



**Ali & 2 others v Speaker, County Assembly of Garissa & another (Constitutional Petition E017 of 2023) [2023] KEHC 25847 (KLR) (30 November 2023) (Ruling)**

Neutral citation: [2023] KEHC 25847 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT GARISSA  
CONSTITUTIONAL PETITION E017 OF 2023  
JN ONYIEGO, J  
NOVEMBER 30, 2023  
IN THE MATTER OF SUSPENSION OF MEMBERS OF THE COUNTY  
ASSEMBLY OF GARISSA  
IN THE MATTER OF ARTICLES 22(1) AND 258 OF THE  
CONSTITUTION OF KENYA  
AND  
IN THE MATTER OF VIOLATION AND THREATENED VIOLATION  
OF RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLES  
2(1), 2(2), 2(6), 10, 19(2), 20(1) & (2), 21(1) &  
(3), 22(1), 23, 27, 28, 47, 50, 73, 174, 175(A), 185, 232, 258 AND 259  
OF THE CONSTITUTION OF KENYA  
AND  
IN THE MATTER OF COUNTY ASSEMBLIES POWERS AND  
PRIVILEGES ACT NO.6 OF 2017  
AND  
IN THE MATTER OF THE COUNTY ASSEMBLY STANDING ORDERS**

**BETWEEN**

**HON. ABDIRAHMAN MOHAMED ALI ..... 1<sup>ST</sup> APPLICANT  
HON. OMAR ABDI HASSAN ..... 2<sup>ND</sup> APPLICANT  
HON. ABUBAKAR MOHAMED KHALIF ..... 3<sup>RD</sup> APPLICANT**

**AND**

**SPEAKER, COUNTY ASSEMBLY OF GARISSA ..... 1<sup>ST</sup> RESPONDENT**



**RULING**

1. *Vide* a petition dated 8<sup>th</sup> November 2023, the petitioners herein sought orders as hereunder;
  - a. A declaration that the 1<sup>st</sup> Respondent's ruling made on 25-10-2023 suspending the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Petitioners for the remainder of the Garissa County Assembly Second session violates Article 47 of *the Constitution* of Kenya and is therefore null and void *ab initio*.
  - b. A declaration that the 1<sup>st</sup> Respondent can only expel or suspend members of the Garissa County Assembly for gross misconduct in the manner prescribed under Standing Order Number 104 (2) (a) and (b).
  - c. Order of Prohibition to restrain the 1<sup>st</sup> Respondent from expelling, suspending and or removing the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Petitioners from the remainder of the Garissa County Assembly Second Session
  - d. Costs of this petition.
2. Contemporaneously filed with the petition is a notice of motion of even date brought pursuant to Article 22, 23, 159, 258 and 259 of *the Constitution* seeking orders that:
  - i. Spent
  - ii. That this Honourable court do issue a conservatory order staying and/or setting aside the 1<sup>st</sup> Respondent's ruling of 25<sup>th</sup> October, 2023 suspending the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Petitioners from the remainder of the Garissa County Assembly Second session pending the hearing and determination of the Petitioner's application.
  - iii. That this Honourable court do issue a conservatory order staying and/or setting aside the 1<sup>st</sup> Respondent's ruling of 25<sup>th</sup> October, 2023 suspending the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Petitioner's from the remainder of the Garissa County Assembly Second Session pending the hearing and determination of the Petitioner's Petition.
  - iv. That the costs of this Application be provided for.
3. The application is premised upon grounds stated on the face of it and an undated, unsigned and un-commissioned affidavit of one Omar Abdi Hassan the second petitioner/applicant herein. Basically, the application by the applicants who are members of the County Assembly Garrissa is anchored on grounds that on 25<sup>th</sup> October 2023, at the County Assembly chambers, the 1<sup>st</sup> respondent who is the speaker of the house without any colour of right suspended them from the remainder of the second session until 13<sup>th</sup> February 2024.
4. It was averred that the current session is crucial as it will discuss security issues and floods which are affecting Garissa. That the suspension is an affront to their constituents whom they represent. Further, that the suspension is in revenge of their consistent attacks in attempt to exercise oversight over the executive county executive committee.
5. It was deponed that the suspension was in violation of their constitutional rights and exercise in excess of authority. That the said act is in violation of the *powers and privileges Act*.



6. In response, the respondents filed a preliminary objection citing grounds that:
  - i. This Honourable Court lacks jurisdiction to hear and determine this matter in view of the provisions of article 196(3) of *the constitution* of Kenya as read with sections 10 and 11(2) of the *county Assemblies Powers and Privileges Act* No. 6 of 2017.
  - ii. The proceedings herein offend the doctrine of separation of powers as envisaged under article 175(a) of *the constitution* as the orders sought by the petitioners seek this Honourable Court to interfere with the internal operations and management of the County Assembly.
  - iii. The Supporting affidavit of Omar Hassan Ali in support of the petition and the application offends Rule 9 of the *Oaths and Statutory Declaration Rules* for failing to seal the exhibits under the seal of a Commissioner for Oaths and mark with Serial letters of identification. Therefore, the evidence alluded to at Paragraph 2, 3 and 9 of the Supporting affidavit are not only inadmissible but the entire affidavit is bad in law and shall be expunged making the application and petition incomplete, bad in law and ought to be struck out in limine.
  - iv. For the following reasons, the petitioners' petition and application is incompetent and legally untenable and ought to be struck out with costs.
7. When the matter came up for directions, the court directed that it be canvassed together with the preliminary objection. Parties were therefore directed to file submissions to canvass the two. However, only the applicants and the 1<sup>st</sup> and 2<sup>nd</sup> respondents complied with the said directions.
8. The applicants via their submissions filed on 23.11.2023 contended that the substratum of the petition herein is on the basis of the infringement of rights and freedoms guaranteed upon the applicants. That the Honourable Court's jurisdiction in this instance is drawn from *the constitution* as provided for in article 165 (3) (b).
9. It was argued that the 1<sup>st</sup> respondent in issuing the ruling/order which suspended the applicants from the County Assembly on 25.10.2023, failed to uphold the rule of law which restricts the arbitrary exercise of power. That despite the 1<sup>st</sup> respondent asserting that his decision was pursuant to the *County Assemblies Powers and Privileges Act*, he failed to establish or constitute the Committee of Powers to make an inquiry into the alleged breaches of privilege, which is contrary to the Act.
10. That the 1<sup>st</sup> respondent did not follow the laid down procedures as he acted as the judge, jury and executioner by assuming the role of the Committee of Powers and Privileges as envisaged under the Act.
11. The applicants further urged that the petition herein did not offend the doctrine of separation of powers and placed reliance in the case of *James Opiyo Wandayi v Kenya National Assembly & 2 Others* [2016] eKLR where the issue of disciplining the member of parliament for Ugunja Constituency met the threshold of fairness and proportionality as well as discharge of general administrative powers under article 47 of *the Constitution*. That Odunga J (as he was then) stayed the orders as he held that the doctrine of separation of powers was not available where it was alleged that *the constitution* had been violated.
12. Counsel further submitted that the applicants should not suffer as a result of the mistake of an advocate. To support that position, reliance was placed on the case of *Tana and Athi Rivers*



*Development Authority v Jeremiah Kimigbo Mwakio & 3 Others* [2015] eKLR where the court stated that:

“In determining whether to exercise the discretion in a party’s favour, the court pays regard to the damage sought to be forestalled vis a vis the prejudice to be visited on the opposing party”.

13. The 1<sup>st</sup> and 2<sup>nd</sup> respondents via their submissions filed on 23.11.2023 urged this court that it lacked the jurisdiction to entertain the matter herein as the same was akin to interfering with the internal operations and management of the County Assembly. Reliance to support the same was placed on the case of *Samuel Kamau Macharia & another v Kenya Commercial Bank & 2 others* [2012] eKLR.
14. It was contended that the act of the speaker to suspend the applicants was in exercise of his constitutional and statutory duties and the same was an internal matter of the County Assembly. That the respondents enjoy immunity from these proceedings as the same offends article 196(3) of *the constitution* of Kenya as read with sections 10 and 11(2) of the *County Assemblies Powers and Privileges Act*. Reliance was placed on the case of *Dominic Ndonye Maithya & 3 Others v Machakos County Asembly Speaker & 2 Others* (2017) eKLR to urge this court that the businesses of the County Assembly are usually transacted through their respective standing orders and for all intents and purposes internal affairs.
15. Further, that the proceedings herein offend the doctrine of separation of powers as envisaged under article 175(a) of *the constitution* as the orders sought by the applicants interfere with the internal operations and management of the County Assembly.
16. In the same breadth, it was urged that the supporting affidavit of Omar Hassan Ali in support of the petition and the application offends Rule 9 of the *Oaths and statutory Declarations Act* for failing to seal the exhibits under the seal of a commissioner for oaths and mark the same with serial letters of identification. That on that ground alone, the evidence alluded to at paragraph 2,3 and 9 of the Supporting affidavit were not only inadmissible but also the entire affidavit is bad in law. In the end, this court was urged to strike out the application and petition.

### **Determination**

17. I have considered the preliminary objection as raised by the 1<sup>st</sup> and 2<sup>nd</sup> respondents against the application in question. The only issue which arises from these proceedings is whether the preliminary objection meets the threshold for grant of the orders sought.
18. It is trite that the validity of any preliminary objection is gauged against the requirement that it must raise pure issues of law capable of disposing of a dispute at once and with finality. That it is therefore, mandatory for a Court to ascertain that a preliminary objection is not caught up within the realm of factual issues that would necessitate the calling of evidence.
19. I have considered the application herein and the objection thereof. This court’s jurisdiction has been cited as lacking. Secondly, the competence of the application and petition has been cited on account that the supporting affidavit which is used to support both of them is not commissioned, dated nor signed. These are critical issues which if resolved in favour of the objection, the suit shall fall by the wayside hence no need to determine the application nor petition.



20. In Civil Suit No. 85 of 1992, *Oraro v Mbaja* [2005] 1 KLR 141, Ojwang J, as he then was, cited with approval the position in *Mukisa Biscuit v West End Distributors Ltd* (1996) E. on the operation of preliminary objection as follows: -
- “ ... I think the principle is abundantly clear. A “preliminary objection”, correctly understood, is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed”.
21. The applicants have urged that the 1<sup>st</sup> respondent failed to uphold the rule of law which restricts the arbitrary exercise of power by subjecting such power to well defined and established laws. That the 1<sup>st</sup> respondent’s assertion that his decision was pursuant to the *County Assemblies Powers and Privileges Act*, failed to establish or constitute the Committee of Powers to make an inquiry into the alleged breaches of privilege, which is contrary to the Act.
22. But of importance, all these averments were well packaged in an application and/or petition that was supported by not only unsigned but also un-commissioned and undated supporting affidavit.
23. The making of affidavits is governed by the *Oaths and Statutory Declarations Act*, Cap 15 Laws of Kenya. Section 5 of the Act provides, thus:
- “ Every commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made.”
24. Further, Section 8 states:
- “ A magistrate or commissioner for oaths may take the declaration of any person voluntarily making and subscribing it before him in the form in the Schedule.”
25. Therefore, an affidavit must clearly state the place and date where it was made and it must be made before a Magistrate or a Commissioner for oaths.
26. This court was referred to Section 9 of the *Oaths and Statutory Declaration Rules* while averring that the evidence alluded to by the applicants is therefore inadmissible.
27. It is not in dispute that the purported supporting affidavit herein was not commissioned nor signed nor dated by the deponent contrary to the law. In as much as the applicants urged that no prejudice will be occasioned on the respondents and further, that this court ought to invoke sections 1A and 1B of the *Civil Procedure Act* and article 159 of *the Constitution* to cure the anomaly, the defect is unfortunately incurable.
28. Blacks’ Law Dictionary defines an affidavit as a voluntary declaration of facts written down and sworn to by the declarant before an officer authorized to administer oaths such as a Notary Public. An affidavit therefore must be voluntary, written and commissioned. If any of these three ingredients is missing, then that document is not an affidavit.



29. In the case of *CMC Motors Group Limited v Bengeria arap Korir trading as Marben School & another* (2013) eKLR, the court, while striking out an affidavit on similar grounds, stated that:

“The merit as I find it in respect of Waudo’s affidavit is that the affidavit does not seem to have been sworn before a Commissioner for Oaths. For avoidance of doubt the Black’s Law Dictionary defines an oath as follows –

‘Oath is a solemn declaration accompanied by a swearing to God or a revered person or thing that ones’s statement is true or that one will be bound to a promise ... The legal effect of an oath is to subject the person to penalties for perjury if the testimony is false.’

‘... Bearing that definition the question that needs to be answered is whether Waudo took an oath before a Commissioner for Oaths...It is not an affidavit which is under oath. That being so the same is hereby struck out...”

30. In *Gideon Sitelu Konchellab v Julius Lekakeny Ole Sunkuli & 2 others* [2018] eKLR the supreme court had this to say;

(8) We have no hesitation in finding that the purported Replying Affidavit filed by the 1st Respondent is fatally defective as the same contravenes all the legal requirements for the making of an affidavit. Hence it has no legal value in the matter before us. We have checked all the eight copies of the Replying Affidavit as filed in the Court Registry and confirmed that none of the copies was signed, commissioned and dated. Consequently, as the same is defective, it is deemed that there is no Replying Affidavit on record filed by the 1st Respondent.

(9) A Replying Affidavit is the principal document wherein a respondent’s reply is set and the basis of any submissions and/or List of Authorities that may be subsequently filed. Absence this foundational pleading, the Replying Affidavit, it follows that even the Written Submissions purportedly filed by the 1st Respondent on 17th August, 2018 are of no effect. Curiously, we further note that even the said Written Submissions are not dated, though this possibly might not have been fatal had the foundational document, the Replying Affidavit, been in order. From a perusal of the Written Submissions, it is clear to us that they are substantially based and relies on the undated and unsworn Replying Affidavit...”

31. Guided by the decisions hereinabove cited, I find that the purported supporting affidavit filed by the applicants/petitioners in support of the petition/application herein is not an affidavit as known in law and the same cannot be allowed to remain on record and ought to be struck out and expunged from the court record.

32. Article 159(2) (d) of *the constitution* cannot salvage the situation. This is not about technicality but breach of a mandatory statutory provision. This is a classic case where counsel should indemnify a client for his wrongs but not for the court to sanitize. [ Also See *Odinga & 5 Others v IEBC* (2013) eKLR, where the Supreme Court struck out and expunged from the record un-commissioned affidavits filed by the petitioner].

33. On account of the defective supporting affidavit alone, the preliminary objection must succeed. The consequence of that holding is that both the petition, application and the submissions plus the annexures thereof are not anchored on any valid affidavit hence incompetent and therefore struck out. Having held as such, I need not belabour on the issue of lack jurisdiction and separation of powers as that will prejudice any possible suit arising out of similar circumstances and grounds.



34. Accordingly, the preliminary objection as raised by the 1<sup>st</sup> and 2<sup>nd</sup> respondent is hereby upheld and the petition/application herein stand struck out with no order as to costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 30<sup>TH</sup> DAY OF NOVEMBER 2023**

.....

**J. N. ONYIEGO**

**JUDGE**

