



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CONSTITUTIONAL PETITION NO. 31 OF 2020

EVANS MUSWAHALI LADTEMA.....PETITIONER

VERSUS

HON. HASNA MUDEIZI SPEAKER

COUNTY ASSEMBLY OF VIHIGA.....1ST RESPONDENT

THE COUNTY ASSEMBLY OF VIHIGA.....2ND RESPONDENT

H.E. DR. WILBER OTTICHILO.....3RD RESPONDENT

RULING

1. The applicant filed a Notice of Motion application dated 18/8/2020 praying for a Conservatory Order in the following terms:-

(a) That pending the hearing and determination of the substantive petition, this Honourable Court be pleased to issue a Conservatory Order barring and prohibiting the 3rd Respondents from submitting to 1st and 2nd Respondents the names of Mary Amalemba or any other name other than in compliance with Constitution as nominee for the position of County Executive Committee Member of the 4th Respondent for approval.

(b) That the 1st and 2nd Respondents be barred from receiving and/or accepting from the 3rd Respondent, committing to the Committee an appointment, debating and/or approving the names of Mary Amalemba or any other name other than in compliance with the Constitution.

2. On 21/8/2020 the Court granted a status quo order pending the hearing and determination of the application.

3. The application is premised on grounds set out on the face of the Notice of Motion numbered 1 to 13 the gravamen of which is that pursuant to Article 179(2) (b) of the Constitution, the Governor of Vihiga County, forwarded to the Speaker of the County Assembly, the names of nominee's for vetting and approval as members of the Vihiga County Executive Committee.

4. That the 3rd respondent nominated one Mary Amalemba, who does not represent the youth, has no academic qualification and does not represent Vihiga sub-county which has nobody in the cabinet.

5. That the 3rd respondent did not consider the marginalised minorities, Youth or persons living with disability in violation of the law.

6. That Vihiga County is populated by different communities including the Luo, Kisii, Luyha, Kikuyu and Kalenjins but the 3rd respondent only nominated people from the majority Luyha community.

7. That the application be granted. The application is buttressed by a supporting affidavit of Evans Mushwahili Ladtema, deposing and restating the grounds aforesaid.

8. In the petition itself, the petitioner cites Article 2(1); 2(4), and (3) of the Constitution which binds all persons to observe the Constitution as the supreme law of the land; that any act or omission that contravenes the constitution is invalid and that the Constitution obliges every person to respect, uphold and defend the Constitution.

9. That under Article 10, the Constitution sets out national values and principles of governance that state officers, state organs, public officers,

and all persons are bound by whenever they apply or interpret any law, make or implement public policy decisions.

10. That among the national values and principle of governance are justice, inclusiveness, equality, human rights, non-discrimination, good governance, transparency and accountability, and sustainable development.

11. That Article 56 of the Constitution makes provisions for the state to put in place affirmative action programme designed to ensure that minorities and marginalised groups (a) participate and are represented in grievance and other spheres of life.

12. And that Article 73 of the Constitution provides:-

(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.

That

(2) The guiding principles of Leadership and integrity includes:-

(a) Selection on the basis of personal integrity, competence and suitability, on 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 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 decision and actions;

And

(e) Discipline and commitment in service to the people.

13. The Petitioner/Applicant deposes that the respondents have failed the Constitutional test and imperative aforesaid in nominating Mary Amalemba, an old person to replace a youth and in appointing all members of the County Executive Committee from one community to the exclusion of all other communities resident permanently in Vihiga County.

14. The respondents filed a replying affidavit sworn to by Dr. Wilber Ottichilo, the Governor of the 3rd respondent who is also cited as the 2nd respondent.

15. He deposes *inter alia* that this very Court made a finding in a similar case involving the Governor and the County Government in **John Chebu Bor (Acting on behalf of the Terik community) –vs- Wilber K. Otichilo and 11 Others [2018] eKLR** where the court held:-

“Following the Supreme Court decision in Julius Kariuki Mate & Another and Martin Nyaga Wambora and Another, 2017, eKLR, I find that the Petition was brought prematurely without the Petitioner first awaiting conclusion of the vetting process by the Assembly of the nominees and a decision transmitted to the Governor for the appointments to take place.”

16. That the same thing is happening in this suit and the petitioner should first await conclusion of the vetting process by the Assembly of the nominee and a decision transmitted to the Governor for the appointments to take place.

17. That the issues raised should be raised in the County Assembly and not the Court.
18. That the Court would finally, if seized of the matter make a proper finding in respect of damages if at all that would have been suffered by the Petitioner/Applicant at the end of the process. That, that is what happened in John Chebu Bor Case (*supra*) in which, the County Government won the petition but had already suffered delayed services by fact of conservatory orders that had been issued.
19. The respondent prays that the application be dismissed with costs.
20. The 4th respondent deposed to a replying affidavit in which he concurs with the deposition by the 2nd and 3rd respondents in all material respects and prays that the application be dismissed.
21. The Petitioner/Applicant joined issues with the respondents in a supplementary affidavit sworn to by one Adelaide Gamigi a resident of Vihiga County who deposes that she is one of the Youths in Vihiga County and are concerned with the composition of the County Executive Committee assembly which is in violation of chapter 10 of the Constitution.
22. That Section 25 (2) (a) (b) and (c) of the County Governments Act, 2012, prohibit approval of nomination for appointment to Executive Committee that does not take into account not more than 2/3 of either gender, representation of minorities, marginalized groups and Communities and the community and cultural diversity within the County.
23. That the deponent has petitioned the County Assembly of Vihiga to reject the nomination of Mary Amalemba since she does not represent the youth.
24. That the Governor should either retain Agufana Marita or appoint a youthful person.

Determination

25. Issuance of Conservatory Orders in Public domain is governed by the Principles set out by the Supreme Court in the matter of **Gatirau Peter Munya –vs- Dickson Mwenda Kithinji and 2 others – Application No. 5 of 2014, [2014] eKLR** in which the court held as follows:-

“[86] ‘Conservatory Orders “bears a more decided Public law connotation: for these are orders to facilitate ordered functioning within Public agencies, as well as to uphold the adjudicatory authority of the Court in the Public interest. Conservatory orders, therefore, are not unlike interlocutory injunctions, linked to such private-party issues as “*the prospects of irreparable harm*” occurring during the pendency of a case or “high probability of success” in the supplicant’s case for orders of stay. Conservatory orders, consequently should be granted on the inherent merit of a case bearing in mind the public interest, the Constitutional values, and the proportionate magnitudes and priority levels attributable to the relevant causes.”

26. The Supreme Court also introduced the doctrine of judicial restraint on matters of separation of powers in the case of **Julius Kariuki Mate & Another and Martin Nyaga Wambora and Another 2017, eKLR**. The Court cautioned against Courts rushing to issue conservatory orders that hinder other arms of government from exercising their Constitutional and Statutory roles. The Supreme Court guided the Courts to be restrained in interfering in ongoing processes in the National and county Assemblies and await the Assemblies to make their decision, then the Court have authority to examine and review if seized of the matter.

27. The Supreme Court whilst emphasising the Supremacy of the Constitution and the adjudicatory role of the Courts in determining matters emphasised adherence by all persons and state organs to the objects and principles of the Constitution, found that it is in the interest of the people for which all state organs are enjoined to serve that there be avoidance of premature interference by the Courts in the procedure of other state organs especially, the legislative arm of government which is presumed to represent the will of the people unless proved otherwise.

28. This Court upheld this principle in the case of John Chebu Bor (*Acting on behalf of the Terik community*) –v- Wilber K. Ottichilo and 11 Others [2018] eKLR.

29. Accordingly, the Court is hesitant to interfere with the process of vetting of the interested party herein by Vihiga County Assembly, which has the mandate to examine and be guided properly in taking a proper decision as to whether the nominees by the 3rd and 4th respondents for appointment as members of Vihiga County Executive Committee meet the Constitutional and statutory criteria for appointment in that capacity.

30. Accordingly, the application lacks merit and is dismissed with costs in the cause.

DATED AND DELIVERED NAIROBI THIS 11TH DAY OF MARCH, 2021

MATHEWS N. NDUMA

JUDGE

ORDER

In view of the declaration of measures restricting court of operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th March 2020, this ruling has been delivered to the parties online with their consent. They have waived compliance with *Order 21 rule 1 of the Civil Procedure Rules* which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by *Article 159(2)(d)* of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under *Article 48* of the Constitution and the provisions of *Section 18 of the Civil Procedure Act (chapter 21 of the Laws of Kenya)* which impose on this court the duty of the court, *inter alia*, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MATHEWS N. NDUMA

JUDGE

Appearances:

Mr. Mwamu for Petitioners/Applicants

Mr. Lakewa for 1st and 2nd respondent

Mr. Musiega for Interested party

Mr. Mr. Andisi for 3rd Respondent

Chrispo: Court clerk