



REPUBLIC OF KENYA



KENYA LAW
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**Langat v Kericho County Assembly Committee on Appointments & 2 others
(Petition 28 of 2019) [2020] KESC 34 (KLR) (6 August 2020) (Judgment)**

Moses Kiprotich Langat v Kericho County Assembly Committee on Appointments & 2 others [2020] eKLR

Neutral citation: [2020] KESC 34 (KLR)

**REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA**

PETITION 28 OF 2019

PM MWILU, DCJ & VP, MK IBRAHIM, SC WANJALA, N NDUNGU & I LENAOLA, SCJJ

AUGUST 6, 2020

BETWEEN

DR MOSES KIPROTICH LANGAT PETITIONER

AND

**THE KERICHO COUNTY ASSEMBLY COMMITTEE ON
APPOINTMENTS 1ST RESPONDENT**

THE SPEAKER OF KERICHO COUNTY ASSEMBLY 2ND RESPONDENT

KERICHO COUNTY ASSEMBLY 3RD RESPONDENT

*(Being an appeal from the Judgment of the Court of Appeal at
Nyeri (Sitting in Nakuru) (Githinji, Sichale & Kantai JJA) in
Nyeri Civil Appeal No. 109 of 2018 delivered on 11th June, 2018)*

The rejection of a nominee to a county executive committee for lack of experience and relation to another nominee does not violate the Constitution.

Reported by Kakai Toili

Labour Law – employment – public appointments – procedure to be followed – where an applicant sought to be appointed as a county executive committee member - where the county assembly rejected the nominee's name for appointment to the county executive committee for lack of experience and for being related to another nominee - what were the factors to be considered in making county government appointments – whether the decision of the county assembly to reject the nominee violated the Constitution - Public Appointments (County Assemblies Approval) Act (cap 265B) sections 3, 5, 7 and 10; County Governments Act (Cap 265) section 35.

Jurisdiction – jurisdiction of the Supreme Court – appellate jurisdiction – where an appellant challenged the decision of a county assembly to reject his name for appointment to the county executive committee for lack of



experience and being related to another nominee - whether the Supreme Court had the jurisdiction to determine the appeal – Constitution of Kenya articles 160(1) and 163(4); Supreme Court Act (Cap 9B) sections 15(1) and (2).

Brief facts

The County Government of Kericho by way of an advertisement invited suitable candidates to apply for various positions in the county executive committee. Following the advertisement, the appellant applied to be the member of the education, culture and social services committee. He was successful and his name, alongside nine others, was submitted to the 3rd respondent by the Governor of Kericho County (Governor) for vetting. During the vetting, the appellant's name was rejected for appointment for two reasons: that he lacked the experience for management of ECDE and village polytechnics and that he was related to a nominee for finance and economic planning. Aggrieved by the decision, the appellant filed a petition before the Employment and Labour Relations Court terming the reasons for his rejection as unconstitutional.

The appellant sought for among others a declaration that the proceedings of the 3rd respondent (county assembly) rejecting his appointment was void and prohibitory orders against the Governor from presenting to the Speaker of the county assembly any fresh names of nominees for approval by the county assembly for appointment as members of Kericho County Executive Committee. The Employment and Labour Relations Court granted all the prayers sought by the appellant. Dissatisfied by that decision, the respondents filed an appeal at the Court of Appeal which allowed the appeal and set aside the Employment and Labour Relations Court orders. Aggrieved by the Court of Appeal's decision the appellant filed the instant appeal.

Issues

- i. Whether the Supreme Court had the jurisdiction to determine an appeal challenging the decision of a county assembly to reject the name of a nominee to a county executive committee?
- ii. What was the procedure to be followed in making public appointments?
- iii. What were the factors to be considered in making county government appointments?
- iv. Whether the decision of the County Assembly of Kericho to reject a nominee to the county executive committee for lack of experience and relation to another nominee violated the Constitution.

Relevant provisions of the Law

Constitution of Kenya, 2010

Article 163

(4) Appeals shall lie from the Court of Appeal to the Supreme Court –

1. *As of right in any case involving the interpretation or application of this Constitution; and*
2. *In any other case in which the Supreme Court, or Court of Appeal, certifies that a matter of general public importance is involved, subject to clause (5)*

(5) A certification by the Court of Appeal under clause (4) (b) may be reviewed by the Supreme Court, and either affirmed, varied or overturned.

Supreme Court Act, 2011

Section 15 - Appeals to be by leave

1. *Appeals to the Supreme Court shall be heard only with the leave of the Court.*
2. *Subsection (1) shall not apply to appeals from the Court of Appeal in respect of matters relating to the interpretation or application of the Constitution.*

Held

1. The test to evaluate the jurisdictional standing of the court in handling the appeal was whether the appeal raised a question of constitutional interpretation or application, and whether the same had been canvassed in the superior courts and had progressed through the normal appellate mechanism so as to reach the court by way of an appeal as contemplated under article 163(4)(a) of the Constitution. The issue of the constitutionality of the respondents' decision in rejecting the name of the appellant in the County Executive Committee was consistent from the Employment and Labour Relations Court to



- the Court of Appeal and to the court. Consequently, the appeal fell within the ambit of article 163(4) (a) of the Constitution.
2. Article 176(2) of the Constitution mandated every county government to decentralize its functions and the provision of its services to the extent that it was efficient and practicable to do so. County executive committees thus comprised members appointed by the county governor, with the approval of the assembly, and who were not members of the assembly as provided for under article 179(2)(b) of the Constitution.
 3. The procedure for public appointments was governed by the Public Appointments Act No. 33 of 2011. Section 3 of the Public Appointments Act provided that all appointments under the Constitution or any other law for which the approval of Parliament was required would not be made unless the appointment was approved or deemed to have been approved by Parliament. Section 5 of the Act set the procedure for nominating a candidate for a public appointment, upon nomination, under section 5, a candidate whose position required approval by Parliament had to undergo the approval hearing as set out in section 6 of the Act. Accordingly, section 7 of the Act provided that an approval hearing had to focus on a candidate's academic credentials, professional training and experience, personal integrity and background. When approving a candidate, the House of Parliament had to be guided by the procedure used to arrive at the nominee; any constitutional or statutory requirements to the office in question; and the suitability of the nominee for the appointment proposed having regard to whether the nominee's abilities, experience and qualities met the needs of the body to which nomination was being made.
 4. On rejection of a nomination, section 10 of the Public Appointments Act provided that where the nomination of a candidate was rejected by Parliament, the appointing authority could submit to the relevant House the name of another candidate, and the procedure for approval was specified in the Act. In the context of county government appointments under section 35 of the County Governments Act No. 17 of 2012, the governor should, when nominating members of the executive committee, ensure that to the fullest extent possible, the composition of the executive committee reflected the community and cultural diversity of the county; and took into account the principles of affirmative action as provided for in the Constitution. The county assembly was mandated to ensure that all nominations for appointments to the executive committee took into account two thirds-gender rule, representation of minorities, marginalized groups and communities and community and cultural diversity recognized in Kenya among other considerations.
 5. A county assembly could reject the name of a nominee if it failed the test set out in section 35 of the County Governments Act and the provisions of the Public Appointments Act. The appellant did not fault the vetting process (which the constitutional and statutory threshold required) but the outcome. There was no reason to depart from the Court of Appeal's finding.
 6. Separation of powers was an integral principle in the Constitution: for instance, chapter 8 was devoted to the Legislature; chapter 9 to the Executive and chapter 10 on the Judiciary provided (article 160(1)) that: in the exercise of judicial authority, the Judiciary as constituted by article 161 was subject only to the Constitution and the law and was not to be subject to the control or direction of any person or authority. If courts decided only those cases that met certain justiciability requirements, they respected the spheres of their co-equal branches and minimized the troubling aspects of counter-majoritarian judicial review in a democratic society by maintaining a duly limited place in government.
 7. The respondent's decision to reject the appellant's appointment did not flout any constitutional or statutory provisions. There was no reason to interfere with the manner in which the county assembly exercised its powers on the issue.

Appeal dismissed.

Orders

Each party to bear their own costs of appeal.



Citations

Cases

Kenya

1. *In the Matter of the Interim Independent Electoral Commission (Applicant)* Constitutional Application 2 of 2011; [2011] KESC 1 (KLR); [2011] 2 KLR 32 - (Explained)
2. *Jobo & another v Shabbal & 2 others* Petition 10 of 2013; [2014] KESC 34 (KLR); [2014] 1 KLR 111 - (Explained)
3. *Kagiri, Simon Wachira v County Assembly of Nyeri, Governor Nyeri County & Attorney General* Petition 7 of 2013; [2013] KEHC 2400 (KLR); [2013] eKLR - (Explained)
4. *Lawrence Nduttu & 6000 others & Kenya Breweries Ltd & Another* Petition 3 of 2012; [2012] 2 KLR 804 - (Followed)
5. *Munya v Kithinji & 2 others* Application 5 of 2014; [2014] 1 KLR 58- (Explained)
6. *Rai & 3 others v Rai & 4 others* Petition 4 of 2012; [2014] 2 KLR 253 - (Followed)
7. *Speaker of the Senate & another v Attorney-General & another; Law Society of Kenya & 2 others (Amicus Curiae)* Advisory Opinion Reference 2 of 2013; [2013] KESC 7 (KLR); [2013] eKLR - (Explained)

Statutes

Kenya

1. Constitution of Kenya articles 10, 27(4); 27(5); 28; 39(3); 41(1); 43; 47(1); 48; 56(c); 163(4(a)); 176(2); 179(2)(b); Chapter 6 - (Interpreted)
2. County Governments Act (cap 265) sections 16, 17, 35, 42(2) - (Interpreted)
3. National Assembly (Powers and Privileges) Act (Repealed) (cap 6) section 12 - (Interpreted)
4. Public Appointments (County Assemblies Approval) Act (cap 265B) sections 5, 6, 7, 8, 9, 10 - (Interpreted)
5. Supreme Court Act (cap 9B) section 15(1) - (Interpreted)

Advocates

Mr Wanyama for the appellant.

Mr Ochieng for the respondents.

JUDGMENT

A. Background

1. The present appeal arises from a Judgment of the Court of Appeal (Githinji, Sichale & Kantai JJ A) which overturned the decision of the Employment and Labour Relations Court in *Moses Kiprotich Langat v Kericho County Assembly Committee on Appointments & 3 others* Kericho Petition No 12 of 2017.

i. Proceedings at the Employment and Labour Relations Court

2. The instant appeal can be traced to an advertisement by the County Government of Kericho dated August 26, 2017 inviting suitable candidates to apply for various positions in the County Executive Committee. Following the said advertisement, the appellant tendered his application to be considered for member of the Education, Culture and Social Services Committee. He was successful and his name, alongside nine (9) others, was submitted to the 3rd respondent by the Governor for vetting in accordance with sections 35 and 42(2) of *County Government Act*, 2012. Thereafter, a committee on appointments was set up by the 3rd respondent, in terms of Standing Order No 188, for vetting nominees by the 1st respondent. During the vetting, the appellant's was rejected for appointment for



two reasons: that he lacked the experience for management of ECDE and village Polytechnics and that he was related to a nominee for Finance and Economic Planning.

3. Aggrieved by the said decision, the appellant filed a Petition No 12 of 2017, *Moses Kiprotich Langat v Kericho County Assembly Committee on Appointments & 3 others*, before the Employment and Labour Relations Court at Kericho. The appellant termed the reasons for his rejection as illegal, unreasonable, irrelevant, discriminative, ludicrous, preposterous, unconstitutional and a blatant violation of *Constitution of Kenya*, 2010, the *County Governments Act* and the *Public Approvals (County Assembly Approvals) Act*, No 5 of 2017.
4. The appellant specifically sought a declaration that the proceedings of the Kericho County Assembly rejecting his appointment to the Kericho County Executive Committee was null and void for: firstly, breaching his constitutional rights under articles 27(4), 27(5), 28, 39(3), 41(1), 43, 47(1), 48 and 56(c) of *Constitution of Kenya*; secondly, breaching Constitutional rights of the residents of Kericho under article 43 of *Constitution*; thirdly, violating the provisions of section 35 of the *County Governments Act* No 5 of 2017; and fourthly, violating the provisions of section 9 of the *Public Appointments (County Assembly Approval) Act* No 5 of 2017. The appellant also sought an order of mandamus to compel the Kericho County Assembly to approve his nomination as a member of the Kericho County Executive Committee. Moreover, the appellant sought prohibitory orders against the Governor of Kericho County from presenting to the Speaker of Kericho Assembly any fresh names of nominees for approval by Kericho County Assembly for appointment as members of Kericho County Executive Committee and if a name had already been presented, the respondents be prohibited from vetting such fresh nominee. Finally, he sought an order directing that he be appointed as a member of the Kericho County Executive Committee and that the grounds contained in page 41 of the Committee of Appointment's report be expunged from the report for being unconstitutional and unlawful.
5. Having listened to all the parties, the learned Judge (Marete, J) granted all the prayers sought by the appellant in his petition.

ii. Proceedings at the court of Appeal

6. Dissatisfied by the decision of the Employment and Labour Relations Court, the respondents filed, Nakuru Civil Appeal No 109 of 2018, the *Kericho County Assembly Committee on Appointments & 2 others v Dr Moses Kiprotich Langat*.
7. Having considered submissions by both parties, the learned Judges of Appeal crystalized the grounds of appeal into two namely, whether the Employment and Labour relations Court could hear and determine a petition raising constitutional issues and whether the Employment and Labour Relations Court arrogated itself powers vested on the respondents by Constitution and substituting the respondent's decision in the vetting process with its own. Consequently, on June 11, 2019, the Appellate Court found merit in the Appeal and set aside the orders of the trial Court dated May 18, 2018 in entirety.
8. The appellant, aggrieved by the decision of the court of Appeal, approached this court to have the court of Appeal's decision overturned.

Parties' Submissions

i. The appellant's submissions

9. The appellant relied on his written submissions filed on October 3, 2019. On whether the court can interfere with the decision of the County Assembly, Mr Wanyama, Counsel for the appellant,



submitted that courts may interfere with the doctrine of separation of powers when proceedings or decisions contravene *Constitution*. On this point, Counsel relied on the case of *Speaker of the Senate & another v. Attorney General & 4 others*, Reference No 2 of 2013; [2013] eKLR (Re Speaker of the Senate) where this Court expressed its reluctance to interfere with parliamentary procedures where they did not breach *Constitution*. Mr Wanyama urged that under article 163(4)(a) of *Constitution*, the court has jurisdiction to determine the instant appeal as it raises substantial constitutional issues. He cites this Court's decision in *Simon Wachira Kagiri v County Assembly of Nyeri & 2 others* [2013] eKLR in support of that submission. It was thus the appellant's case that by virtue of being a state organ, the County Assembly is bound by the Bill of Rights and that this Court can interfere with the legislative process when the same violates the Bill of Rights.

10. As to whether the respondents violated articles 10, 27(4), 27(5), 28, 41(1), 43, 47(1), 48 and 56(c) of *Constitution*, the appellant submitted that the reasons advanced by the respondents in rejecting the appellant's nomination were illegal, unreasonable, irrelevant and unconstitutional considering that he underwent a rigorous interview. Counsel furthermore argued that the newspaper advertisement for the position the appellant applied for did not list any qualification with regards to having experience in ECDE and village polytechnics.

In that regard, Counsel submitted that, by relying on that qualification specifically, experience in ECDE and village polytechnics, the respondents violated constitutional principles and statutory provisions on fair labour practices under article 41(1) of *Constitution*, and his right to human dignity as provided for under article 28 of *Constitution*.

11. With regard to the costs of this appeal, the appellant submitted that the same should follow the event. Consequently, they urged the court to allow the appeal as prayed.

ii. The respondents' submissions

12. In opposing the appeal, Mr Ochieng, counsel for the respondents made his submissions on three limbs; that is, whether the petition has raised sufficient grounds to warrant exercise of the court's jurisdiction; whether the petition offends the doctrine of separation of powers and whether the respondents complied with the legal procedures in vetting the appellant. Counsel submitted that the Petition has not raised any sufficient grounds, on the basis of which this court should exercise its discretion to grant the orders sought. While citing section 35 of the *County Governments Act*, section 8 of the *Public Appointments Act* and Chapter 6 of *Constitution*, the respondents urged that there is no evidence that the procedure employed by the respondents violated any of the above legislation or cited procedure or any other laid down law.
13. Learned counsel submitted that nothing in the Appeal challenges the integrity of the process and that the respondents adhered to the law. Indeed, the respondents submitted that the appellant has only challenged the final decision that rejected his name and not the procedure employed by the respondents. The respondents submitted that the appellant's name was validly rejected for three reasons namely: he lacked basic experience in management of devolved function as provided for by the 4th Schedule Part II of *Constitution* with respect to ECD and village Polytechnics; he was a maternal cousin of Mr Patrick C Mutai, a nominee for Finance and Economic Planning; and that the nominations did not take into account issues of regional balance, gender and persons with disabilities. Counsel concluded his submissions on this issue by stating that there were no fundamental omissions or extraneous or irrelevant matter that would render the whole process unconstitutional.
14. As to whether the petition offends the doctrine of separation of powers and whether the respondents complied with the legal procedures in vetting the appellant, the respondents urged that the doctrine



of separation of powers applies with equal measures to County Governments. In that context, they cited sections 16 and 17 of the *County Governments Act*, section 12 of the *National Assembly (Powers and Privileges) Act* and the *Simon Wachira Case* to anchor their submissions. They submitted in that regard that the appellant's appointment was refused for justified reasons that did not amount to serious violations of *Constitution* to warrant any interference by this court. Accordingly, Learned Counsel urged the court to dismiss the appeal with costs.

C. Issues for Determination

15. Having considered the grounds of appeal, the submission of the parties, the authorities in support thereof, it is evident to us that there are only three issues for determination by this court, namely:
 - i. Whether the Appeal before this court meets Constitutional threshold under article 163(4)(a) of *Constitution*.
 - ii. Whether the Kericho County Assembly flouted any Law in rejecting the appellant's name.
 - iii. If and when the court interfere with the doctrine of separation of powers.

D. Analysis

i. Does the Appeal before this court meet Constitutional threshold under article 163(4)(a) of Constitution?

16. Whereas, the appellant submitted that the court has jurisdiction to hear the Appeal as it raises substantive constitutional issues, the respondents were of the contrary opinion and argued that this appeal does not raise any substantive issue to warrant exercise of the court's jurisdiction under article 163(4)(a) of *Constitution*.
17. In that regard, the appellate jurisdiction of this court is captured in article 163(4) of *Constitution of Kenya* which states as follows:

“ [article 163]

 - (4) Appeals shall lie from the court of Appeal to the Supreme Court –
 - a. As of right in any case involving the interpretation or application of this Constitution; and
 - b. In any other case in which the Supreme Court, or Court of Appeal, certifies that a matter of general public importance is involved, subject to clause (5)
 - (5) A certification by the court of Appeal under clause (4) (b) may be reviewed by the Supreme Court, and either affirmed, varied or overturned.”
18. Furthermore, section 15(1) of the *Supreme Court Act* also provides that appeals to the Supreme Court shall be heard only with the leave of the court. section (15)(2) on the other hand provides that Sub-section (1) shall not apply to appeals from the court of Appeal in respect of matters relating to the interpretation or application of *Constitution*.
19. This court has in the above context, outlined the boundaries of its jurisdiction under article 163(4) (a) of *Constitution* in several past decisions, which decisions are still applicable. Specifically, we refer to the *Lawrence Nduttu & 6000 others & Kenya Breweries Ltd & another*, SC Petition No 3 of 2012;



[2012] eKLR, [Hassan Ali Joho & another v Suleiman Said Shabbal & 2 others](#), Sup Ct Petition No 10 of 2013, and [Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others](#), SC App No 5 of 2014; [2014] eKLR (Munya 1).

20. In the case of [Hassan Ali Joho & another v Suleiman Said Shabbal & 2 others](#), Sup Ct Petition No 10 of 2013 (Joho Case), this court observed as follows:

“[37]: In light of the foregoing, the test that remains, to evaluate the jurisdictional standing of this court in handling this appeal, is whether the appeal raises a question of constitutional interpretation or application, and whether the same has been canvassed in the Superior Courts and has progressed through the normal appellate mechanism so as to reach this court by way of an appeal, as contemplated under article 163(4)(a) of [Constitution...](#)” [emphasis added].

21. In applying the above holding to the present appeal, we note that the record at pages 55 and 57 shows that on appeal, the Appellate Court identified two issues as being central in the Appeal before it, namely:
- i. Whether an Employment and Labour Relations Court can hear and determine a petition raising constitutional issues.
 - ii. Whether the Employment and Labour Relations Court arrogated itself powers vested on the respondents by [Constitution](#) and substituting the respondent’s decision in the vetting process with its own.
22. We note the issue of Constitutionality of the respondents’ decision in rejecting the name of the appellant in the County Executive Committee was consistent from the trial court to the court of Appeal and now to this court. Consequently, we hold that this appeal, indeed, falls within the ambit of article 163(4)(a) of [Constitution](#).

ii. Whether the Kericho County Assembly flouted any Law?

23. The appellant urged that the respondent’s decision was illegal, unreasonable and unconstitutional and violated articles 10, 27(4), 27(5), 28, 41(1), 43, 47(1), 48 and 56(c) of [Constitution](#). Mr Wanyama submitted that the appellant was discriminated due to his relationship with a nominee for the Finance and Economic Planning Docket. He also submitted that the other criteria used to reject the appellant’s name, that is lack of experience in ECDE and village polytechnics, violated Constitutional principles and statutory provisions on fair labour practices under article 41(1) of [Constitution](#). Quite to the contrary, the respondents submitted that the appellant’s appointment was refused for justified reasons which did not amount to serious violations of [Constitution](#) to warrant any interference by this Court and that the respondents complied with the law.
24. What exactly is the procedure for appointing County Executive Committees? Did the County Assembly of Kericho defy the same? article 176(2) of [Constitution](#) mandates every County Government to decentralize its functions and the provision of its services to the extent that it is efficient and practicable to do so. County Executive Committees thus comprise members appointed by the County Governor, with the approval of the assembly, and who are not members of the assembly as provided for under article 179(2)(b) of [Constitution](#).
25. The procedure for public appointments is governed by the [Public Appointments Act](#) No 33 of 2011. In that regard, section 3 of the [Public Appointments Act](#) provides that all appointments under [Constitution](#)



or any other law for which the approval of Parliament is required shall not be made unless the appointment is approved or deemed to have been approved by Parliament.

26. section 5 of the same Act sets the procedure for nominating a candidate for a public appointment. It states as follows:

- “5(1) An appointing authority shall, upon nominating a person for an appointment to which this Act applies, notify the relevant House of Parliament accordingly.
- (2) A notification under subsection (1) shall be—
- (a) in writing;
- (b) be lodged with the Clerk of the relevant House of Parliament.
- (3) A notification of appointment shall be accompanied by information concerning the nominee, having regard to the issues mentioned in section 7.
- (4) For purposes of this Act, a notification of nomination shall be deemed to be duly given on the day on which it complies fully with subsections (2) and (3).”

27. Upon nomination, under section 5 of the Public Appointments Act, a candidate whose position requires approval by Parliament shall undergo the approval hearing as set out in section 6 of the Act. Accordingly, section 7 of the same Act provides that an approval hearing shall focus on a candidate’s academic credentials, professional training and experience, personal integrity and background. When approving a candidate, the House of Parliament shall be guided by the procedure used to arrive at the nominee; any constitutional or statutory requirements to the office in question; and the suitability of the nominee for the appointment proposed having regard to whether the nominee’s abilities, experience and qualities meet the needs of the body to which nomination is being made.

28. On rejection of a nomination, section 10 of the Public Appointments Act provides that where the nomination of a candidate is rejected by Parliament, the appointing authority may submit to the relevant House the name of another candidate, and the procedure for approval specified in this Act shall apply accordingly.

29. In the context of County Government appointments under section 35 of the County Governments Act No 17 of 2012, the Governor shall, when nominating members of the Executive Committee, first, ensure that to the fullest extent possible, the composition of the executive committee reflects the community and cultural diversity of the county; and second, take into account the principles of affirmative action as provided for in Constitution. The County Assembly is, on its part, mandated to ensure that all nominations for appointments to the executive committee take into account two thirds-gender rule, representation of minorities, marginalized groups and communities, and community and cultural diversity recognized in Kenya among other considerations. The section specifically states:

- “35. The governor shall, when nominating members of the executive committee—
- (1) 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 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.
 3. A person may be appointed as a member of the county executive committee if that person—
 - a. is a Kenyan citizen;
 - b. is a holder of at least a first degree from a university recognized in Kenya;
 - c. satisfies the requirements of Chapter Six of *Constitution*; and
 - d. has knowledge, experience and a distinguished career of not less than five years in the field relevant to the portfolio of the department to which the person is being appointed.
 4. A member of the county executive committee shall not hold any other State or public office.”
30. From the foregoing provisions, a County Assembly can reject the name of a nominee if the same fails the test set out in section 35 of the *County Governments Act* and the provisions of the *Public Appointments Act*. In this regard, we take cognizance of the court of Appeal’s finding on this issue whereby the court stated as follows:
- “[Page 15] ...in our considered view, we think it was wrong for the trial court to disregard the appellant’s findings based on the lack of experience for the advertised position. The other consideration was in respect to regional balance. The respondent hails from Bureti where two other candidates had been selected from and approved. The respondent was of the view, and rightly so in our view, that it was not to offer the position on the basis that one of his relations had been offered one of the positions.
- ...it was therefore important for the appellants to adhere to constitutional provisions
- ...the issue of balance was important consideration so as to have an all-inclusive county and not a county where the majority of its employees hail from one community”
31. We have carefully considered the reasons put given by the County Assembly of Kericho in rejecting the appellant’s name namely, that is lack of experience in ECDE and village polytechnics and being related to a nominee for the Finance and Economic Planning Docket, and agree with the Appellate Court’s reasoning that the appellant did not fault the vetting process (which we find meets Constitutional and statutory threshold required) but the outcome. For the above reasons, we see no reason to depart from the court of Appeal’s finding.



iii. When does the court interfere with the doctrine of separation of powers?

32. This Court has numerous in its previous decisions emphasized on the need to respect and uphold the principle of separation of powers, a doctrine that is entrenched in our *Constitution. In the Matter of the Interim Independent Electoral Commission*, Constitutional Application No 2 of 2011; [2011] eKLR, (the Matter of Interim Independent Electoral Commission) this court affirmed that separation of powers is an integral principle in Kenya's Constitution, as follows:

“(53) Separation of powers is an integral principle in *Kenya's Constitution*: for instance, Chapter 8 is devoted to the Legislature; Chapter 9 to the Executive; and Chapter 10, on the Judiciary, provides (article 160(1)) that:

In the exercise of judicial authority, the Judiciary as constituted by article 161, shall be subject only to this *Constitution* and the law and shall not be subject to the control or direction of any person or authority.

(71) the court's preference for judicial restraint: if judges decide only those cases that meet certain justiciability requirements, they respect the spheres of their co-equal branches, and minimize the troubling aspects of counter-majoritarian judicial review, in a democratic society, by maintaining a duly limited place in government.”

33. Further *In the Matter of the Speaker of the Senate & another*, Advisory Opinion Reference No. 2 of 2013; [2013] eKLR, we stated as follows:

“(61) It emerges that Kenya's legislative bodies bear an obligation to discharge their mandate in accordance with the terms of *Constitution*, and they cannot plead any internal rule or indeed, any statutory scheme, as a reprieve from that obligation. This Court recognizes the fact that *Constitution* vests the legislative authority of the Republic in Parliament. Such authority is derived from the people. This position is embodied in article 94(1) thereof. The said article also imposes upon Parliament the duty to protect *Constitution* and to promote the democratic governance of the Republic. article 93(2) provides that the national Assembly and the Senate shall perform their respective functions in accordance with *Constitution*. It is therefore clear that while the legislative authority lies with Parliament, the same is to be exercised subject to the dictates of *Constitution*. While Parliament is within its general legislative mandate to establish procedures of how it conducts its business, it has always to abide by the prescriptions of *Constitution*. It cannot operate besides or outside the four corners of *Constitution*. 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.”

34. *In the Matter of Interim Independent Electoral Commission*, we also found that courts of law may intervene in cases where different state organs may operate outside their mandate:

“(54) The effect of *Constitution's* detailed provision for the rule of law in the process of governance, is that the legality of executive or administrative actions is to



be determined by the courts, which are independent of the executive branch. The essence of separation of powers, in this context, is that in the totality of governance-powers is shared out among different organs of government, and that these organs play mutually-countervailing roles. In this set-up, it is to be recognized that none of the several government organs functions in splendid isolation.”

35. Furthermore, this court *In the Matter of the Speaker of the Senate & another*, Advisory Opinion Reference No 2 of 2013; [2013] eKLR, stated as follows:

“(62) However, where a question arises as to the interpretation of *Constitution*, this Court, being the apex judicial organ in the land, cannot invoke institutional comity to avoid its constitutional duty. We are persuaded by the reasoning in the cases we have referred to from other jurisdictions to the effect that Parliament must operate under *Constitution* which is the supreme law of the land. The English tradition of Parliamentary supremacy does not commend itself to nascent democracies such as ours. Where Constitution decrees a specific procedure to be followed in the enactment of legislation, both Houses of Parliament are bound to follow that procedure. If Parliament violates the procedural requirements of the supreme law of the land, it is for the courts of law, not least the Supreme court to assert the authority and supremacy of *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 *Constitution*. Where however, as in this case, one of the Houses is alleging that the other has violated *Constitution*, and moves the court to make a determination by way of an Advisory Opinion, it would be remiss of the court to look the other way. Understood in this context therefore, by rendering this Opinion, the court does not violate the doctrine of separation of powers. It is simply performing its solemn duty under *Constitution* and the *Supreme Court Act*.”

36. Having found that the respondent’s decision to reject the appellant’s appointment did not flout any Constitutional or Statutory provisions, we see no reason to interfere with the manner in which the County Assembly of Kericho exercised its powers on the issue. The effect of this is that the Appeal herein lacks merit and is therefore dismissed.

37. On costs, the appellant prayed that the costs of the appeal be borne by the respondents. In *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others* SC Pet No 4 of 2014; [2014] eKLR, we held that we have discretion to award costs in order to ensure that the ends of justice are met. Since the Appeal sought a clarification on the exercise of powers by a public entity, the County Assembly of Kericho, we see no reason to penalize any party on costs. Each party shall bear their own costs.

38. Consequently, the appeal fails and is dismissed.

Orders

39. Accordingly, and in view of the foregoing reasons the final orders are:

- i. The petition of appeal dated July 19, 2019 be and is hereby dismissed.
- ii. Each Party shall bear their own costs of appeal.



40. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 6TH DAY OF AUGUST 2020.

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P.M MWILU

DEPUTY CHIEF JUSTICE & VICE PRESIDENT OF THE SUPREME COURT

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M. K. IBRAHIM

JUSTICE OF THE SUPREME COURT

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S. C. WANJALA

JUSTICE OF THE SUPREME COURT

.....

NJOKI NDUNGU

JUSTICE OF THE SUPREME COURT

.....

I. LENAOLA

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR

SUPREME COURT OF KENYA

