions of the constitution and the law.
 - c. An order of judicial review by way of Prohibition, prohibiting the Respondents and all persons from processing the nomination/appointments of the interested parties or any other person nominated in contravention of statutory and constitutional except as provide under the law.
 - d. A declaration that the skewed nomination/appointment or action by the 1st Respondent on or about 13th October, 2022 of purported nomination/appointments of interested parties and or any other person as County Executive Committee members of Nakuru County Government without constitutional and statutory provisions is contrary to Articles 1,2,3,27,10.73.75 and 232 of the constitution.
 - e. An order of Judicial Review by way of Mandamus to the 1st Respondent to perform her duties according to the laws and the constitution and protect, defend this constitution as per the oath of office she took.
 - f. Declaration that the Respondents’ actions, omissions and or commissions amount to discrimination contrary to Articles 27 and 28 of the constitution.
 - g. This being a petition in the public interest, I will direct that each party will bear its own cost.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 5TH DAY OF DECEMBER, 2022.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE



In the presence of:

Munene for Respondents – present assisted with Nguriri – present

Chege for 1st to 3rd Respondents with Munene & Nguriri – present

Mwangi for Interested Parties (1st to 10th) – present

Biko for 11th to 13th Interested Parties – present

Magere for the Petitioner – present

Nyamwange for 4th Respondent and office of the County Attorney – present

Court Assistant – Fred

