



**REPUBLIC OF KENYA**

**EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT KERICHO**

**PETITION NO. 14 OF 2017**

*(Before D. K. N. Marete)*

**STEPHEN KIPRONO NGETICH..... CLAIMANT**

**VERSUS**

**SPEAKER, COUNTY ASSEMBLY OF KERICHO..... 1ST RESPONDENT**

**COUNTY ASSEMBLY OF KERICHO..... 2ND RESPONDENT**

**GOVERNOR, COUNTY GOVERNMENT OF KERICHO..... 3RD RESPONDENT**

**COUNTY GOVERNMENT OF KERICHO..... 4TH RESPONDENT**

**AND**

**PATRICK CHERUIYOT MUTAI.....1ST INTERESTED PARTY**

**HELLEN CHEPKEMOI CHEPKWONY.....2ND INTERESTED PARTY**

**GEOFFREY KIPKURUI RUTO.....3RD INTERESTED PARTY**

**CHARLES KIPROP BIRECH.....4TH INTERESTED PARTY**

**DR. SHADRACK KIPKOECH MUTAI.....5TH INTERESTED PARTY**

**JUDGEMENT**

This matter is brought to court by way of a Petition dated 6th November, 2017. It opens with an application by way of Notice of Motion of even date.

The respondents in a Replying Affidavit sworn on 27th November, 2017 in opposition to the application and petition deny the same and plead *bona fides* in the nomination and appointments of the County Executive Officers now complained of.

By an application by way of Notice of Motion dated 13th November, 2017 the Interested Parties, viz, Patrick Cheruiyot Mutai, Hellen Chepkemoi Chepkwony, Geoffrey Kipkurui Ruto, Charles Kiprop Birech and Dr. Shadrack Kipkoech Mutai

seek orders of joinder as such Interested Parties to the petition. This application is compromised by a consent of the parties recorded on 20th November, 2017 in which they are so enjoined as parties.

The Interested Parties in The Interested Parties Response to the Petition dated 6th December, 2017 deny the petition and pray that it be dismissed for lack of merit.

The petitioner's case is that the 3rd respondent was elected as Governor of Kericho on 8th August, 2017. He has taken oath of office to execute his mandate as per the Constitution of Kenya and other relevant laws.

The petitioner's further case is that pursuant to Article 179 (2) (b) of the Constitution, the Governor (3rd respondent) presented to the 1st respondent ten nominees for vetting by the committee on appointments and consideration for approval by the County Assembly for appointment as members of the County Executive Committee. The 1st respondent thereon committed the list of nominees to the committee on appointments for consideration and approval as provided under Article 179 (2) (b) of the Constitution of Kenya.

The petitioner's other is that after the vetting exercise, five of the nominees, Patrick Cheruiyot Mutai, Hellen Chepkemai Chepkwony, Charles Kiprop Birech Geoffrey Kipkurui Ruto and Dr. Shadrack Kipkoech Mutai were approved for appointment and the 3rd respondent accordingly appointed them as such to various County Executive Member offices/portfolios.

The petitioner's complaint and bone of contention forming the genesis of the petition is that these appointments did include the marginalized, minority, youth or persons living with disability in complete disregard and violation of the law. It is his assertion that there are people from different communities residing permanently within Kericho County and these include Kikuyus, Kisiis, Luos, kambas and others.

In the penultimate, the petitioner avers that none of the appointed persons

availed a clearance certificate from the Ethics and Anti Corruption Commission and that at the time of the appointment there were issues of integrity hanging over them and which had not been cleared by the aforesaid commission.

The petitioner cites a violation of Article 10 of the Constitution that sets out national values and principles of governance and binds all state organs, state officers, public officers and all persons as they:

- a) applies or interprets this Constitution;*
- b) enacts, applies or interprets any law; or*
- c) make or implements public policy decisions.*

It is his case that the 3rd respondent's action violated national values and principles of governance advocating for national unity, the rule of law, the participation of the people, equity, social justice, inclusiveness, equality, human rights, non discrimination, good governance, transparency and accountability and sustainable development.

It is his further case that the 3rd respondent violated Article 56 of the Constitution which guarantees the minorities and marginalized groups the right to participate and be represented in governance and other spheres of life now not recognized by the action of the 3rd respondent.

Again, the 3rd respondent's list of nominees, appointments or omissions does not reflect the hallowed principles of leadership and integrity espoused under Article 73 of the Constitution as follows – selection on the basis of personal integrity, academic competence and suitability, objectivity and impartiality in decision making and also ensuring that decisions are not influenced by nepotism, favoritism and other improper motives of corrupt practices.

He also cites a violation of Article 232 of the Constitution – Values and principles of public service, in that this did not afford adequate and equal opportunities for appointment, training and advancement at all levels of the public service, of men

and women from members of all ethnic groups and persons with disabilities.

The petitioner further avers that the respondents are likely to violate the provisions of the Public Appointments (County Assembly Approval) Act of Kericho which provides that once a candidate has been rejected, the appointing authority shall submit the name of another candidate and cannot resubmit the rejected one. The respondent's are as such in violation of this by submitting and accepting the names respectively.

In closing, the petitioner submits as follows;

- *That the respondents have no respect for the spirit of the Constitution on the rule of law.*
- *That the decision of the respondent is not only outrageous but also capricious and whimsical.*
- *That the respondents have abdicated their duty under the law to protect the law and carry them (sic) in accordance with the law.*
- *That the respondents have collectively acted in an opaque manner denying the petitioners, the entire residence of the County of the opportunities guaranteed by the constitution.*
- *That the respondents have collectively acted towards the petition (in a) manner that is manifested irresponsible and inimical to good leaders' governance.*

He prays thus;

*a) A declaration that the list of nominees comprising of the names of MR. PATRICK CHERUIYOT MUTAI, BARNABAS KIPKURUI NGENO, EDNA*

*CHEBET CHEPKWONY, HELLEN CHEPKEMOI CHEPKWONY, DR. ALICE CHEMUTAI MUTAI, CHARLES KIPROP BIRECH, HELLEN CHEPKURUI NGENO, DR. MOSES LANGAT, GEOFFREY KIPKURUI RUTO and DR. SHADRAC KIPEKMOI MUTAI or any other name other than in compliance with Constitution presented by the 3rd Respondent to the 1st Respondent for approval was unconstitutional and hence unlawful, null and void ab initio.*

*b) A declaration that the approval and appointment of PATRICK CHERUIYOT*

*MUTAI (Department of Finance and Economic Planning), HELLEN CHEPKEMOI CHEPKWONY (Department of Water, Forestry, Environment and Natural Resources), GEOFFREY KIPKURUI RUTO (Department of Water, Forestry, Environment and Natural Resources), DR. SHADRACK KIPKEMOI MUTAI (Medical, Public Health and Pharmaceutical Services) was unconstitutional and hence unlawful, null and void ab initio.*

*c) An order directing the Respondents to conduct fresh nomination, vetting, approval and appointment in strict conformity with the constitution and the governing statutes.*

*d) Any other order as the Honourable Court may deem fit to grant.*

*e) A declaration that 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> Respondents have violated the petitioner's rights to human dignity under Articles 28 of the constitution and the right not to be subjected to any form of violence or be treated in a cruel, inhuman or degrading manner under article 29(c) and (f) of the constitution.*

*f) The petitioner be paid costs.*

The 1st and 2nd respondent's case is outlined in an Affidavit sworn by Dominic Rono on 27th November,

2017 in answer to the application by the petitioner. It is her case that the 4th respondent placed an advertisement in the National Newspaper inviting applications by suitably qualified candidates to fill the positions of County Executive Committee Members and Chief Officers pursuant to the provisions of the County Governments Act, No. 17 of 2012.

The 1st and 2nd respondent's further aver that it is not clear whether the petitioner or the persons on whose behalf he is acting tendered their applications for consideration as members of the Kericho County Executive Committee. She further avers as follows;

*6. THAT it is true that, the 3<sup>rd</sup> and 4<sup>th</sup> Respondent nominated and submitted the names of ten (10) persons to the 2<sup>nd</sup> Respondent for vetting and approval by the 2<sup>nd</sup> Respondent's Committee on Appointments as provided for by the County Government Act No.17 of 2012 and the County Assembly Standing Order No.188.*

*7. THAT vide an Advertisement in a National Newspaper the Clerk of the 2<sup>nd</sup> Respondent notified the members of the public of the names of the nominees for appointment as County Executive Committee members which included the names of the interested Parties and five (5) others and the date and time that they were invited for vetting by the County Assembly Committee on Appointments.*

*8. THAT the ten (10) nominees were then interviewed and the Interested Parties' nominations approved while those of the five (5) others rejected.*

*9. THAT a report of the Appointment committee on vetting of nominees for the positions of the county executives committees members hereto attached and marked "DR – 1" was eventually prepared and adopted by the 2<sup>nd</sup> Respondent.*

It is their case that the County Assembly in the vetting process relied on the guiding principles as set out in the Constitution and statutory provisions as follows;

*(i) National Values and Principles of governance set out in Article 10 of the Constitution including observance of human rights, non discrimination, equality, and social justice, rule of law, good governance and integrity.*

*(ii) Sec. 35(2) of the County Government Act No. 17 of 2012 enjoining the county Assembly to take into account.*

*(iii) Sec. 7 of the Public Appointments (County Assemblies Approval) Act No. 5 of 2017 that sets out the relevant procedures and factors to be taken into account in vetting a nominee for public appointment.*

It was also guided by Kericho County Public Appointments (County Assembly) Approval Act and the Kericho County Assembly Standing Order No.188.

The 1st and 2nd respondents further aver that the vetting process rejected the nomination of five candidates namely, Barnabas Kipkurui Ngeno, Edna Chebet Chepkwony Ruto, Alice Chemutai Mutai, Hellen Chepkirui Ngeno and Moses Kiprotich Langat as members of the Kericho County Executive Committee. In their report – annexed as "DR 1" they asked the 3rd respondent to take into account issues of regional balance, gender and persons with disabilities which was omitted in this exercise in making fresh nominations to the County Executive Committee.

She further avers and submits as follows;

- *THAT no single person with disabilities was nominated and/or had his nomination approved.*

- *THAT just a single female nominee had her nomination approved*
- *THAT it was therefore not possible to approve the nomination of the five (5) above named persons based on the above cited criteria on account of disabilities, gender and regional balance.*
- *THAT the persons did not have appropriate knowledge and understanding of the relevant docket.*
- *THAT the 3<sup>rd</sup> Respondent has not done fresh nominations as was required above and there is still room for the Respondents to meet the above cited requirements of the law on considerations of persons with disabilities especially those who applied for the positions and are also qualified for the remaining positions.*

It is their penultimate case that this petition is premature on grounds that the nominations, interview and approval process has not been concluded. Besides, their annexed report of the 2nd respondent's Committee on Appointments displays total compliance with the requirements of the procedure of vetting and that they arrived at their decision fairly. The petition does not therefore stand for lack of legal basis.

The 3rd and 4th respondents have not filed a response to the petition. Instead, they filed Grounds of Opposition dated 10th November, 2017 and a Replying Affidavit sworn on 11th November instant, both in answer to the application preceding the petition by the respondent. The Grounds of Opposition comes out as follows;

1. *THAT the people from different communities residing within Kericho County are not marginalized communities as contemplated under Article 56 as read with article 260 of the Constitution.*

2. *THAT Kikuyus, Luos, Kisiis and Kambas are not marginalized as per the definition of marginalized community under article 260 of the Constitution which defines marginalized community as follows;*

*a. a community that, because of its relatively small population or for any other reason, has been unable to fully participate in the integrated social and economic life of Kenya as a whole;*

*b. a traditional community that, out of a need or desire to preserve its unique culture and identity from assimilation, has remained outside the integrated social and economic life of Kenya as a whole;*

*c. an indigenous community that has retained and maintained a traditional lifestyle and livelihood based on a hunter or gatherer economy; or*

*d. pastoral persons and communities, whether they are-*

*i. nomadic; or*

*ii. a settled community that, because of its relative geographic isolation, has experienced only marginal participation in the integrated social and economic life of Kenya as a whole;*

3. *THAT the Petitioners have not adduced any evidence to demonstrate that the appointed county executive members were not cleared by the Ethics and Anti-Corruption Commission.*

4. *THAT the Petitioners in their notice of motion and supporting affidavit have not demonstrated by way of proof that Persons from marginalized communities (if any) applied for the positions and were not considered and/or discriminated against.*

5. *THAT in the supporting Affidavit there is no evidence to support the allegations of violations of*

*Constitutional provisions by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.*

*6. THAT the County Assembly are not a proper respondent to this suit as the Assembly only approves nomination that have been forwarded by the Governor in accordance with Article 179 of the Constitution and section 35 of the County Government Act.*

*7. THAT the Petitioner has not demonstrated how the criteria under Article 179 of the Constitution and section 35 of the County Government Act in nominating, vetting and approving County Executive Committee Members has not been met.*

*8. THAT Article 56 of the Constitution is not a right but a principle on how the state shall put in place affirmative action programmes designed to ensure that minorities and marginalized groups participate and are represented in governance and other spheres of life and not a mandatory requirement binding the Governor.*

*9. THAT the application is devoid of merit and should be dismissed with costs.*

Their Replying Affidavit sworn on 11th November, 2017 reiterates the contents of the Grounds of Opposition and further reinforces the role of the County Governor in the articulation of the process of appointments to the positions of County Executive Members which he avers was done with the law in process.

The 3rd respondent in this affidavit continues to deny the conferment of rights under Article 56 of the Constitution to the petitioner/applicant but instead mandates the state to come up with measures of affirmative action to ascertain participation in governance by marginalized groups. As a show of propriety, he annexes a copy of a clearance letter from the Ethics and Anti-Corruption Commission releasing the nominees from any culpability.

The Interested Parties in The Interested Parties Response to the Petition dated 6th December, 2017 deny the petition. They also file Grounds of Opposition that;

*1. The application is brought in bad faith.*

*2. The application is incompetent, bad in law, misconceived and an abuse of court process as there is failure to provide evidence of the allegations of discrimination and violation of the constitution and other laws;*

*3. The orders if granted would be an affront to the constitutional and statutory prerequisites for the grant of the prayers sought*

*4. That the orders being sought which are within the province of discretionary powers of this honourable court cannot be issued where there is not specificity and particulars as required in law.*

*5. The application is fatally deficient and defective.*

*6. The application has no merit in law and fact; and*

*7. Any other ground as shall be adduced at the hearing.*

The Interested Parties come into the petition by virtue of the appointments in various offices as Members of the County Executive Committee. They deny the petition *in toto*. They reinforce their case as follows;

*8. The interested parties aver that their nomination and subsequent appointment was done in accordance with the provisions of the Constitution of Kenya, 2010, the County Government Act, 2012, the Public Service (Values and Principles) Act, 2015, the Public Appointment (County Assembly Approval) Act No. 5 of 2017 and all other enabling guidelines on appointment of County*

*Executive Committees.*

*13. In response to paragraph 36 of the petition, the interested parties states that on 4<sup>th</sup> November, 2017, the Ethics and Anti-Corruption Commission wrote a letter to the 3<sup>rd</sup> Respondent stipulating that there were no outstanding issues or ongoing investigations against the interested parties. There is therefore no advise finding or comments against the nominees.*

*14. The petitioner makes reference to a letter dated 6<sup>th</sup> November, 2017 to accuse the Respondents as well as the interested parties of pending investigations. The alleged letter is not produced. The accusation is baseless and aimed at vexing the court and Respondents.*

*15. The interested parties upon coming across the referenced letter on social media and the letter having been couriered to the 3<sup>rd</sup> Respondent by one KIPTOO KOROS of EACC and telephone number 0729554245 sought to confirm whether indeed the originator of the letter was EACC. EACC wrote back on 14<sup>th</sup> November, 2017 denying the letter terming it a forgery.*

*16. The interested parties states that by introducing and referring to a forged letter to this Honourable court, the petitioner is;*

- i. Untrustworthy, undependable and irresponsible petitioner who wants to mislead this honourable court,*
- ii. A fraudster in that he wants to obtain orders by fraud, and*
- iii. A person who cannot be trusted to objectively represent the public as he alleges.*

*29. The petitioner has alleged that constitutional provisions have been breached by exclusion of other tribes or category or persons in the nomination thus discriminating against them. The interested parties states as follows;-*

- i. The shortlisting was objectively done considering all the applicants.*
- ii. The listing was fair and reasonably justifiable and it differentiates between persons according to objectively determinable criteria intrinsic of the position advertised and no other considerations,*
- iii. Laws differentiate between persons but not every differentiation equates to discrimination, and*
- iv. There was compliance and guidance by the provisions of article 10 of the Constitution of Kenya in the compliance of the list and the subsequent appointment of the County Executive Committee.*

*30. The petitioner has not furnished the court with particulars of what he alleges as discrimination. Therefore, this Honourable court should not be drawn into determining whether certain acts amount to discrimination without such particulars being appropriately furnished in the pleadings.*

They therefore submit an inconclusive, unfounded and baseless case for the petitioner.

The issues for determination therefore are;

1. Whether this court has jurisdiction to hear and determine this petition?
2. Whether the petitioner has set out and proved a case of violation of the Constitution and the

County Governments Act, 2012 in the nomination, vetting and appointment of the Interested Parties as members of the Kericho County Executive Committee?

3. Whether the petitioner is entitled to the relief sought?

4. Who bears the costs of this petition?

The 1st issue for determination is whether this court has jurisdiction to hear and determine this petition. This issue was not canvassed in the pleadings or even at the hearing of this petition. Whatsoever, no mention of this was made any earlier than these written submissions. This court position is that this matter and issue should have been brought out as a preliminary objection and thrashed at the onset of these proceedings. Sneaking the issue at this point amounts to an ambush not only to the parties but also to court. Why would the respondents (1st and 2nd) await all this time to bring out such a determinant matter in middle of nowhere?

I do not find it useful to enter into an analysis and determination of this issue.

This is because regardless of its placement in the proceedings, it does not add value to the same. Moreover, it is neither pleaded and is therefore futile.

The 2nd issue with determination is whether the petitioner has set out and proved a case of violation of the Constitution and the County Governments Act, 2012 in the nomination, vetting and appointment of the Interested Parties as members of the Kericho County Executive Committee. The parties hold diametrically opposed positions on this.

I note that the petitioner does not file written submissions in support of his case. This must be deliberate bearing in mind that all parties were awarded adequate time and space to file the same.

The 1st and 2nd respondents in their written submissions dated 11th January, 2018 submit a case of compliance with the procedural, legal and constitutional requirements for nomination, vetting and appointment of members of the County Executive Committee. In this, they reiterate the contents of the replying affidavit as evidenced by the Report of the County Assembly Committee and Vetting annexed therein and marked "DR-1."

It is their further submission that the County Assembly Committee of Appointments rejected several nominations for the appointment as members of the County Executive Committee on grounds *inter alia* that the nomination did not take into account issues of regional balance, youth, gender and persons with disabilities. The Committee in its concluding remarks on the report made recommendations to the Governor – the 3rd respondent, to consider and configure these factors in making fresh nominations.

The respondents further fault the petitioner for not adducing evidence in support of the allegation of default to pursue due process in vetting the nominees, or at all. Further, she submits as follows;

*The petitioner is only challenging the decisions of the Respondents which*

*decision making process has not been concluded and has not in his petition established that there were defects in the procedure adopted in reaching the decisions or that are likely to affect future decisions. He has not shown any fundamental omissions or consideration of extraneous or irrelevant matters that would render the cumulative process unconstitutional. This petition ought to fail on that account.*

This is all too telling.

The 1st and 2nd respondents further reinforce their case by relying on the authority of **Simon Wachira Kagiri vs. County Assembly of Nyeri & 2 Others (2013) eKLR** where at page 21 where it was held that;

*“The petitioner therefore appears not to attack the procedure adopted by the 1st and 2nd respondent, but the substance of the vetting process itself. Pausing here, does the Court have jurisdiction to do so “in the case of **Trusted Society of Human Rights Alliance vs. The AG & 2 Others** **Petition Number 2269 of 2012** the High Court stated;*

*“...the court is entitled to review the process of appointment to state or public offices for procedural infirmities as well as for legality. A proper review to ensure the procedural soundness of the appointment process includes an examination of the process to determine if the appointing authority conducted proper inquiry to ensure that the person appointed meets constitutional requirement.*

*The court is therefore clothed with jurisdiction to question the substance of decisions made by other organs of government such as the 1st and 2nd respondent but only to the extent of their constitutionality or otherwise. The court must guard against the temptation to substitute its own opinion and judgement with that of other state organs properly mandated to make such decisions”*

*It was further held at page 23 of the said decision that:-*

*“The Committee had the opportunity to interview the petitioner and in the absence of any material to show they acted in excess of their jurisdiction or took into account issues that they ought not to have taken into account, cannot be faulted. In conducting the process, the Committee and the 1st respondent were agents of the County Government hence had the duty and responsibility to recommend for appointment not only the best person for the job but also comply with the constitution and enabling statutes with regard to national values, gender balance and equity in public appointments. Nothing has been shown by way of evidence or affidavit that they acted contrary to the constitution or any law. The petitioner has merely made broad allegations of violations by the 1st and 2nd respondent without getting to the specifics of how and in what way the Committee violated those rights or failed to comply with the law. In the case of **Anarita Karimi Njeru vs. The Republic (1976 – 1980) 1KLR 1272** the court held as follows with respect to constitutional applications:*

*“...if a person is seeking redress from the High Court on a matter which involves a reference to the constitution, it is important that he should set out with reasonable degree of precision that of which he complains, the provisions said to be infringed and the manner in which they are alleged to be infringed.”*

The 1st and 2nd respondents in these submissions reiterate their case of compliance and further that the petition has miserably failed to raise any or any sufficient grounds and therefore should fail.

The 1st and 2nd respondent’s further submits that the petition offends the doctrine of separation of powers. This is demonstrated by section 16 and 17 of the County Government Act as follows;

*16 “No civil or criminal proceedings may be instituted in any court or tribunal against a member of a county assembly by reason of any matter said in any debate, petition, motion or other proceedings of the county assembly”*

*17 “The national law regulating the powers and privileges of parliament shall, with the necessary modifications, apply to a County Assembly”*

The further buttress this by reliance of the authority of the National Assembly (Powers and Privileges Act CAP 6 Laws of Kenya at S.12 provides:

*“No proceedings or decision of the Assembly or the Committee or Privileges acting in accordance with this Act shall be questioned any court.”*

Again, they rely on the authority of **Simon Wachira Kagiri vs. County Assembly of Nyeri & 2 Others**

(2013) eKLR (supra) at pages 18 and 19 that;

*“The only possible scenario in which the court may be prepared to interfere with the proceedings and decisions of the County Assembly and indeed Parliament is in extreme situations when these bodies act or conduct their proceedings in a manner that amounts to abrogation of the Constitution. I say so because article 1 of the Constitution vests the sovereign power on the people of Kenya which they can either exercise directly or through their democratically elected representatives. This sovereign power is delegated to parliament, legislative assemblies of the county governments, the judiciary sovereignty, an organ of the state acts in excess of such power, the High Court exercising its authority under article 165 (3) (d) of the Constitution has power on being moved to issue appropriate orders in the circumstances. In recent case of Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 Others Civil Appeal No. 290 of 2012 the Court of Appeal in interpreting the breadth and scope of article 165(3) (d) took a similar view and held as follows;*

*“...It is clear that on its face, the jurisdiction of the High Court is broad enough to cover review of the constitutionality or legality of appointments by other organs of government...”*

*A similar position was taken by the High Court in the case of Federation of Women Lawyers Kenya (FIDA-A) & 5 Others vs. The Attorney General & Another [2011] eKLR when the court held:*

*“...If the process of appointment is unconstitutional, wrong, unprocedural or illegal, it cannot lie for the respondents to say that the process is complete and this court has no jurisdiction to address the grievances raised by the petitioners...the jurisdiction of this court is dependent on the process and constitutionality of the appointment..”*

I agree.

The 3rd and 4th respondents in their written submissions dated 20th November, 2017 also follow the case and arguments of the earlier respondents as illustrated in the authority of **Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 Others (2013) eKLR** as follows;

*However, separation of powers 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 license to take over functions vested elsewhere. There must be judicial, legislative and executive deference to the repository of the function.”*

*“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 also concede, the Courts have an interpretative role-including the last word in determining the constitutionality of all government actions...”*

They also sought to rely on the authority of **The Obama White House and The Supreme Court, page 71-72** thus;

*“There are a (sic) number of procedural doctrines that can be used for this purpose. Other examples include ripeness (is it too early for a court to decide the case?), mootness (is it too late for a court to decide a case?), venue (is this court the right one?), and the “political question” doctrine (is the subject matter appropriate for a court to decide at all?). Everyone agrees that these doctrines are necessary, at some level; the courts cannot be allowed to weigh in on controversies simply because judges feel like deciding the merits.”*

Again in the authority of **Shadrack Kosgei & another v Governor of Nakuru County & 2 others [2016] eKLR** the court was faced with similar situation the court held thus;

*No allegations has been made by the Petitioners that the above procedures were not followed by the Respondent in making the appointments in question. The contention by the Respondents that all the positions including those for County Executive Committee members were competitively sourced that has not been refuted by the Petitioners at all. It was not even alleged much less proved that any person from the marginalized groups applied for any of the posts and despite being properly qualified was not appointed. Further the Petitioners did not in any way challenge the qualifications suitability and/or competence of any of the 19 appointed persons.*

*The same situation pertains in this present petition. No proof of the ethnicity of the 19 appointed persons has been availed to this court. A mere allegation of ethnicity without substantive evidence to prove the same will not suffice. The names of the appointed persons are not sufficient basis upon which this court can impute their ethnicity. It is highly likely and I have no doubt that information showing the true ethnic extraction of each appointed person is in fact in the custody of Respondents. However the Petitioner made no application to have that information availed to them or to the court. There was nothing barring the petitioners from making such an application. Their failure to do this leaves their allegations of ethnic bias unproven.*

This is agreeable and flows into the current circumstances.

The Interested Parties in their written submissions dated 13th December, 2017 also largely pursue the path of the respondents. It is their submission that the petitioner has not met the constitutional threshold of proof of any case against them. In this they rely on the authority of **Mumo Matemu (supra)** as follows;

*“It is a fundamental tenet of the rule of law that evidence, whether real, documentary, circumstantial or presumptive is the basis of any judicial decision and that is why judicial decisions are not founded on a toss of the coin”*

Further, this is buttressed as follows;

*“We cannot but emphasize the importance of precise claims in due process, substantive justice, and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims. However, we also note that precision is not coterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated. We speak particularly knowing that whole function of pleading, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude ex ante is to miss the point.”*

Again in **Bernard Murage v Fineserve Africa Limited & 3 Others [2015] eKLR**, the court observed as follows;

*In the circumstances and following the principle restated above, where a party is unable to plead with some precision how a right or fundamental freedom has been violated, a court ought not to speculate and make findings based on conjecture*

The Interested Parties apply the above authorities in support of a case of lack of

proof of the issues complained of by the petitioner. It is their submission that the petitioner has not provided an iota of evidence to prove that the appointment was in violation of the law, breach of the Constitution or other subsidiary or statutory legislation.

Again, the petition does not provide particulars of the alleged complaints or even

the manner of infringement of the actions complained about. It is also bear of the jurisdictional basis of the action before court thus making it prejudicial to their interest. It is their submission that the petition

as drafted and presented does not meet the constitutional test for proof in constitutional matters and should not be allowed to stand.

I agree with the respondents and Interested Parties. This matter does not stand the test of proof. It does not meet the constitutional threshold of proof in constitutional matters.

The petition in whole is an expression of lack of compliance with various constitutional provisions in the nomination, vetting and appointment of members of the County Executive Committee – Kericho County. Beyond a narration of the various breaches of the Constitution and the law by the appointing and vetting authorities, the petitioner does not particularize or adduce any empirical evidence in support of the alleged breaches. This transgresses the legal position as expressed in the authorities of **Anarita Karimi Njeru vs Republic** and **Mumo Matemu vs Trusted Society of Human Rights Alliance & Others (supra)**, all expressed earlier in this judgement.

The issue of burden of proof is cardinal in all legal proceedings. This is clearly provided for under section 107 and 108 of the Evidence Act, Chapter 80, Laws of Kenya. It is also a candid principle of law that he who alleges must prove. The petitioner was always duty bound to discharge his burden of proof or falter in his quest for relief. This is more so in cases of allegations of constitutional breaches as is well established by precedent.

Again, the petition as presented is premature. It should always have been a later day affair. The respondents argue and submit that the process of vetting and recruitment of County Executive Committee members is incomplete and ongoing. The interview and approval process is not concluded and this gives the complainant parties and the petitioner an opportunity to participate if they so wish and qualify. This therefore pre-empts the petition.

The respective cases of the respondents and Interested Parties display a faultless process in the nomination vetting and appointment of the County Executive Committee. This is clearly evidenced by the Report of the Committee on the Vetting of nominees for the positions of County Executive Committee Members and recommendation for appointment filed in court as read with the letter of clearance of the nominees by the Ethics and Anti-Corruption Commission dated 4th October, 2017.

The 1st and 2nd respondent's also bring out an interesting angle and submission in defence. It is their argument that the petitioners' allegation of discrimination against minority groups within Kericho County, to wit, Kikuyus, Luos, Kisiis, Kambas *et al* is not founded in that in the first place this are not marginalized communities in terms of Article 260 of the Constitution. This cannot be all true. A broad and purposeful interpretation of the constitution would pre-empt this narrow approach at marginalization. In the first place, it is public knowledge dispute that these communities are outnumbered in the county. The possibility of a subversion of their interest would not be entirely be overruled in the circumstances. This is the marginalization anticipated and pre-empted by the constitutional provisions.

Overall, the petition is not proven by evidence. The cases of the respondents and interested parties overwhelmingly demonstrate this. It must therefore fail. And this answers the 2nd issue for determination.

The 3rd issue for determination is whether the petitioner is entitled to the relief sought. He is not. Having failed to sustain a case of breach of legal and constitutional provisions in the process of appointment of the County Executive Committee, he loses all. He is not entitled to the relief sought.

I am therefore inclined to dismiss the petition with orders that each party bears their own costs of the petition.

Delivered, dated and signed this 31st day of January 2018.

**D.K.Njagi Marete**

## **JUDGE**

### Appearances

1. Mr. Ochang' instructed by Ochang' Ajigo & Company Advocates for the petitioner.
2. Mr. Ochieng instructed by Sila Munyao & Company Advocates for the 1st and 2nd respondents.
3. Dr. Bett instructed by Manyonge Wanyama & Associates Advocates for the 3rd and 4th respondents.
4. Mr. Sigei instructed by Sing'oei Murkomen & Sigei Advocates for the Interested Parties.