



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CONSTITUTIONAL PETITION NO. 8 OF 2013

ABDIWAB ABDULLAHI ALI.....APPLICANT

VERSUS

GOVERNOR GARISSA COUNTY.....1ST RESPONDENT

HON. ATTORNEY GENERAL.....2ND RESPONDENT

CLERK, COUNTY ASSEMBLY OF GARISSA.....3RD RESPONDENT

RULING

The application

Contemporaneously with the Petition dated and filed on 18th July 2013 is the Notice of Motion brought under certificate of urgency dated and filed on the same date. In the Notice of Motion, the applicant is seeking the following orders:

- i. That the hearing of this application be certified as urgent and be heard ex parte in the first instance.
- ii. That a temporary order do issue staying the forwarding of the list of nominees of the County Public Service Board to the County Assembly of Garissa for approval pending the hearing and determination of this application.
- iii. That a temporary order do issue staying the vetting, gazettelement and or any formal appointment by the 1st respondent of the nominees of the County Public Service Board pending the hearing and determination of the application.
- iv. That an order do issue declaring the list of the County Public Service Board published by the 1st respondent on the 18th June 2013 unconstitutional and an order do issue compelling the 1st respondent to properly constitute/nominate nominees to the County Public Service Board in accordance with the law.
- v. Costs of the application.

The application is supported by grounds found on the face of the application and on the supporting affidavit sworn by the applicant and dated 18th July 2013. The applicant has stated that the 1st respondent presented on 18th June 2013 names of nominees to the County Public Service Board to the County Assembly on 9th July 2013 for vetting but the same were rejected; that among these names were those of one Annette Wambui Muriuki and one Mohamed Ibrahim who were not in the list of the shortlisted candidates published in the Standard Newspaper of 31st May 2013; that the 1st respondent was planning to present for a second time the same rejected names for vetting; that this action is unconstitutional and

prejudicial to the residents of Garissa because the nominees are not qualified; that the list of nominees lacks equity, inclusivity, openness, fair distribution and public participation and exhibits favoritism and bias and is therefore unconstitutional.

This court certified the application urgent on 18th July 2013 and ordered the same be served on the other parties for hearing on 25th July 2013. On 25th July 2013 this court directed that the Preliminary Objection and the Grounds of Opposition filed by the respondents be argued first before the court could entertain other various applications in the proceedings as well as the Petition.

Preliminary Objection

On 25th July 2013, the 1st Respondent raised a Notice of Preliminary Objection that the Notice of Motion dated 18th July 2013 was bad in law as drawn and the same should be struck out with costs to the 1st Respondent for reasons that it was not brought under any provision of the Civil Procedure Act; that the prayers sought at the interlocutory stage do not lie as they are not prayed for in the Petition and that the matter complained of is overtaken by time as the nominees to the County Public Service Board have been approved by the Assembly and presented for gazettelement.

The 2nd Respondent filed grounds of opposition dated 23rd July 2013 contenting that the Notice of Motion and the Petition lack merit due to non-disclosure of constitutional violations in precise and specific manner; that the alleged breach of the Constitution in respect to alleged nepotism, favouritism and other improper motives are matters of evidential facts requiring strict proof to which the burden is with the Petitioner and that the Petition is an abuse of court process and the same should be dismissed with costs.

Submissions by 1st & 3rd Respondents

I wish to set the record straight on the outset that the Preliminary Objection to my understanding is in respect to the Notice of Motion dated 18th July 2013 and not the Petition. I have noted that the 1st and 3rd Respondents have submitted as though the Preliminary Objection was in respect of both the Petition and the Notice of Motion when this is not the case. I will therefore confine my ruling on the issues raised in respect of the Notice of Motion.

In their submissions dated 23rd September 2013, the 1st and 3rd Respondents spared a paragraph on the Notice of Motion. They have submitted that the orders being sought in the Notice of Motion dated 18th July 2013 would make the court issue orders in vain; that it is seeking orders against persons who are not parties to the proceedings; that the Notice of Motion is an abuse of court process and ought to be dismissed.

Submissions by 2nd Respondent

The 2nd Respondent has also submitted in respect of the Petition. It would be unfair to the Petitioner and other parties whose applications are awaiting hearing if this court were to determine the Preliminary Objection and Grounds of Opposition in respect of the Petition at this stage. Since the 2nd Respondent has not submitted on respect of the Notice of Motion dated 18th July 2013 I will confine ruling to the issues raised against the Notice of Motion. It seems to me that the parties have misapprehended my directions dated 25th July 2013 that the Preliminary Objection and the Grounds of Opposition be heard first.

Submissions by the Applicant

The applicant has also submitted in response to issues raised by the respondents in respect to both the Petition and the Motion. I have stated above in this ruling that I will confine my ruling to the issues touching on the Motion. The applicant has submitted that what is pleaded in the Preliminary Objection and the Grounds of Opposition are not purely on points of law; that it is only after the hearing that the

court can decide whether there was non-disclosure of constitutional violations and alleged breach of the Constitution in respect to alleged nepotism, favouritism and other improper motives.

Determination

I wish to address the following issues:

- i. Whether the application is bad in law for failure to cite the provisions of the law under which it is brought.
- ii. Whether the prayers sought in the Notice of Motion can issue at the interlocutory stage.
- iii. Whether the Notice of Motion has been overtaken by events.
- iv. Whether the Notice of Motion is unmeritorious due to non-disclosure of constitutional violations.
- v. Whether the alleged breach of the Constitution in respect of alleged nepotism, favouritism and other improper motives are matters of evidential facts requiring strict proof.

On the first issue, this court is under an obligation to determine matters before it without paying undue regard to procedural technicalities (**see Article 159 of the Constitution**). Further no technical objection may be raised to any pleadings on the ground of any want of form (**see Order 2 Rule 14 of the Civil Procedure Rules**). This court does not downplay the importance of citing the provisions of the law relied on. Parties are required to quote the sections of the law they are relying on first to warn the other party of the nature of the orders sought and secondly for clarity. Failure to cite the law though not fatal to a case may be detrimental where the orders sought are not clarified.

On the second issue, it is my view that to declare at the interlocutory stage that the list of nominees to the County Public Service Board published by the 1st Respondent on 18th July 2013 as unconstitutional before hearing the Petition is prejudicial to the Petition and the Respondents.

On the third issue, it is true that the Notice of Motion dated 18th July 2013 specifically prayers 2 and 3 have been overtaken by events. The record of the court file shows that the names of nominees were tabled before the County Assembly.

On the fourth and fifth issues, it is my view that the determination of these issues can only be concluded after hearing and determining the Petition. They are issues that require evidentiary proof.

Having considered this matter and the rival issues raised by the parties as well as their rival submissions, it is my view that the issues raised in the Notice of Motion can only be handled exhaustively and substantially after hearing the Petition. It is also my view that the orders sought, specifically the order to declare the list of nominees unconstitutional cannot be issued at the interlocutory stage without prejudicing the other parties and finally the Notice of Motion has been overtaken by events. For the above reason, I do hereby order the Notice of Motion dated 18th July 2013 dismissed. Let each party bear its own costs. It is so ordered.

Dated, signed and delivered this 7th July 2014.

S.N.MUTUKU

JUDGE