



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.....1ST RESPONDENT

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

AND

HENRY MANG'ONG'O LUMBASIO & 9 OTHERS...INTERESTED PARTY

J U D G M E N T

1. The Petitioner seeks various reliefs vide amended petition dated 27th October, 2017 as follows –

- (a) A declaration that the County Executive Committee of Vihiga County Government as presently constituted without inclusion of the Terik Community is unconstitutional.
- (b) An order dissolving the said County Executive Committee together with a further order compelling the Respondents to reconstitute the committee a fresh in which a member of the Terik Community should be appointed.
- (c) A finding that the Terik community have suffered discrimination promoted by the Respondents with regard to the appointments to the County Executive Committee entitling them to compensation estimated at Kshs.46.7 million.

2. The Petition was filed by one John Chebun Bor on behalf of the Terik community.

Facts

3. In the 2009 Kenya Population and House Census, conducted between 24th, 25th August 2009, Terik Community was recognized as a community of the Kalenjin Origin and were given code number 617 for identity. The Terik are different from Tiriki Community who are identified amongst the Luhya and whose code is 615. The Terik speak Kalenjin dialect while Tiriki speak Luhya. It was deposed by the Petitioner that the Terik Community number about 20,000 people in a county of about 600,000 Luhya's. The Terik live in Hamisi Sub-county of Vihiga County and fall in three groups of Masan, Sino and Geo. It is submitted that the Terik have a distinct culture and hold a registration certificate issued by the County Government of Vihiga recognizing their cultural diversity.

4. The community lists various historical injustices including land derivation by the colonial government; imposition of Luhya Chiefs and that it never had an elected member of parliament or an elected MCA Member of the county Assembly (MCA) in any of the twenty five wards which were all taken by the Luhya composing the Maragoli, Bunyore and Tiriki.

5. In 2017, community was denied a slot amongst the thirteen nominated members of the county Assembly of Vihiga after the general elections and they filed petition No. 14 of 2017 in the High court of Kenya at Kakamega.

6. In the 2013 – 2017, county executive committee, the Terik had one member, Hon. Silas Kipkemboi appointed to represent the Terik. The

gravamen of this petition is failure by the present Governor, Hon. Wilber K. Ottichilo to appoint at least one Terik to the county Executive Committee, hence the prayers sought in this Petition.

7. The Terik sent Petitions to the Governor prior to the nomination, vetting and appointments but out of the 10 county Executive Committee Members, the Community did not get one of them appointed.

8. The Petitioner relies on Article 28 of the constitution which guarantees every person right to dignity and Sections 34 and 36 of the County Government Act 2012 stating that the Executive Committee is enjoined to ensure the protection and promotion of the interests and rights of the minority and marginalized communities under sub-section 34(e). That omission by the Governor amounts to discrimination and defeats the objective and principles of devolved government as laid out in Articles 174 and 175 of the Constitution to share power at the lowest level. That sharing power translates to sharing of resources including the salary in excess of Kshs.300,000 which an Executive Member gets as monthly emoluments.

9. The Petitioner further relied on Article 27 of the constitution which provides for equality and freedom from discrimination under 27(6) –

“To give full effect to the realization of the rights guaranteed under this Article, the state shall take legislative and other measures including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination”

10. It is the Petitioner’s submission, that the Article 27 obliges the Governor to take affirmative action to protect the Terik from discrimination and guarantee the community equality in representation within the County Government of Vihiga.

11. Affirmative action is defined under Article 260 of the constitution as follows:-

“Includes any measures designed to overcome or ameliorate an equality or the systemic denial or infringement of a right or a fundamental freedom.”

12. Furthermore section 35 of the county Government Act, Provides–

“Appointment of County Executive Committee Members –

(1) The governor shall when nominating members of the executive committee –

(a) Ensure that to the fullest extent possible, the composition of the executive committee reflects the community and cultural diversity of the county and

(b) Take into account the principles of affirmative action as provided for in the constitution.

(2) The County Assembly shall not approve nominations for appointment to the executive committee that do not take into account

(a) Not more than two thirds of either gender;

(b) Representation of the minorities, marginalized groups and communities, and

(c) Community and cultural diversity within the county.”

13. It is the petitioner’s submission that Terik Community qualify to be represented in the county executive committee per dictates of the aforesaid constitutional and statutory provisions. The Petitioner prays the Petition be allowed with costs.

Response by 1st & 2nd Respondent and by Interested Party

14. It is admitted that there is no member of the Terik Community in the Vihiga County Executive Committee (CEC) as presently constituted. It is also not in dispute that the Terik Community had one of their own in the last CEC.

15. The issue in dispute is whether failure to have a member of Terik Community in the CEC violates the Constitutional provisions that guarantee, right to dignity; to equality; against discrimination and whether a case for affirmative action in terms of the County Government’s Act, and the Constitution has been made out by the Petitioner.

16. The Respondent states that, the Governor has a discretion in the nomination of CEC members of simply nominating the candidates himself or advertising for the positions through the county Public Service Board.

17. In the case of Vihiga, the Governor chose to have the nomination exercise to follow advertisement to attract most qualified and interested persons. This fact is not in dispute.

18. The Respondent relies on case of **Joel Onsare v Governor T/ Nzoia county & others [2015] eKLR** in support of the proposition that a

person who has not applied to be considered for a particular position cannot be heard to later fault the process and claim that they were not considered and/or were discriminated upon.

19. The Respondents submit that no member of the Terik Community responded to the advertisement to be considered for the CEC position and therefore they cannot be heard to now fault the process and the result of the open, and transparent nomination and vetting of CEC members.

20. Furthermore, the Applicant was at liberty to make representations to the County Assembly which has the mandate under section 8 of the County Government's Act, to vet and approve nominees for appointment. In terms of section 35(2) the County Governments Act, the Assembly has power to approve and or disapprove the list of nominees forwarded to it by the Governor for CEC positions. That it is only after the vetting process has taken place and the Assembly has made its decision that a complaint or petition to challenge the decision may be made to the court.

21. The Respondent relies for this proposition on the decision of the supreme court of Kenya in **Justus Kariuki Mate & another & Martin Nyaga Wambora & another [2017] eKLR.**

22. The court pronounced itself thus:-

“This court will not question each and every procedural infraction that may occur in either of the Houses of parliament. The court cannot supervise the workings of parliament. The institutional comity between the three arms of government must not be endangered by the unwarranted intrusions into the workings of one arm by another.”

23. Furthermore, the Respondent submits that the Teriks are not a minority in Vihiga County to qualify for affirmative action in terms of Article 56 of the Constitution which provides for minorities and marginalized groups to benefit from affirmative action from the state by way of programmes designed to uplift these communities and in particular in respect of participation and representation in governance and other spheres of life.

24. The Respondent relies on definition of minority group in Black Law Dictionary (8th Edition) at page 107 to include a group that is different in some respect such as race or religious belief from the majority and that is sometimes treated differently as a result. The Respondent states that the term does not automatically apply to a group that is outnumbered but not necessarily different from the rest of the community.

25. Respondent submits that there is no evidence before court that the Terik have been historically discriminated upon because of who they are. The Respondent submits further that, the Terik are simply Kalenjins, and Kalenjins are a very empowered community in Kenya and have provided the longest serving president in Kenya and have the current Deputy Present.

26. The Respondent therefore submits that the Kalenjin community in Vihiga are not ethnically, religiously or linguistically, distinct from the Kalenjin communities in other parts of this county for them to be regarded as a minority group.

27. The Respondent finally submits that the prayers sought to declare the CEC of Vihiga is unconstitutional due to lack of inclusion of Teriks is farfetched, unmerited and is not supported by any evidence.

28. That the prayer to compel the Respondents to include a Terik to the CEC is equally misconceived because, all persons who applied to be considered were openly interviewed and vetted and it would be an injustice to introduce persons who did not show any interest or are not qualified for the advertised positions.

29. The prayer for compensation in the sum of Kshs.46.7 million is according to the Respondent similarly misconceived as it has no basis in fact or Law.

30. That the petition be dismissed with costs.

Determination

31. The court has considered the competing arguments and evidence before court from the parties and will not regurgitate the facts and submissions already put forth in this judgment.

32. The court has arrived at the following findings of law and facts:-

(i) The Terik Community in the County of Vihiga is part of the larger Kalenjin Community in Kenya.

(ii) That the Terik as compared to the Luhyas are a minority community in the County of Vihiga.

(iii) That a member of the Terik Community was appointed member of the previous CEC upon nomination by the previous Governor and vetted and approved by the County Assembly of Vihiga.

(iv) That the present CEC was constituted following advertisement by the Public Service Board of vihiga, inviting interested, qualified candidates to apply for the positions of member of county executive committee of Vihiga for nomination by the Governor and subsequent vetting by the County Assembly.

(v) That neither the Petitioner nor any interested person from the Terik community applied to be considered for the CEC position.

(vi) Following the supreme court decision in **Julius Kariuki Mate & another & Martin Nyaga Wabora & another 2017, eKLR**, I find that the Petition was brought prematurely without the petitioner first awaiting conclusion of the vetting process by the Assembly of the nominees and a decision transmitted to the Governor for the appointments to take place.

(vii) Furthermore, and following the decision by J. R Karanja in **Joel Onsare v Governor T/Nzoia County & others [2015] eKLR**, I find that the petitioner has failed to prove a case of discrimination of Terik Community by the Respondents because none of the members of the said community applied to be considered for nomination and subsequent vetting for the position of member of Vihiga CEC and was rejected by the Public Service Board, the Governor or the County Assembly during the process of recruitment.

33. Accordingly, the court finds that the petitioner has failed to discharge the onus placed upon him under sections 107 and 108 of the Evidence Act, Cap 80 Laws of Kenya to prove on a balance of probabilities that the Respondents discriminated members of Terik Community in Vihiga County in the nomination, vetting and appointment of members of Vihiga county executive committee.

34. The Petition lacks merit and is dismissed in its entirety with each of the parties to bear their own costs of the suit this being a public interest suit and the Respondents are state institutions.

Judgment Dated, Signed and delivered this 25th day of October, 2018

Mathews N. Nduma

Judge

Appearances

Mr. Musiega for the Petitioner

Mr. Sore for 1st Respondent

Mr. Didi for 2nd Respondent

Mr. Chivai for Interested Party Chrispo – Court Clerk