



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE NO. 420 OF 2017

HON. SAMUEL OTARA ARAMA

CLAIMANT

V

NAKURU COUNTY PUBLIC SERVICE BOARD 1ST RESPONDENT

H.E. GOVERNOR LEE KINYANJUI 2ND RESPONDENT

NAKURU COUNTY ASSEMBLY 3RD RESPONDENT

RULING

1. Hon Samuel Arama (applicant) moved Court on 16 October 2017 under certificate of urgency against Nakuru County Public Service Board (1st Respondent), His Excellency Governor, Lee Kinyanjui (2nd Respondent) and the Nakuru County Assembly (3rd Respondent) seeking

1. . . .

2. Pending the hearing and determination of this claim, an injunction do issue, restraining the Respondent herein, by its agents, servants, or otherwise howsoever, from conducting approval hearing over executive Committee nominee members and county nominee members.

3. Costs of this application be provided for.

4. Such further and/or other orders be made as the court may deem fit and expedient.

2. After hearing brief submissions from the applicant, the Court directed that the motion be served upon the Respondents and scheduled *inter partes* hearing for 19 October 2017.

3. Instead of filing grounds of opposition/replying affidavits, the Respondents filed Notices of Preliminary Objections as set hereunder.

1st and 2nd Respondents

4. TAKE NOTICE that the 1st and 2nd Respondents shall raise a Preliminary Objection seeking to have the application dated 16th October 2017 and the entire claim struck out in *limine* on the following grounds;-

1. The suit herein is misconceived, premature and therefore total abuse of court process.

2. The entire suit violate the constitutional *principal* of separation of powers.
3. That all issues raised in the claim are issues to be determined by the Nakuru County Assembly during the vetting under Section 35(2) of the County Government Act.
4. The Claimant ought to have placed his claim as a memorandum before the County Assembly.

The 3rd Respondent's objection

5. TAKE NOTICE that the 3rd Respondent herein shall at the hearing hereof and/or at the opportune time raise preliminary points of law to have the Claim herein struck out on the following grounds;

1. The Claimant herein does not have the requisite Locus Standi to institute and prosecute this Claim.
2. That the Claim is pre-mature in view of the provisions of the County Governments Act No. 17 of 2012 and Of The Public Appointments (County Assembly Approval) Act No. 5 Of 2017
3. That this Honourables Court (*sic*) jurisdiction has not been properly provoked (*sic*) and hence it lacks the jurisdiction to deal with the same.
4. That the claim is incompetent, bad in law and otherwise an abuse of the Court process.
5. That the Claim does not disclose any reasonable cause of action against the 3rd Respondent.

6. The Court directed that it would address the preliminary objections first.

Submissions

1st and 2nd Respondents

7. These Respondents urged that the application was premature because in terms of section 35(2) of the County Governments Act, the County Assembly (3rd Respondent) was enjoined to consider whether the Governor (2nd Respondent) had in nominating members of the county executive taken into consideration affirmative action, minorities, marginalised groups and communal and cultural diversity of the county.

8. According to these Respondents, the 3rd Respondent had notified the public to make representations in respect of the nominees presented by the 2nd Respondent and therefore the issues the applicant were purporting to litigate should have been made to the 3rd Respondent as a memorandum.

9. These Respondents also submitted that the role of the 3rd Respondent in the vetting was to act as a check and balances (separation of powers) to ensure the 2nd Respondent complied with the constitutional and statutory principles applicable to the appointment of county executive committee members.

10. In their opinion, the applicant was requesting the Court to play the role of the County Assembly and that was premature.

11. Any role for the Court, it was further submitted should be at the end of the process, because it was at that stage that the Court could make a determination as to whether the constitutional and statutory imperatives were complied with by both the County Assembly and the Governor.

3rd Respondent

12. The 3rd Respondent re-echoed the position advanced by the 1st and 2nd Respondents.

13. Apart from the re-echoing the submissions of the other Respondents, the 3rd Respondent submitted that the Court had no jurisdiction to entertain the Cause, and/or in the alternative that the applicant lacked *locus standi* to present the claims because in terms of section 12 of the Employment and Labour Relations Court Act, there was no employment/contractual relationship between him (applicant) and the Respondents. It was urged that the role of the applicant was representation in the national assembly, and not in Court.

14. The jurisdiction of the Court, according to the 3rd Respondent was limited to disputes in which there was an employment relationship between the parties.

15. The option available to the applicant, according to the 3rd Respondent, should have been through Article 258 of the Constitution, but that avenue was not invoked as the applicant had approached Court through an ordinary Cause rather than through a Constitutional Petition.

16. In any case, the 3rd Respondent urged, the applicant had not alleged violation of any constitutional rights/provisions.

Applicant's contentions

17. In a spirited bid to stave off the seemingly fatal challenge presented by the Respondents, the applicant posited that being an elected representative of Nakuru Town West constituency and in exercise of delegated sovereign power in terms of Article 1 of the Constitution, he was well within the law in presenting before Court the challenge to the nomination of county executive committee members in the County of Nakuru.

18. The applicant also contended that in case there was some soundness on the *locus* question, Article 159(2)(b) served as a panacea as the Court ought to treat such as an undue technicality.

19. On the prematurity question, it was the position of the applicant that the process so far had been carried out in breach of the requirements of section 35 of the County Governments Act and section 8 of the Public Appointments (County Assembly Approval) Act No. 5 of 2017.

Evaluation

20. The parties directed the attention of the Court to several decided cases and the Court has looked at them even though no express mention will be made in this ruling to them.

The jurisdictional question.

21. The 3rd Respondent took the position that the jurisdiction of this Court is derived singularly from section 12 of the Employment and Labour Relations Act. No reference was made to the other primary employment and labour statutes such as the Employment Act, 2007 which govern the jurisdiction of this Court

22. The Court would not be overstretching the jurisdictional question by stating that section 12 of the Employment and Labour Relations Act is not the only provision of law which clothes this Court with jurisdiction. That section only grants the general or universal jurisdiction.

23. And in the Court's view, if it were the only provision on jurisdiction, the use of the term *including* would be superfluous. The term *including* suggests that the categories enumerated therein are not exhaustive.

24. In appropriate cases, even a person who is not in an employment relationship can institute legal proceedings depending on the subject of the cause of action. In the instant case, it is worth noting that county executive committee members are public/state officers who are appointed to office(s) as servants

of the public.

Prematurity question

25. Both a Governor and the County Assembly have been given distinct roles to play in the process of appointment of county executive committee members.

26. In nominating persons to the position of county executive committee member(s), section 35(1) of the County Governments Act has set out the criteria which a Governor shall consider.

27. In my view, because the statute has set out the considerations the Governor ought to keep at the back of his mind, that *nominating phase* can be challenged where the Governor does not consider the relevant statutory factors.

28. That appears to be the option taken by the Claimant.

29. However, the county assembly has also been put under a statutory obligation to consider certain criteria in the *approval process* by section 35(2) of the aforesaid Act.

30. In the performance of the approval role, the county assembly is expected to invite public participation before conducting its statutory role, and it is also placed under a strict constitutional and statutory interdict to ensure that the Governor complies with *nominee qualification* prerequisites.

31. Section 35(1) and (2) of the County Governments Act suggest a statutory framework in which the County Assembly serves as the first bulwark against a Governor who in nominating persons to serve as county executive committee members does not comply with the applicable criteria.

32. In such a scenario, the county assembly would be playing a check and balances role or to use a now common terminology, *oversight role*.

33. But that framework cannot be used to oust the jurisdiction of the Court when invoked properly at the appropriate time considering that both a Governor and County Assembly may fail to consider the set statutory criteria.

34. In the instant case, the applicant did not suggest that he had raised the concerns on the 2nd Respondent's non-compliance with the constitutional and statutory imperatives for consideration by the county assembly during the vetting/approval hearings.

35. Therefore, for this Court to act and/or intervene at this stage and on the basis of material placed before it would be premature and a speculative usurpation of the role of the county assembly.

36. In so stating, this Court is not declaring that it has no jurisdiction or power to intervene in the nomination, vetting and appointment process of county executive committee members where a case has been well laid out, both on the facts and the law.

37. The Court is of course cognisant of the submission by the Respondents that it has the power to intervene after the conclusion of the approval process where it can be demonstrated that the constitutional and statutory principles have not been complied with by a Governor or County Assembly.

38. Having reached that conclusion, it is the view of the Court that it is not necessary to consider the other questions of law which were raised.

39. Arising from the foregoing, the Court upholds the preliminary objections raised on the legal issue of *prematurity* and therefore concludes that it would be unnecessary to proceed to determine the applicant's motion seeking injunctive relief.

40. The logical effect of upholding the preliminary objection(s) being that the motion is struck out.

41. For clarity, the Court declines the invitation by the Respondents to strike out the Cause at this early stage and leaves it to the applicant to consider his legal options as to the substantive Cause.

42. Costs in the cause.

Delivered, dated and signed in Nakuru on this 24th day of October 2017.

Radido Stephen

Judge

Appearances

For applicant Mr. Nyagaka instructed by Nyagaka S.M. & Co. Advocates

For 1st & 2nd Respondents Mr. Karanja instructed by Mirugi Kariuki & Co. Advocates

For 3rd Respondent Mr. Ogola instructed by Gordon Ogolla, Kipkoech & Co. Advocates

Court Assistants Nixon/Martin