



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

PETITION NO. 16 OF 2017

**IN THE MATTER OF ARTICLES 1, 2, 3, 10, 27, 50, 56, 73, 75, 232, 258 AND 260 OF THE
CONSTITUTION OF KENYA**

AND

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

AND

IN THE MATTER OF CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

AND

IN THE MATTER OF FAIR ADMINISTRATIVE ACTIONS ACT NO. 4 OF 2015

AND

**IN THE MATTER OF DISCRIMINATION OF PERSONS LIVING WITH DISABILITIES IN
NOMINATION OF COUNTY CHIEF OFFICERS**

QABALE DIBA BADAKE.....1ST PETITIONER

QALICHA DIBA BORU.....2ND PETITIONER

AMBARO ABDULLAH ALLI.....3RD PETITIONER

VERSUS

THE PUBLIC SERVICE BOARD MARSABIT COUNTY.....1ST RESPONDENT

THE GOVERNOR MARSABIT COUNTY.....2ND RESPONDENT

THE COUNTY GOVERNMENT MARSABIT.....3RD RESPONDENT

THE COUNTY ASSEMBLY OF MARSABIT.....4TH RESPONDENT

NATIONAL GENDER & EQUALITY COMMISSION.....INTERESTED PARTY

JUDGMENT

1. The Petitioners sued the Respondents for allegedly discriminating against the Petitioners who are persons with disability as candidates for County Chief Officers' positions. It was contended that the 2nd Respondent nominated 16 individuals for vetting by the 4th Respondent for the positions of Chief Officers and out of the 16 nominees none is a disabled person despite the Petitioners being qualified and having been shortlisted by the 1st Respondent. The Petitioners averred that the 1st and 2nd Respondents acted illegally and in contravention of the Constitution by discriminating against the Petitioners who are persons with disabilities as candidates for County Chief Officers positions. The Petitioners averred that the assumption of office by the nominees will amount to flagrant breach of the Constitution and the residents of Marsabit County will suffer irreparable harm. The Petitioners averred that the Respondents have violated the provisions of the Constitution, the County Governments Act and International Conventions. The Petitioners' prayed for a declaration that the process of recruitment being undertaken by the 1st Respondent and the shortlisting thereof contravenes the provisions of Articles 10, 56 and 232 of the Constitution, Section 34(e) and 66 of the County Governments Act and therefore unconstitutional and void *ab initio*; an order be issued compelling the Respondent to strictly adhere to the provisions of the Constitution and the County Governments Act and ensure regional, gender and ethnic balance as well as equity, inclusivity and good governance in the recruitment exercise and subsequent recruitment exercise; an order be issued compelling the Respondents to provide a full list of all positions in the Marsabit County Public Service filled by the 1st Respondent giving details of when the positions were advertised, list of the shortlisted candidates, dates when interviews were conducted and dates of the appointments plus costs of the suit.

2. The 1st Respondent filed a replying affidavit sworn by its Chief Executive Officer and the Secretary to the County Public service Board Mr. Mohammed Noor Adan who stated that the County Public Service Board followed the statutory requirements while making the recruitments in compliance with Section 65(1) and (2) of the County Governments Act. He deponed that the Board had set out a criteria of areas that they require certain competencies and ensured fair competition, diversity in the county and merit in short listing of the Petitioners. He deponed that the Board acted within the law and shortlisted the Petitioners in a fair and competitive manner and further interviewed them on merit but due consideration had to be made to accord the overall highest scorers and their suitability to the positions in question. He deponed that the Nominees were the highest scorers and any other nomination would amount to discrimination on their part. He deponed that the Board indeed gave the Petitioners a competitive platform for them to present their qualifications but it had to look at overall performance and qualification on merit primarily for purposes of quality service delivery for the people of Marsabit.

3. The 2nd and 3rd Respondents also filed a replying affidavit and reiterated the averments in the 1st Respondent's replying affidavit. The 2nd Respondent through the Governor of Marsabit County, Mohamud Mohamed Ali maintained that the selection and or recruitment process followed the laid down procedure and that he acted pursuant to the Board's recommendation and in accordance with Section 45 of the County Government Act, by choosing the nominees as contained in the recommendations, ensuring diversity, depicting the face of Marsabit County and forwarding the nominees to the County Assembly for Vetting. He further deponed that pursuant to the provisions of Section 45 of the County Government Act as read together with Section 8 of the Public Appointments (County Assemblies Approval) Act, he received the County Assembly report dated 5th December 2017 approving a list of the Nominees to the positions of County Chief Officers and pursuant to the said approval he appointed the said Nominees who have already assumed office. He deponed that the Petitioners were subjected to a fair, competitive process free from discrimination in the selection and recruitment of the County Chief Officers.

4. The 4th Respondent filed a replying affidavit sworn by Mohamud Kamaya the Clerk of the County Assembly and he stated that public appointments in the County Governments go through certain laid down procedures with different actors in the process. He deponed that the County Assembly vets and approves or rejects any nominees that are forwarded to it according to the law and the vetting is through a public hearing after inviting the nominees to appear before the County Assembly Committee. He averred that pursuant to the provisions of the Public Appointments (County Assemblies Approval) Act, any

person may prior to the approval hearing and by written statement on oath provide the clerk with evidence contesting the suitability of a candidate to hold the office to which the candidate has been nominated. He deponed that the 1st and 2nd Petitioners through a letter dated 16th November 2017, raised issues similar to those in the Petition and the County Assembly through the Committee on vetting was seized of the matter and had the authority to address the Petitioners' concerns. He deponed that the issues raised in the Petition are issues that should have been lawfully canvassed during the vetting and approval process that had already commenced in accordance with Section 8 of the Public Appointments (County Assemblies Approval) Act. He deponed that the 4th Respondent is the legal arbiter of the issues raised by the Petitioners and the Court should show restraint in exercising its jurisdiction and allow the 4th Respondent to perform its legal obligation by vetting the nominees and indeed determining if they were duly nominated in accordance with the law. He deponed that the 4th Respondent pursuant to the directions issued by Honorable Justice Chitembwe in Marsabit High Court proceeded and concluded the vetting process of the 16 nominees in strict compliance of the law and bearing in mind the issues that had been raised by the Petitioners. He deponed that the 4th Respondent having due regard to the provisions of the Constitution, the County Governments Act, the Public Appointments (County Assemblies Approval) Act and the standing orders of the County Assembly of Marsabit found that the nominees were nominated in strict compliance with the law and subsequently the 4th Respondent duly approved them. He deponed that based on the foregoing reasons, the orders sought in the Petition are not merited and should be dismissed with costs. The Interested Party only entered appearance and did not file any replying affidavit.

5. The Petition was canvassed by way of written submissions. The Petitioners submitted that the Constitution and other key international human rights instruments provides that every person has the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law. They submitted that the Constitution holds dear those communities who have been historically marginalized and other vulnerable persons and that Article 27 provides not only equality and freedom from discrimination but also affirmative action to remedy these historical wrongs. They submitted that Article 54 and 56 elaborate the rights of people with disabilities, minorities and marginalized persons and that however, the Governor Marsabit County had violated the Petitioners' rights by failing to appoint them by virtue of them being persons with disabilities thereby discriminating against them. The Petitioners submitted that the Marsabit County as currently constituted, is unconstitutional as there is no person with disability, minority or marginalized as required by Articles 54 and 55 of the Constitution. The Petitioners further contended that the nomination process by the 2nd Respondent was flawed since he intentionally refused to pick the petitioners despite them having been qualified for the respective seats in the County Administration. The Petitioner asserted that the state is required to ensure on a progressive basis that at least 5% of members to appointive and elective positions are persons with disabilities and the Constitution also requires that persons with disability are afforded adequate and equal opportunities for appointment, training and advancement at all levels of the public service. The Petitioner submitted that if the prayers sought are granted they are bound to affect both the persons who were nominated and sworn into the various posts and as such divest their posts. The Petitioners thus prayed for a declaration that the Public Service Board Marsabit County failed to steadfastly supervise the entire recruitment by failing to employ the Petitioners despite the fact that they were well qualified for the position.

6. The 1st, 2nd and 3rd Respondent's submitted that due process was followed while selection and/or recruitment of the 16 nominees was ongoing. They submitted that the 1st Respondent adopted a criteria of selecting the candidates which included the relevant years of experience, regional and ethnic balance and invited the applicants including the Petitioners for an interview that was conducted through a fair and competitive process and the nominees selected based on merit with due consideration to the qualification of all the candidates and the Constitutional principles without any discrimination. The Respondents submitted that after such a rigorous exercise, all the top three overall performance in each department were recommended to the nominating authority (the 2nd Respondent) and the Petitioner's did not form part of the top three. They submitted that the 1st Respondent upon forwarding the list of qualified nominees to the 2nd Respondent cognizant of their overall performance in terms of a holistic criteria required for the applicable positions and pursuant to the provisions of Article 232 of the Constitution and

Section 65 of the County Government Act forwarded the list of the nominees as required under Section 45 of the County Government Act to the 4th Respondent for approval. The 4th Respondent after confirming that the provisions of the County Government Act, the Constitution, the Public Appointments (County Assemblies Approval) Act and the standing orders of the County Assembly had been strictly adhered to, duly adopted the report of the committee on vetting and appointments and approved all the nominees. The Respondents submitted that the 2nd Respondent in accordance to Section 45 of the County Government Act as read together with Section 8 of the Public Appointments (County Assemblies Approval) Act received the recommendations of the 4th Respondent and subsequently issued letters of appointments to the said nominees. The Respondents submitted that they complied with Articles 10, 2, 3, 27, 56 and 232 of the Constitution, provisions of the County Government Act and any other Statutory Provisions in appointing County Chief officers who are thus validly in office. On the issue of whether the Petitioners were discriminated against, the 1st, 2nd and 3rd Respondents submitted that at no particular point throughout the whole process of advertisement, short listing, interviewing, selection and/or recruitment did they discriminate against the Petitioners on grounds of their disability given that they were equally shortlisted, taken through the interview process just like all other candidates and nominees appointed on merit. The Respondents contended that the Petitioners have not demonstrated that the 1st Respondent treated other applicants preferentially compared to them as all the applicants were subjected to a competitive process and appointments made on merit since after the interview, the scores were ascertained and ranked as per the performance and the Petitioners failed to form part of the top three. The Respondents submitted that according to Article 73(2) of the Constitution, one of the guiding principles of leadership and integrity is the selection on the basis of personal integrity, competence and suitability and the Petitioners were therefore ranked less competent and hence could not qualify for the positions. The Respondents submitted that denying qualified citizens a position in the public service yet Article 27 guarantees equal opportunity as a fundamental right would have violated the national values and principles regarding transparency and accountability and/or equal treatment before the law. The Respondents emphasized Article 232(1)(g) of the Constitution is clear that appointments and promotions in the public service shall be guided by the values and principles of fair competition and merit as well as ethnic, regional, and gender diversity. It was submitted that the 1st Respondent had satisfied the Constitutional criteria by appointing qualified and competent nominees to the position of the County Chief Officers. The Respondents submitted that the criteria for selection and recruitment were uniformly applied across all the applicants including the Petitioners and no evidence has been adduced that certain candidates were treated differently and suffice to note, the letter from the petitioners contesting why they were not nominated did not challenge the suitability of any of the nominees to hold the office to which the nominees had been appointed. The Respondents contended that although, persons with disabilities are recognized as marginalized and enjoy special opportunities, that right is not absolute. The Respondents submitted that Article 54(2) of the Constitution recognizes the difficulty in the immediate realization of the principle that 5% of the members of the elective and appointive bodies are persons with disabilities and advocates for the progressive realization of the principle. The 2nd Respondent submitted that it has employed disabled persons who are currently serving in the county under various capacities. The Respondents relied on the case of **Northern Nomadic Disabled Persons' Organization (Nondo) v Governor County Government of Garissa & Another [2013] eKLR** where Mutuku J. while dismissing the Petitioner's case for lack of merit referred to the Supreme Court of Kenya Advisory Opinion No. 2 of 2012 **In the matter of the principle of Gender Representation in the National Assembly** where "progressive realization" was defined as a gradual movement or development towards a destination. The Respondents submitted that in the absence of any evidence that other applicants were preferentially treated than the Petitioners on account of their disability, this court should find that the said Petitioners were not discriminated against and that the 1st Respondent's short listing and nomination was based on merit and performance as provided in the County Public Service Board report considered by the vetting and appointments committee. The Respondents relied on the case of **Ashwander v Tennessee Valley Authority [1936] 297 U.S 288** which was quoted in the case of **Wanjiru Gikonyo & 2 Others v National Assembly of Kenya & 4 Others [2016] eKLR** and submitted that judicial authority to determine disputes does not extend to determination of abstract questions. They also cited the case of **Halima Ali Abdullahi v County Government of Wajir & 2 Others [2019] eKLR** where Mwita J. in dismissing the petition observed "*.....the petitioner did not find it necessary to amend her petition to address the state of affairs obtaining where the appointments have been finalized so that it is no longer a*

threat but actual violation of the rights. The petition is still talking of the nomination when the process has been concluded so that the court would no longer be addressing nomination but appointment. Taking the above considerations into account, I am not satisfied as to the merit of this petition dated 15th December 2017, is declined and dismissed with no order as to costs.” The Respondents submitted that if the orders in the present case are granted, then it would lead to a constitutional deadlock since the appointments followed due process and would infringe upon the independence of the 4th Respondent and the doctrine of separation of powers under Article 1(3) of the Constitution.

7. The 4th Respondent’s submissions were as to whether the Petition is an affront to the principle of separation of powers as the grievances raised in the Petition are matters that should be resolved by the 4th Respondent during the vetting process. The 4th Respondent submitted that Section 8 of the Public as Appointments (County Assemblies Approval) Act provided for issues for consideration by the 4th Respondent in vetting the nominees submitted by the Governor. It submitted that issues canvassed through the Petition herein are issues that should be lawfully canvassed during the vetting approval process. The 4th Respondent submitted that it is the legal arbiter and it should be allowed to perform its legal obligation by vetting the nominees and determining if they were duly nominated in accordance with the law. It submitted that the doctrine of separation of powers dictates that each arm of government should be allowed to perform its legal obligation before the judiciary as an arm of government can intervene. The case of **Born Bob Marren v Speaker Narok County Assembly & 3 Others [2015] eKLR** and the **John Musakali v Speaker County of Bungoma & 4 others [2015] eKLR** where the court dismissed a Petition because internal dispute resolution mechanisms had not been exhausted before invoking the jurisdiction of the court. The 4th Respondent submitted that it has been demonstrated that the petitioners’ move to this was ill advised and ill timed, with the implication that it offends the clear legally defined authority of the 4th Respondent to entertain disputes of the recruitment process during the vetting of the nominees thus amounting to abuse of the court process as the utilization of court resources at this time is unwarranted and wasteful.

8. It is not in doubt that the State is required to ensure on a progressive basis that at least 5% of members to appointive and elective positions are persons with disabilities and the Constitution also requires that persons with disability are afforded adequate and equal opportunities for appointment, training and advancement at all levels of the public service. This must be a goal for each County including the 3rd Respondent and the progressive realization of the aspiration by the framers of our Constitution do not mean there will be immediate realization of the ideal. The Petitioners did not demonstrate that they were discriminated against or the appointees who secured the nominations considered more favourably than they were. In my considered view there was no proper challenge to the nominations as there was adherence to the law. The doctrine of separation of powers holds that the co-equal arms of Government have to engage in the dance of checks and balances. There is no way the County Assembly can operate outside the law and the Judiciary watches without doing anything where prompted by a petition such as this one. In this case there is no reason to interfere but where there is Constitutional basis to do so Courts will not hesitate to right the ship. The Petition herein however is unsuccessful for the reasons articulated above. There be no order as to costs.

It is so ordered.

Dated and delivered at Nyeri this 20th day of November 2019

Nzioki wa Makau

JUDGE