



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAKURU

PETITION NO.10 OF 2017

EMMANUEL NGIMERO.....1ST PETITIONER

REBECCA LOCHU AKOPE.....2ND PETITIONER

LOTHIA EWOTON.....3RD PETITIONER

VERSUS

THE GOVERNOR, SAMBURU COUNTY GOVERNMENT ...1ST RESPONDENT

THE SPEAKER, SAMBURU COUNTY ASSEMBLY.....2ND RESPONDENT

RULING

The 2nd respondent, The Speaker Samburu County Assembly by Notice of Preliminary Objection filed on 18th January, 2018 is seeking for the petition to be struck off with costs on the grounds that;

1. *This court has no jurisdiction to entertain the petition.*

2. *The subject of the suit, MARY KANYAMA EKAI, ceased being an employee of the County Government of Samburu by dint of Article 198 of the Constitution of Kenya, 2010 and there being no employment or labour relations or industrial relations between the said subject and the said County Government, this suit out to have been filed in the High Court of Kenya.*

3. *The said subject of the suit, MARY KANYAMAN EKAI, has herself filed two*

(2) suits against the respondents herein wherein similar issues have been framed for determination. The two (2) suits, which have been filed before the High Court of Kenya, the only court vested with jurisdiction to hear and determine this dispute, are:-

(a) NAKURU HIGH COURT CONSTITUTIONAL PETITION NO.6 OF 2017

Mary Kenyaman Ekai –vs- The County Government of Samburu & another

(b) NAKURU HIGH COURT JUDICIAL REVIEW NO.8 OF 2017

Mary Kenyaman Ekai (Ex Parte Applicant) –vs- The County Assembly of Samburu

4. *In the circumstances, this suit is an abuse of the court process and is aimed at defeating the ends of justice and ought to be dismissed with costs to the respondents.*

5. *The continuation of these proceedings, this court and the High Court of Kenya are primed for embarrassment should they arrive at different findings.*

The parties made there oral submissions.

The 2nd respondent having filed the notice of objections submitted that in the petition, the subject is the nomination of Mary Kenyaman Ekai

(Ekai) by the 1st responded to the 2nd respondent assembly but when she went through vetting by the 2nd respondent she was rejected. Ekai then filed **Petition No.6 of 2017 - Mary Kenyaman Ekai –vs- The County Government of Samburu & another** at High Court Nakuru and also **JR No.8 of 2017 - Mary Kenyaman Ekai (Ex Parte Applicant) –vs- The County Assembly of Samburu** at Nakuru and which matter she later withdrew.

In **Petition No.6 of 2017 - Mary Kenyaman Ekai –vs- The County Government of Samburu & another**, the High Court in Nanyuki has since delivered judgement on 19th July, 2018 and the respondents therein were satisfied the High Court had jurisdiction.

In this petition, the petitioners in their prayers (3) and (4) such were the issues in

Petition No.6 of 2017 - Mary Kenyaman Ekai –vs- The County Government of Samburu & another which have since been determined. Prayer (4) related to the question of discrimination against the Turkana Community. Ekai was not an employee of the respondents for the petitioners to move this court when stay was granted stopping the nomination of any other person save for Ekai. Article 198 of the Constitution on the transition on County Executive members operates as a matter of law. With such transition measure, Ekai is not an employee of the respondents for the court to adjudicate over this matter and the petition should be dismissed for want of jurisdiction. The High Court at Nanyuki

The petitioner submits that the objections made have no legal basis. The petitioners filed this petition to challenge the constitution of the executive members of the 1st respondent as all its members were from the Samburu community and the Turkana nominee was rejected.

The objections filed are not purely on matters of law as the facts should not be contested.

The two cases the respondents have relied upon have not been placed as part of the pleadings. It is not clear why JR No.8 of 2017 was mentioned and such remain facts and not matters of law. The submission that the orders sought to quash the 2nd respondents' decision is a matter of fact and not law.

The 2nd respondent has moved to the Court of Appeal since judgement in petition No.6 of 2017. Partially some matters have been addressed in that petition while others remain to be addressed by this court.

Determination

The single most important issue which arise is whether the court has jurisdiction to hear this petition. Once this is resolved then the issue of whether the other matters in **JR.8 of 2017** and **Petition No.6 of 2017 before the High Court** are in issue here shall be resolved.

The *locus classicus* on jurisdiction is the celebrated case of **Owners of the Motor**

Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] KLR 1 where the Court of Appeal held as follows;

I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. [Underline added].

The power given to a court to carry out its functions and or mandate form its jurisdiction. The boundaries within which the court must operate. Without limitations or going beyond the set limitation, the court only acts beyond such powers. Such mandate, authority, power and limitation may be conferred by statute or the constitution or both.

For the Employment and Labour Relations Court, article 162(2) of the Constitution, 2010 read together with section 12 of the Employment and Labour Relations Court Act, 2011 give the court the requisite authority within which to act. The preamble to the Act, also further defines the mandate and authority of the court to extend to matters *of connected purposes*. It provides as follows;

An Act of Parliament to establish the Employment and Labour Relations Court to hear and determine disputes relating to employment and labour relations and for connected purposes

Such mandate in the court's view is not far-fetched. There arise matters which are not articulated under Article 162(2) of the Constitution, 2010 or section 12 of the Employment and Labour Relations Court Act, 2011 with regard to the employment and labour relations set out thereunder as there exists other employment and labour relations and for connected purposes as held in **Rift Valley Railways Workers Union (K) versus Kenya Railways Staff Retirement Benefits Scheme & another**

[2017] eKLR. Employees work benefits, employer and employee relations with other stakeholder for social security hold such *connected purposes* and cannot be removed from the jurisdiction of the court as held in **Central Organisation of Trade**

Unions (K) & 2 others versus Cabinet Secretary Ministry of Labour National Social Security and Services [2014] eKLR.

Such constitutional and legal provisions give the court jurisdiction.

In this case, the petition is premised on the facts that the petitioners as members of the Turkna Community and group living in Samburu County are big discriminated against by the actions of the Samburu County Assembly. Being representatives of the Turkana Community appointed as council of elders make this petition seeking for

orders that the 1st respondent be prohibited from nominating and presenting to the County Assembly or vetting any other person save for Ekai as the rejection of her nomination to the County Executive by the County Assembly during her vetting was discriminatory, wrongful and unfair. That Ekai was the only representative of the Turkana community in the County Executive to the Samburu County Government.

Such matters with regard to the appointment, composition and membership of County Assembly are matters specifically removed from this court by the constitution and statute. Article 186 of the Constitution, 2010 and the County Government Act, 2012 confer authority on the High Court to address. Similarly Article 179(7) provides that;

(7) If a vacancy arises in the office of the county governor, the members of the county executive committee appointed under clause (2) (b) cease to hold office.

Therefore, until the person appointed by the Governor and upon being vetted and approved by the County Assembly, any disputes arising from such appointment, nomination and vetting and where such touch on the violation of the Bill of Rights must go before the Lower courts or with the High Court. The rationale is that before such nomination and appointment, there exists no employment of labour relations of connected purposes to justify this court intervention in arbitrary. Such matters are for the High Court to deal.

I have had occasion to read **Mary Kanyaman Ekai versus County Assembly of Samburu & another [2018] eKLR (formally Nyahururu High Court Petition No. 25 of 2017), the substance and subject therein relates to the** nomination of Ekai;

... Mary Kanyaman Ekai, to the Samburu County Executive as member in charge of Medical Services, Public Health and Sanitation, and her name were submitted to the Respondent, the County Assembly of Samburu, for purposes of vetting under the Public Appointments (County Assemblies Approval) Act, 2017. Upon such vetting the Petitioner was found unsuitable for the proposed appointment and was rejected.

The similarities between the orders sought by Ekai in her petition and the petitioner herein cannot be divorced. To do so would lead to issuance of orders directed at the same respondents over similar facts and cause of action. Such would not meet the ends of justice.

The petition by Ekai was filed on 30th October, 2017.

This petition herein is filed on 1st November, 2017.

Where it was apparent to the parties that there existed Petition No.25 of 2017 at Nyahururu and which was moved to Nanyuki as Petition No.6 of 2017 to maintain this petition as herein would lead to conflicting findings. Without an existing employment or labour relations or connected purposes between the parties, this petition ought to have been dismissed instantly. To maintain this petition even on the submissions that there is an appeal pending from the judgment in Nanyuki Petition No.6 of 2017 will not achieve any useful purpose. To urge the petition on would mar the very essence of the matters between the parties.

Without jurisdiction, this court should stop here save for costs to the 2nd respondent.

Dated and delivered in Nakuru this 15th day of November, 2018.

M. MBARU JUDGE

In the presence of: