



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT KERICHO

PETITION NO. 12 OF 2017

(Before D. K. N. Marete)

DR. MOSES KIPROTICH LANGAT.....PETITIONER

VERSUS

THE KERICHO COUNTY ASSEMBLY COMMITTEE

ON APPOINTMENTS.....1ST RESPONDENT

THE SPEAKER OF THE KERICHO COUNTY ASSEMBLY.....2ND RESPONDENT

KERICHO COUNTY ASSEMBLY.....3RD RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....4TH RESPONDENT

JUDGEMENT

This is a petition dated 19th October, 2017 and sets out various violations of the petitioners legal and constitutional rights in the Constitution. The County Governments Act and various legislation of the County Government of Kericho.

The 1st and 3rd respondents in a Replying Affidavit sworn on 5th December, 2017 deny the petition and pray that the same be dismissed with costs.

The petitioner's case is that on 26th August, 2017, the County Government of Kericho placed an advertisement in the Nation Newspaper inviting suitable candidates to apply for the various positions in the County Executive Committee.

The petitioner's further case is that pursuant to the said advertisement, he tendered his application to be considered for the Education, Culture and Social services docket of which he was successful and his name, alongside nine (9) others, was submitted to the 3rd Respondent by the Governor for vetting in accordance with section 35 and 42 (2) of County Government Act, 2012. A committee on appointments was thereon set up by the 3rd Respondent in terms of Standing Order No. 188 for vetting nominees by the 1st Respondent.

The petitioner avers that vetting process was premised and undertaken against the following legal regimes and activities as follows;

11. The vetting process was to be guided by various laws namely;

- i. The Constitution of Kenya, 2010*
- ii. The County Government Act, 2012*
- iii. The Public Appointments (County Assemblies Approval) Act, Act No. 5 of 2017*
- iv. The Kericho County Public Appointments (County Assembly) Approval act, 2014*

12. The clerk to the 3rd Respondent notified the public on the proposed nomination through the Nation newspaper.

13. In conducting the vetting process, the 1st Respondent was to be guided by the criteria as set out in the Public Appointments (County Assemblies Approval) Act, Act No. 5 of 2017 namely;

- a) Academic qualifications
- b) Professional qualification
- c) Employment record
- d) Experience as relating to the docket
- e) Knowledge of the relevant subject
- f) Potential Conflict of interest
- g) Probono/Charity Work
- h) Integrity
- i) Vision and Leadership
- j) Expectations and key priorities
- k) Overall suitability for the position

The petitioner's other case is that the 1st respondent interviewed the petitioner alongside other nominees and prepared a report which was submitted to the 3rd respondent at a meeting of the whole house on 18th October, 2017 and the report was adopted and approved unanimously.

The petitioner further avers that at page 41 of the said report, the petitioner was found unsuitable for appointment to the position of County Executive Committee member in charge of Education, Culture and Social Services for two (2) main reasons;

I. The Petitioner did not have the experience and competence for management of ECDE and village polytechnics.

II. The Petitioner is a maternal cousin to Mr. Patrick C. Mutai nominee for Finance and Economic Planning.

It is his further case that the grounds of his rejection for appointment are illegal, unreasonable, irrelevant, discriminatory, ludicrous, preposterous and unconstitutional and a blatant violation of the under listed provision of the Constitution of Kenya, 2010, the County Governments Act and the Public Approvals (County Assembly Approvals) Act, No. 5 of 2017. These breached the petitioner's rights as follows;

- Articles 27(4), 27(5), 28, 39 (3), 41 (1), 43, 47 (1), 48 and 56 (c) rendering the same null and void for all intents and purposes.
- Articles 12 (1), 20 (2), 3, 22 (1) and 10 of the Constitution of Kenya, 2010.

These breaches are clearly expressed by the petitioner in the petitioners Affidavit in Support of Petition sworn on 26th November, 2017 particularly paragraphs 12 – 18.

The petitioner is apprehensive and avers that the 1st respondent took into consideration extraneous issues in arriving at the decision to reject the petitioner's nomination thereby violating his rights. This is further expressed as follows;

19. The Petitioner being a person and citizen within the meaning of both Article 12(1) and 20(2) of the Constitution of Kenya, 2010, is entitled to each and all the fundamental rights and freedoms expressed and or implied in the Constitution.

20. Article 3 of the Constitution of Kenya, 2010 obliged the Respondents (and indeed all other persons) to uphold and defend the Constitution and in particular to insist that all organs and or bodies of the Government of Kenya equally respect, uphold and defend the Constitution

21. Article 22(1) of the Constitution of Kenya, 2010 entitles the Petitioner (and indeed all persons) to move the Honourable Court whenever a right or fundamental freedom in the Bill of rights was denied, violated, infringed or threatened.

22. Article 10 of the Constitution of Kenya, 2010 obliged the Respondents to observe human rights, non-discrimination, equity, social justice, rule of law, good governance, and integrity in exercise of their functions.

23. Article 47 (1) of the Constitution of Kenya, 2010 entitles the Petitioner (in common with other persons) to a fundamental and inalienable right to a lawful and procedurally fair administrative action.

24. Rejecting the nominee on the basis of being related to another nominee is illegal, unreasonable, irrelevant, discriminatory and does not fit into any of the criteria which was set out by the 1st Respondent as contained in page 9 of its own report.

25. One wonders what informed the decision of the respondent to reject the petitioner and not the cousin for the other docket if not open bias.

26. If the relationship was to matter the 1st Respondent ought to have invoked the conflict of interest criteria but in page 40 of its report the Petitioner was found not to have any potential conflict of interest that might hinder the discharge of duties as CEC member in charge of education, culture and social services.

27. By expressly admitting that the Petitioner had the right qualifications and good academic credentials, but declining to approve the Petitioner for appointment unreasonably and violated the Petitioner's right to fair labour practices contrary to the provisions of Article 41 (1) of the Constitution of Kenya.

28. To infer that a holder of Doctorate Degree (PHD) is not capable of managing child education and village polytechnics is illogical, unreasonable and a total misnomer.

29. By refusing to approve the petitioner for appointment to the Kericho County Executive Committee without giving cogent reasons for rejection of petitioner as nominees for appointment into the Executive Committee, the respondents acted illegally, unreasonably and violated the petitioner's right to administrative action that is lawful, reasonable and procedurally fair, contrary to the provisions of Article 47 (1) and presumption of innocence contrary to Article 50 (2) (a) of the Constitution of Kenya.

He prays as follows;

- a. A declaration that the proceedings of the Kericho County Assembly to reject the petitioner for appointment to Kericho County Executive Committee breached the petitioner's constitution rights under articles 27(4), 27(5), 28, 39(3), 41(1), 43, 47(1), 48 and 56 (c) of the Constitution of Kenya, and were null and void for all intents and purposes;
- b. A declaration that the proceedings of Kericho County Assembly to reject the petitioner for appointment to Kericho County Executive Committee breached the constitutional rights of the residents of Kericho under article 43 of the Constitution of Kenya, and were null and void for all intents and purposes;
- c. A declaration that the proceedings of the Kericho County Assembly to reject the petitioner for appointment to Kericho County Executive Committee patently violated the provisions of section 35 of the County Government Act No.5 of 2017 and were null and void for all intents and purposes;
- d. A declaration that the proceedings of the Kericho County Assembly to reject the petitioner for appointment to the Kericho County Executive Committee patently violated the provisions of section 9 of the Public Appointments (County Assembly Approval) Act No.5 of 2017 and were null and void for all intents and purposes;
- e. That pending the hearing and determination of the application inter partes, conservatory orders of stay do issue to stay the decision of the respondents to reject the nomination of the petitioner;
- f. An order of Judicial Review Orders of Mandamus to remove into this honourable Court and compel the Kericho County Assembly to approve the nomination of the petitioner as a member of the Kericho County Executive Committee there being no statutory and constitutional principle to reject the petitioner from being appointed to the Kericho County Executive Committee;
- g. An order of Judicial Review Orders of Prohibition to remove into this honourable Court and Prohibit the Governor of Kericho County from presenting to the Speaker of Kericho Assembly or any person whatsoever, any fresh names of nominees for approval by Kericho County Assembly for appointment as members of Kericho County Executive Committee and if a name has already been presented, the Respondents be prohibited from vetting such fresh nominee;
- h. An order of Judicial Review Orders of Manadamus to remove into this honourable Court and Compel the Governor of Kericho County to appoint the petitioner as a member of the Kericho County Executive Committee;
- i. An order expunging the grounds contained in page 41 of the Committee of Appointment's report as unconstitutional and thus unlawful;
- j. All the necessary and consequential orders and directions be given.
- k. The cost of this application be provided for.

The respondent's case opens with an agreement with basic facts of the petition as relates to the advertisement by the County Government of Kericho all the way through the petitioners application, nomination and placement for vetting as nominee for the position of County Executive Committee – Education, Culture and Social Services.

The respondent's further case, as set out in their Replying Affidavit sworn on 5th December, 2017 is as follows;

10. **THAT** the report marked “MKL5” in the Petitioner’s Supporting Affidavit was on 18/10/2017 eventually adopted by the County Assembly.

11. **THAT** the guiding principles that the County Assembly considered whether to approve or reject nominees for appointment to the County Executive Committee are set out in the following Constitution and Statutory Provisions.

12. **THAT** the vetting process was also guided by the Kericho County Public Appointments (County Assembly) Approval Act and The Kericho County Assembly Standing Order No. 188.

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 vetting a nominee for public appointment.

13. **THAT** in compliance with the aforesaid provisions, the County Assembly Committee of Appointments and the County Assembly rejected the Petitioner’s nomination for the appointment as a member of the Kericho County Executive Committee on the following grounds enumerated at **para. 3.8.5** at page 38 and **para. 3.8.10** at **page 39 – 40** of the Report marked “MKL5” in the Supporting Affidavit.

a) Though he has experience academic qualifications and knowledge in education field and research, more so post secondary education and despite the fact that he was highly qualified in the field of chemistry, he lacked basic experience in management of devolved function as provided for by the 4th schedule part II of the Constitution with respect to pre-primary education, village polytechnics, home craft Centers and Child Care Facilities this explanation of his experience to ECDE was not satisfactory.

b) The nominee was a material cousin of one Patrick C. Mutai the nominee for Finance and Economic Planning.

The respondents further aver that other issues for consideration and arising out of the vetting process are;

14. **THAT** at page 50 of the Report, the Committee of Appointments also asked the Governor, in making fresh nominations, to take into account issues of regional balance, gender and persons with disabilities which was not done during the previous nomination exercise subject hereof.

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

16. **THAT** just a single female nominee and two nominees from Bureti Sub County where the Petitioner hails from had their nominations approved i.e Geoffrey Kipkurui Ruto and Shadrack Kipkemoi Mutai.

17. **THAT** it was therefore not also possible to approve the nomination of the Petitioner based on the above cited criteria on account of disabilities, gender and regional balance.

18. **THAT** it is also obvious that the Petitioner did not have appropriate knowledge and understanding of the relevant docket.

Foremost, the respondents contend and aver that the petitioner does not have appropriate knowledge and understanding on the relevant docket.

The respondents further twist their defence and make other averments as follows;

20. **THAT** this court is being invited to sit on an appeal over the opinion of the organ of appointment which powers this court lacks and any invitation to so act ought to be resisted in the strongest terms possible.

21. **THAT** even if this court was to uphold this Petition, the most it can do will be to refer the Petition back to the deciding body with directions on which procedural lapses occurred and require their correction as opposed to making its own decision, even if its eyes it would have conducted the matter and made a decision differently.

22. **THAT** it is evident on a cursory look at the pleadings herein that the County Assembly and the Committee on Appointments complied will all the provisions of the law in regard to the procedure followed in the vetting process and arrived at its decision fairly.

23. **THAT** the Petitioner is seeking to defeat the doctrine of separation of powers, which demand that there is a distinction between the legislative and other organs of the government.

In the penultimate, the respondents deny that this court has jurisdiction to entertain the petition as set out.

The issues for determination therefore are;

1. Whether this court has jurisdiction to hear and determine this matter?
2. Whether the non-joinder of the County Governor of Kericho in this petition is fatal?
3. Whether the respondents vetting exercise and process met the constitutional and statutory threshold as to warrant upholding?
4. Whether the claimant is entitled to the relief sought?
5. Who bears the costs of this claim?

The 1st issue for determination is whether this court has jurisdiction to hear and determine this matter. The matter of lack of jurisdiction for this court was raised by the respondents. The petitioner however resists and rubbishes this as being a non issue.

The respondents form a case of lack of jurisdiction by this court to hear and determine this petition and ground their submissions on section 162 (2) (a) and section 12 of the Industrial Court Act the latter of which defines an employer as;

“Any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company”

“A person employed for wages or a salary and includes an apprentice and indentured learner”

“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 employer’s organization and a trade unions organization;*
- d) disputes between trade union;*
- e) disputes between employer organizations;*
- f) disputes between an employers’ organization and a trade union;*
- g) disputes between a trade union and a member thereof;*
- h) disputes between an employer’s organization 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 complain may be lodged with the court by or against an employee, an employer, a trade union, an employer’s organization, 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 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 the Court considers just.

The respondents further rely on Article 165 (5) of the Constitution to draw a jurisdiction borderline between this court and the High Court. It is their submission that inasmuch as the High Court has no jurisdiction in matters of the Employment and Labour Relations Court, it is only the High Court which is vested with the jurisdiction to hear this matter as it is a constitutional petition. This is despite the respondents acknowledging and broadly citing the celebrated authority of **Karisa Chengo & 2 Others vs Republic, (2015) eKLR** where the court of appeal distinguished the jurisdiction of the High Court *vis a vis* that of the Employment and Labour Relations Court and Environment and Land Court (*courts with the status of the High Court*) was elaborately spelt out and delineated.

The petitioner frames the issue of this court's lack of jurisdiction as expressed by the respondent as one of determining whether this petition violates the doctrine of separation of powers by asking the court to interfere with powers, functions and discretion of the respondents. It is the respondent's case that the proceedings of a county assembly are immunized against challenge of any court and therefore this court has no jurisdiction to entertain this petition. He puts it thus;

The respondents anchor their case on Article 117 of the Constitution as well as those of sections 12 and 29 of the National Assembly (Powers and Privileges) Act as read with Section 17 of the County Governments Act and are of the view that no court has jurisdiction to question the validity of the "proceedings or decision of the Assembly or the Committee of Privileges acting in accordance with" the National Assembly (Powers and Privileges) Act as such proceedings cannot "be questioned in any Court."

The respondents also bring in a submission that the petitioner offends the doctrine of separation of powers in so filing this application in court. On this they seek to rely on sections 16, 17 and 12 of the County Governments 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 necessary modifications, apply to a County Assembly"

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

The respondent's further sought to rely on the authority of **Simon Wachira Kagiri vs. County Assembly of Nyeri & 2 others (2013) eKLR** at pgs 18 & 19 where the court observed as follows;

" 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 and independent tribunals. So if in the purported exercise of this delegated sovereignty, an organ of the state acts in excess of such power, the High Court exercising its authority under Article 16(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 Right 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..."

This was also echoed by the High Court in the case of **Federation of Women Lawyers Kenya (FIDA-K) & 5 Others vs. The Attorney General & Another [2011] eKLR** when the court held as follows;

"...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..."

In essence therefore, the intervention by the High Court in such cases is underpinned on the constitutional supremacy which requires that any violation of the constitution by parliament and indeed any organ of the state in the performance of its functions is amenable to judicial review.

For the court to interfere however, the applicant or petitioner ought to demonstrate that the action or inaction by parliament or county assembly or any state organ for that matter, attacks the very fabric of the constitution which if left unchecked would destroy the foundation of our sovereignty and nationhood. The issue so to speak beyond just personal rights and liberties of

the petitioner.

The petitioner in rebuttal submits that the doctrine of separation of powers is moot. It has been ably dealt with in the authority of **County Assembly of Kisumu & 2 others vs. Kisumu County Assembly Service Board & 6 Others** where the court observed as follows;

*“With regard to the issue before us, under the doctrine of separation of powers, the court should not interfere with the freedom of speech and debate of legislative bodies. The court must resist unwarranted intrusion into internal procedures of Parliament and the County Assemblies unless they act unconstitutionally. As this Court stated in **Martin Nyaga Wambora & Others v. Speakers of the Senate & Others**, where it is shown that in conducting its proceedings, a legislative authority has acted within the confines 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 assemblies, like all other organs of state and indeed every person, must act in accordance with the Constitution.”*

This submission is amplified by the authority of speaker of the **Senate & Another vs. Attorney General & 4 Others** where the court in further extrapolation of the National Assembly (Powers and Privileges) Act observed as follows;

“...Kenya’s legislative bodies bear an obligation to discharge their mandate in accordance with the terms of the Constitution, and they cannot plead any internal rule or indeed, any statutory scheme, as a reprieve from that obligation... If Parliament violates the procedural requirements of the supreme law of the land, it is for the court of law... to assert the authority and supremacy of the Constitution. It would be different if the procedure in question were not constitutionally mandated. This court would be averse to questioning parliamentary procedures that are formulated by the Houses to regulate their internal workings as long as the same do not breach the Constitution.”

This view was echoed by the South Africa Constitutional Court in the authority of **Doctors For Life International v. Speaker of The National Assembly And Others** as follows;

“Courts are required by the Constitution ‘to ensure that all branches of government act within the law’ and full their Constitutional obligations”

It is the petitioner’s submission that this court has jurisdiction to pronounce itself on the proceedings of the county assembly with regard to approval of the petition as is the case here. Nomination and vetting was a joint venture of the County Executive Committee and County Assembly both of which are constitutional organs drawing power for so acting from the Constitution.

The supremacy of the Constitution binds all persons and state organs and therefore the justification of the petitioner in challenging the unconstitutional decision of the county assembly to reject his nomination.

The petitioner buttresses the above position by relying on the authority of Article 165 (6) of the Constitution which vests supervisory jurisdiction on the high court as follows;

“(6) The High Court has supervisory jurisdiction over subordinate courts and over any person, body or authority exercising judicial or quasi judicial function but not over a superior court.”

A broad interpretation of this, and in view of Article 162 (2) (a) – this court *with the status of the High Court*, has supervisory jurisdiction over the actions of officers appointed under Articles 177 and 178 (Membership of the county assembly and Speaker of the county assembly) and 179 (county executive committees) whose proceedings are quasi – judicial in nature and intent. The issue of lack of jurisdiction of this court therefore becomes a non issue and a cropper.

The issue of jurisdiction in this court is now settled. Six years down the line of the establishment of this court and about ten years of the practice of the Constitution of Kenya, 2010, the issue of jurisdiction of the Employment and Labour Relations Court is settled, if not wholly concluded. Various precedents have established the jurisprudence on jurisdiction beyond measure. One can only have themselves to blame if they traversed out of jurisdiction or lacked an air of the same.

If the respondents intended to support their case of lack of jurisdiction on the authorities above cited, this can only be a contradiction. The authority of **Simon Wachira Kagiri and Federation of Women Lawyers** as presented by the respondent agree with the petitioner’s case and conclusively bring out a case of the courts intervention and interference when the donation of sovereignty is unconstitutionally exercised by parliament, county assemblies or any other state organs whatsoever.

I therefore suspect that the submissions of the respondents on jurisdiction was only evasive. The clarion call of employer/employee relationship as enunciated under section 12 (1) (a) of the Employment and Labour Relations Court as a basis for the jurisdiction of this court is now a remote view of the subject. It has long been overtaken by events. What with the massive practice and precedent on the subject and the able, eloquent, broad and purposive interpretation of the Constitution and statutes on the subject. I have not the slightest doubt that this court has jurisdiction to hear and determine this matter in the circumstances.

The 2nd issue for determination is whether the non-joinder of the County Governor of Kericho in this petition is fatal. This issue was raised by the petitioner as follows;

3. *THAT the said Petition is incurably defective and ought to be dismissed with costs for being an abuse of court process to the extent that it is seeking orders against the Governor of Kericho who is not party hereto.*

The petitioners did not in any way address or answer this issue in their written submissions.

Overall, this issue for determination was largely ignored by the parties in their presentations and submissions. I however note that the issue of joinder of parties was raised and tackled by court in the authority of **John Mining Temoi & another v Governor of Bungoma County & 17 others [2014] eKLR** which I hereby cite at length as follows;

32. *The next preliminary issue raised by the Respondents was on joinder of parties. From the submissions, the Respondents took issue with the joinder of the 3rd Respondent who is the Speaker of the County Assembly on the ground that he was not involved in the process of selection, nomination and vetting of the County Officers. From my understanding, it was the 3rd Respondent's claim that the County Assembly should have been enjoined in this case as the acts complained of fell within its mandate. In addition, it was argued that the joinder of the Interested Parties in this Petition was unwarranted as they are innocent parties who applied and were nominated for the posts of County Officers. The joinder of the Chairman of the 3rd Respondent was also objected to.*

33. *With regard to the contention that the County Assembly should have been enjoined in the Petition since the Speaker is not involved in the process of selection, nomination and vetting of the County Officers, it is not in dispute that the County Assembly as a distinct institution in the County Government, capable of suing and being sued was a proper party in these proceedings. However, in a case such as this one, the Speaker must also be enjoined together with the County Assembly. See the Case of **Simon Wachira v County Assembly of Nyeri & 2 others (supra)**. This is so considering the allegations against him that he failed to cause the Petitions of the Bongomek Community and Mr. Khaoya to be deliberated upon. Further, although the County Assembly should have been enjoined as a party, the omission in my view did not occasion any prejudice. The Speaker of the Assembly as its titular head as a party. His actions and those of the Assembly were in issue and his presence suffices. In any event, although the practice of non-joinder of parties is not to be encouraged, this court must dispense justice without undue regard of technicalities.*

The non-joinder of the County Governor, Kericho County to me is not fatal to the petition as is submitted by the respondents. In the first place, the role of the County Governor in the preliminaries of nomination and actual nomination is not contested. What is in issue is only the vetting process and its eventual outcome. This to me appears to be the reason behind the inclusion of the County Governor as a party to this suit. Even the plea of orders against the said Governor does not mutilate the petition. The Governor is the titular determinant and implementing authority of the nomination process. It was not, in the circumstances absolutely necessary that he be so enjoined as a party to this petition.

Again, as observed by court in the authority of **John Mining Temoi & another** above, this court is duty bound to dispense justice without regard to undue technicalities. The issue of joinder in the circumstances is a technicality that should be disregarded in the interest of justice. Moreover, this is also upheld under Article 22 (3) (d) of the Constitution of Kenya, 2010 which discounts procedural technicalities as hereunder;

(3) The Chief Justice shall make rules providing for the court proceedings referred to in this Article, which shall satisfy the criteria that –

(a)...

(b)...

(c)...

(d) the court, while observing the rules of natural justice, shall not be unreasonably restricted by procedural technicalities; and

This settles the matter. The issue of non-joinder would not destroy this petition. It would not negate it, or at all.

The 3rd issue for determination is whether the respondents vetting exercise and process met the constitutional and statutory threshold as to warrant upholding. It is the petitioners submission that the appointment of the County Executive Committee is the province Article 179 (2) (b), Section 35 of the County Governments Act and Section 9 of the Public Appointments (County Assemblies Approval) Act, No. 5 of 2017. This comprises of two phases;

i) Nomination of the Governor

ii) Approval (by way of vetting) by the respondents

The petitioner's further case is that the Governor subjected him to a rigorous interview process. He underwent a process of interview before a panel through which the Governor appointed him as a member of the County Executive Committee in charge of Education, Culture, Youth Affairs and Sports. This was on meeting the panel's threshold for such appointment. The Governor had the opportunity of appointing any other person but preferred the petitioner as his best choice. He forwarded his name to the County Assembly after satisfactorily ascertaining that the petitioner had the competence to manage all the four dockets of Education, Culture, Youth Affairs and Sports.

In settling for the petitioner for this portfolio, the Governor must have considered and satisfied himself on the statutory criteria provided, namely, academic and professional qualifications, employment record, experience relating to the docket, knowledge of the relevant subject, potential conflict of interest, *pro bono*/charity work, personal integrity, vision and leadership, expectations and key priorities besides overall suitability for the position. The County Assembly – respondents, in the petitioners view should only have been interested and considered the last criteria, to wit, overall suitability for the position.

Instead, and in blatant violation of the Constitution and statutes as afore set out, the respondents purported to reject the petitioners appointment on the following illegal, unreasonable, irrelevant and unconstitutional as here under;

I. The Petitioner did not have the experience and competence for management of ECDE and village polytechnics.

II. The Petitioner is a maternal cousin to Mr. Patrick C. Mutai nominee for Finance and Economic Planning.

The petitioner submits that the respondents only cited these two as their grounds for rejecting his nomination and should stop at that. The other reasons adduced in the Respondents Replying Affidavit are a reinvention of the wheel and did not form part of the respondent's report. They should therefore be estopped from relying on such grounds. I agree.

The petitioner's further submission is that he had impeccable credentials as a holder of a doctorate degree (PhD) with ten years experience in the education sector. The respondent's assertion that he was not capable of managing child education and village polytechnics is in his view illogical, absurd, felicitous and a total misnomer. It was never expected or intended that an ECDE teacher or village polytechnic tutor would take charge of this docket. The modern trend is to have professionals manage early childhood education, child development, professional ethics, language development, guidance and social development, practicums and administration of early childhood programmes. The assembly was silent on the petitioner's suitability for the other portfolios namely, Youth Affairs, Culture and Sports. Why? This is not disclosed thereby shrouding the vetting process with an issue of credibility.

The petitioner in further support of his case submits and reinforces this as follows;

The respondents were unfair to the petitioner for in their own report a person who has Bachelor of Arts degree was found suitable to the public works, roads and transport docket, a docket which would ideally need a civil engineer (see pages 29 to 33 of "MKL5"). Why would this criteria be given prominence when the County Governor by virtue of Sections 30 (2) (e) and 31 (d) of the County Government Act, can reconstitute and rotate members of the County Executive.

Why would the threshold in the county government be higher than that of the national government. Professor Kaimenyi who is in charge of the lands docket is a dentist by profession. Hon. Eugene Wamalwa is a lawyer by profession yet he takes charge of water and irrigation. Hon. Charles Keter holds a bachelor of Education degree and he has competently taken charge of the energy docket. Dr. Fred Okengo Matiangi is an IT specialist yet he has lately been in charge of security docket. The list is long. The cabinet/executive members sit in administrative/policy formulation position while the principle secretaries/Cos are the technocrats. It follows that the ground is not tenable and not reason enough to reject the petitioner.

This, to me, raises serious issues of bias – impartiality on the part of the vetting committee.

The second ground for rejection of the petitioner's candidature is that of being a maternal cousin to Mr. Patrick C. Mutai – Nominee for Finance & Economic Planning. The petitioner deems this absurd and more so ridiculous, to say the least. It is his submission that the respondents were hell-bent on rejecting the petitioner and had to coin any grounds for such rejection, their sanity notwithstanding.

Further, this was discriminative and would not fit into any criteria provided by the Constitution, law or statute. His loud thinking and submission is as follows;

One wonders when faced with cousin Moses and Patrick what informed the decision to opt for cousin Patrick other (than) Cousin Moses other than open bias. There is no law barring cousins from serving in the same government. Both applied and each was found to be competent on their own respective right. We do not want to belabor this point but the Respondent must not get away with this.

The term vetting is not defined in the Constitution. However, the Supreme Court of Kenya appeared to adopt or agree with the definition of vetting adopted in the authority of **Judges & Magistrate Vetting Board & 2 others v Centre for Human Rights & Democracy & 11 others [2014] eKLR** as follows;

"89] Vetting is defined in the Webster's Ninth New Collegiate Dictionary (p.1312) as "1.a. to provide veterinary care for (an animal) or medical care for (person) b. to subject (a person or animal to a physical examination) or

2. To subject to expert appraisal or correction, evaluate". The Kenyan model of vetting is defined in The Judges and Magistrates Vetting Board, Interim Report, September 2011 – February 2013 (page 4) as follows;

"Vetting was a term originally used by veterinarians when checking on the physical health and soundness of horses before they participated in a race. In our context, vetting means a thorough examination to determine suitability for a particular office or function." It is virtually synonymous with "evaluate" involving a special search for flaws. (emphasis supplied) (pg 26)

The Collins English dictionary defines vetting as the act of making a prior appraisal of a person, documents scheme etc (Source <https://www.collinsdictionary.com/dictionary/english/vetting.>)

The National Police Service Commission's piece, **Police Vetting Process: Frequently Asked Questions** at page 2 defines vetting as;

"Vetting is a process of assessing the integrity of an individual to determine suitability for public employment. Vetting processes

involve “screening public employees or candidates for public employment to determine if their known conduct qualifies them to serve in public institutions.”

Vetting therefore is an assessment of the suitability of a person’s suitability for office. It involves a thorough examination of any factors that would satisfy or inhibit such suitability for office. It must however be borne in mind that vetting precedes nomination or in a loose sense, appointment through an interview process. This must always be had in mind by the vetting authority.

It must be warned that it is not as such assessing competency, this having been undertaken during the interview process. In the absence of glaring evidence of incompetency, the interview panel having failed to fully and faithfully address this, the vetting authority’s role is merely that of assessing suitability.

Vetting must therefore be compliant with the law and the Constitution of the land. It must be totally free, impartial and void of bias. This must be so with a view to building confidence and trust in the service delivery in that sector or office. Was this the case in the current circumstances?

The respondents did not specifically address this issue for determination. Instead, they dealt with it in their pleadings and submissions on the other issues for determination. It is only discernible from such outlets of the respondents.

From the foregoing, it is obvious and clear that the respondents vetting process was fallacious and did not meet the threshold necessary for its upholding. This is because, as is ably and abundantly submitted by the petitioner, the respondents went on a fishing expedition thereby coming out with a comical rationale for rejection of the petitioner’s nomination to the county executive committee. These are frolics that should be identified, discouraged and altogether curtailed in such serious assignments of governance.

I agree with the submissions of the petitioner that the vetting by the respondents should have involved an assessment of the *overall suitability for the position*. Instead, the respondents employed extraneous, irrelevant and illegal grounds to deny the petitioner his fundamental rights as enshrined in the Constitution. This is sad indeed. That the County Assembly, in exercising its delegated sovereignty and also charged with the duty of acting constitutionally in its acts and proceedings came up with a decision of this nature is appalling. It is an outright violation of Article 10 of the Constitution of Kenya, 2010 that directs on national values and principles of governance by state organs, state officers, public officers and *all persons* in undertaking tasks as follows;

10. (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 marginalized;*
- c) good governance, integrity, transparency and accountability; and*
- d) sustainable development.*

Vetting must incorporate the principles of fairness and natural justice to stand the test of time and space. This was illustrated in the authority of **Republic v National Police Service Commission Exparte Daniel Chacha Chacha [2016]** where the court pronounced itself as follows;

“Therefore, the principles of natural justice concern procedural fairness and ensure a fair decision is reached by an objective decision maker. Maintaining procedural fairness protects the rights of individuals and enhances public confidence in the process. The ingredients of fairness or natural justice that must guide all administrative decisions are, firstly, that a person must be allowed an adequate opportunity to present their case where certain interests and rights may be adversely affected by a decision-maker; secondly, that no one ought to be judge in his or her case and this is the requirement that the deciding authority must be unbiased when according the hearing or making the decision; and thirdly, that an administrative decision must be based upon logical proof or evidence material.

Again, courts must ostracize and in all ways reject situations where the vetting process vitiates the constitution and the law. This was observed in the authority of **John Mining Temoi & another v Governor of Bungoma County & 17 others [2014] eKLR** where Mabeya, J. observed as follows;

“A court of law cannot condone or uphold a process that undermines the Constitution and the law. The days when public servants acted and made decisions without regard to the citizens are long gone. Article 73 of the Constitution declares that public positions are held in trust for the citizenry. There has to be transparency and accountability for each action and decision made by

state organs as well as officers. As costly and unfortunate as it might be, the process of selection, nomination, approval and appointment of the nominees of the posts of the Chief Officers for the County of Bungoma has to be reversed.”

The rejection of the nomination of the petitioner by the respondents was discriminatory and a violation of his constitutional rights. Like has been observed herein it lacked fairness and was tainted with bias. It must be annulled, vacated and thrown out *in toto*. I therefore find that the rejection of the nomination of the petitioner by the respondents fell far short of the threshold necessary for so doing and should be overthrown and set aside.

The 4th issue for determination is whether the petitioner is entitled to the relief sought. He is. Having won a case of breach of his constitutional rights by the vetting body, he becomes entitled to the relief sought.

I am therefore inclined to allow the petition and order relief as follows;

- i. A declaration be and is hereby issued that the proceedings of the Kericho County Assembly to reject the petitioner for appointment to Kericho County Executive Committee breached the petitioner’s constitution rights under Articles 27(4), 27(5), 28, 39(3), 41(1), 43, 47(1), 48 and 56 (c) of the Constitution of Kenya, and were null and void for all intents and purposes;
- ii. A declaration be and is hereby issued that the proceedings of Kericho County Assembly to reject the petitioner for appointment to Kericho County Executive Committee breached the constitutional rights of the residents of Kericho under Article 43 of the Constitution of Kenya, and were null and void for all intents and purposes;
- iii. A declaration be and is hereby issued that the proceedings of the Kericho County Assembly to reject the petitioner for appointment to Kericho County Executive Committee patently violated the provisions of section 35 of the County Government Act No.5 of 2017 and were null and void for all intents and purposes;
- iv. A declaration be and is hereby issued that the proceedings of the Kericho County Assembly to reject the petitioner for appointment to the Kericho County Executive Committee patently violated the provisions of section 9 of the Public Appointments (County Assembly Approval) Act No.5 of 2017 and were null and void for all intents and purposes;
- v. An order of Mandamus be and is hereby issued to remove into this honourable Court and compel the Kericho County Assembly to approve the nomination of the petitioner as a member of the Kericho County Executive Committee there being no statutory and constitutional principle to reject the petitioner from being appointed to the Kericho County Executive Committee;
- vi. An order of Prohibition be and is hereby issued to remove into this honourable Court and Prohibit the Governor of Kericho County from presenting to the Speaker of Kericho Assembly or any person whatsoever, any fresh names of nominees for approval by Kericho County Assembly for appointment as members of Kericho County Executive Committee and if a name has already been presented, the Respondents be prohibited from vetting such fresh nominee;
- vii. An order of Mandamus be and is hereby issued to remove into this honourable court and compel the Governor of Kericho County to appoint the petitioner as a member of the Kericho County Executive Committee in charge of Education, Culture, Youth Affairs and Sports;
- viii. An order annulling and expunging the grounds contained in page 41 of the Committee of Appointment’s report for being unconstitutional and thus unlawful;
- ix. The cost of this petition shall be borne by the respondents.

Delivered, dated and signed this 18th day of May 2018.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr. Langat instructed by Onesmus Langat & Company Advocates for the petitioner.
2. Mr. Ochieng instructed by Sila Munya & Company Advocates for the respondent.