



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU**

**PETITION NO. 40 OF 2017**

*(Before Hon. Justice Mathews N. Nduma)*

**JOHN CHEBUN BOR (ACTING ON  
BEHALF OF THE TERIK COMMUNITY) .....PETITIONER**

**VERSUS**

**THE HON. DR. WILBER K. OTTICHILLO.....1<sup>ST</sup> RESPONDENT**

**THE COUNTY ASSEMBLY OF VIHIGA .....2<sup>ND</sup> RESPONDENT**

**AND**

**HENRY MANGONGO LUMBASIO**

**& 9 OTHERS .....INTERESTED PARTIES**

**RULING**

1. Preliminary Objection has been raised by the Respondent to the amended petition filed on 30<sup>th</sup> October, 2017 by The Terik Community against H. E. Hon. Dr. Wilber K. Ottichillo, Governor, Vihiga, 1<sup>st</sup> Respondent and The County Assembly of Vihiga, 2<sup>nd</sup> Respondent. The impugned nominated County Executive members, ten (10) in number are cited as interested parties.
2. The Terik Community in Vihiga County claim to be a marginalized Community and allege discrimination in the nomination of the County Executive Members and seek declarations to void the nomination, the vetting process already done and to injunct the appointments by the Governor, upon swearing in by the County Assembly.
3. The vetting process has been done in respect of nine (9) interested parties and is pending in respect of one (1) interested party.
4. The Respondents in the preliminary objection allege that the court lacks jurisdiction to entertain the petition in that the cause of action does not arise for an employment and labour relationship as envisaged under Article 162(2) of the Constitution of Kenya 2010, as read with section 12 of the Employment and Labour Relations Court Act, Cap 234 of the Laws of Kenya.
5. The Respondents rely on the rendition of **Nduma J in Nick Githinji Ndichu v Clerk, Kiambu County Assembly & another [2014] eKLR** for the proposition that the petition falls short of criteria for

establishment of an employer and employee relationship between the parties and therefore the court lacks jurisdiction to entertain the same.

6. The Respondent submit that the process of recruitment of the intrested parties was not complete and jurisdiction cannot be founded on prospective employment relationship.

7. The Respondent further argue that the court cannot interfere with the function of County Legislative Assembly of vetting the interested parties. That only after that process is complete would the court have jurisdiction to interfere.

8. That the petition has been filed prematurely and the court should down its tools and move no further as it lacks jurisdiction to entertain the suit.

### **Opposed**

9. The preliminary objection is opposed by the petitioner urging that the recruitment process of a prospective employee is subject of scrutiny and determination by the Employment and Labour Relations Court. That the Constitution of a new executive after an election is governed by section 42(1) of the County Governments Act, and in terms of 42(2), the process ought to be completed within 21 days upon swearing in of the members of the County Assembly.

10. That the Governor forwarded his list of nominees to the county Assembly for vetting on 28<sup>th</sup> September, 2017, twenty two (22) days after the swearing of the County Assembly members on 6<sup>th</sup> September, 2017 and therefore the process is flawed.

11. That the petition impugned the nomination on two fronts in that the Terik Community was not represented in the list of names sent for vetting and that in any event the process was contrary to section 42(2) of the Act, in that the names were presented late.

12. That the process is not yet completed in that appointment by the Governor has not been done and was injucted by the court correctly.

13. The petitioner further submits that the court has jurisdiction to interpret and implement the bill of rights. That Article 21 on the implementation of the rights and fundamental freedoms provides –

*“(3) All state organs and all public officers have the duty to address the needs of vulumable groups within society, including women, older members of society, persons living with disability, children, youths, members of minority or marginalized communities and members of particular ethic, religious or cultural communities.”*

14. That in the present case, the nominees, include only two women and there was no nominee from Terik Community which omission prompted petitioner to raise complaint in writing to the Respondents and failing a response, the petition was filed.

15. That the constitutional issues arising in this matter flow from an employment and labour environment as contemplated under section 12 of the Act as follows –

*“(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 provision of this Act or any other written law which extend jurisdiction to the court relating to employment and labour relations including –*

*As disputes relating to or arising out of employment between an employer and an employee.”*

*(emphasis mine)*

16. It is now settled that the relationship between a Governor of a County and the County Executive Members is an employment relationship going by the criteria set out in the case of Githinji (supra) and adopted by the Court of Appeal in County Assembly of Kisumu and 2 others v Kisumu County Assembly Service Board and others [2015] eKLR as follows:-

*“It is clear from the foregoing that the law is not concerned with the method of acquiring an employee. The law does not concern itself with whether the person was appointed or elected. Rather the person must;*

*(i) be providing a service to a real or legal person.*

*(ii) be receiving a wage/salary for the services rendered.*

*If such a person has a dispute with the person with whom he/she has a contract of service and to whom he/she provides services for a wage or salary, the court has jurisdiction over such dispute and has available remedy for that purpose.”*

17. I would hasten to add a fourth criteria, which is that a person must in providing such service be under the direction and control of the person to whom service is being given.

18. The petition herein is brought on a matter relating to an employment and labour relationship raising constitutional issues for interpretation and implementation. A third party, such as the petitioner herein is perfectly entitled to bring such a petition in terms of Article 22 and 23 of the constitution of Kenya 2010. Article 22 provides –

*“(1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been deemed violated or integrated 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 clan of persons.*

*(c) a person acting in public interest; or*

*(d) an association acting in the interest of one or more of its members”*

19. This provision covers the petitioner herein perfectly, and the subject of the suit relates to a recruitment process of County Executive Members, which is an employment and labour relationship.

20. In **prof. Daniel M. Mugendi v Kenyatta University Court of Appeal at Nairobi civil Appeal No. 6 of 2012** at page 9 settled the matter thus;

*“49 – A correspondent court of the High Court that is the industrial court has now been established to deal with employment and labour matters. It follows that all employment and labour relations matters pending in the High Court shall now be heard by the industrial court which is now a court of the status of the High Court. The High Court thereof lack jurisdiction to deal with matters of employment and labour whether filed at the High Court before or after the establishment of the industrial court.”*

21. The Court of Appeal in **Judicial Service Commission v Gladys Boss Shollei and another Civil Appeal No. 50 of 2014 (2014) eKLR** at **page 15** augmented the matter thus:-

*“Labour and employment rights are part of the Bill of Rights and are protected under Article 41*

*which is within the province of the Industrial Court. To exclude the jurisdiction of the Industrial Court from dealing with any other rights and fundamental freedoms whatsoever arising from the relationship defined in section 12 of the industrial court Act 2011 or interpret the constitution would lead to a situation where there is parallel jurisdiction between the High Court and the Industrial Court. This would give rise to forum shopping thereby undermining a stable and consistent application of employment and labour law”*

22. In the present matter, the Governor has made the nominations, the County Assembly vetted and appointed 9 of the 10 nominees and are awaiting final appointment by the Governor to the positions. We have clearly stated that recruitment process is subject to the jurisdiction of this court as well as any disputes that arise upon actual appointment. See **Joseph Mutuura Mbeeria and another vs Cabinet Secretary for Education Science and Technology & 2 others [2014] eKLR** and **Okiya Omutatah Okoiti & another v Cabinet Secretary Ministry of Education & 5 others [2017]eKLR** in which E & LRC issued an order of mandamus to stop recruitment process of University Council Members by CS Education.

23. The impugned action is the nomination by the Governor which is said to exclude certain components of the community. It is right that action be scrutinized by the court, and if found wanting, it be made right before final appointment is done. This includes the vetting and approval by the County Assembly. The court therefore has jurisdiction to deal with the petition.

24. This holding is affirmed by the Court of appeal in **County Assembly Kisumu and 2 others v Kisumu County Assembly Service Board and 6 others [2015] eKLR** where Maraga, Musinga and Murgor J.J.A stated –

*“The court must resist unwarranted intrusion into internal proceeding of parliament and County Assembly unless they act unconstitutionally. As this court stated in Martin Nyaga Wambora & others v Speaker of the Senate & others where it is shown that in concluding its proceedings a legislative authority has acted within the counties of the constitution, courts have no jurisdiction and ought not to interfere simply because anybody is aggrieved by a decision passed by the legislative authority. However, where they have not, the court can interfere. This is because the legislative assembly, like all other organs of state and indeed every person must act in accordance with the constitution.”*

25. The Supreme Court in the case of **Justus Kariuki Mate & another v Martin Nyaga Wambora & County Assembly of Embu** upheld this view but reversed the decision of the Court of Appeal on the basis that courts under the doctrine of separation of powers lack jurisdiction to interfere with the proceedings of the national and County assemblies before they conclude their processes. That courts ought to focus on outcome of Assembly proceedings, but not to interfere with the proceedings themselves unless there is a clear case of unconstitutional conduct by the Assembly.

26. The rendition by the South African Constitutional Court in the case of **Doctors for Life Insurance v Speaker of The National Assembly and others** is opportune;

*“Courts are required by the constitution to ensure that all branches of government act within the law and fulfil their constitutional obligations.”*

### **Application dated 27/10/17**

27. The Petitioner/Applicant in the application dated 27<sup>th</sup> October, 2017 prays for orders directed at the Respondents, restraining them from admitting oath of office to the interested parties as members of the County Executive committee pursuant to Gazette Notice No. 10622 and from allowing the said persons to assume or remain in office as such until the petition is heard and determined.

28. It is common cause that the approval process has been completed and Gazette Notice issued appointing the interested parties except the 10<sup>th</sup> interested party, whose vetting had not been concluded.

29. The issue for determination is whether the petitioner/applicant has satisfied the requirements for grant of an interim injunction. The criteria was well settled in the celebrated case of **Giella v Cassman Brown and company Limited (1973) EA 358** where the court held at page 360 as follows:-

*“First, an applicant must show a prima facie case with probability of success. Secondly an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt it will decide an application on the balance of convenience.”*

30. The onus of proof is on the applicant on a balance of probabilities.

31. The court has carefully considered the application and the replying affidavit by Mr. Ambaka Kilinga, the clerk of the County Assembly of vihiga and the submissions by the parties and the court has reached the conclusion that the applicant has satisfied the court that he has a prima facie case with probability of success. However, the applicant has failed to demonstrate he is likely to suffer irreparable injury if the interim injunction is not granted because the applicant has other statutory and constitutional remedies available to remedy the issue of marginalization of the Terik Community without preventing and or obstructing the County Government of Vihiga from exercising its statutory and constitutional mandate to govern the County of Vihiga.

32. Public interest is in favour of this court not granting the injunction sought. The failure to grant the injunction does not in itself defeat the pending petition, pursuant to which the court, may if persuaded issue appropriate orders to remedy the issue in dispute.

33. The application is dismissed and all interim orders issued pursuant to the various applications filed in this matter are discharged.

**Dated and Signed in Kisumu this 22nd day of February, 2018**

**Mathews N. Nduma**

**Judge**

**Appearances**

Mr. Musiega & Co. Advocates for Petitioner/Applicant

Mr. M. Sore for 1<sup>st</sup> Respondent

Mr. Khasiala for 2<sup>nd</sup> Respondent

Chrispo – Court Clerk