



Mathenge v Clerk County Assembly of Kirinyaga (Judicial Review Application E004 of 2023) [2023] KEHC 27095 (KLR) (18 December 2023) (Ruling)

Neutral citation: [2023] KEHC 27095 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
JUDICIAL REVIEW APPLICATION E004 OF 2023
RM MWONGO, J
DECEMBER 18, 2023**

BETWEEN

DAVID MATHENGE APPLICANT

AND

THE CLERK COUNTY ASSEMBLY OF KIRINYAGA RESPONDENT

RULING

Background

1. The uncontroversial facts are that the applicant is a Member of the Respondent County Assembly. By a letter dated 25th September, 2023, he was summoned by the Respondent’s Committee on Powers and Privileges (CP&P) to appear before it on 4th October 2023. The purpose of the summons was to enable the Committee to inquire into his conduct following a complaint by another Member.
2. Alarmed by the summons, the applicant filed an application seeking, inter alia, certiorari to quash the said summons. This court issued a temporary stay against the Committee proceeding with the meeting pending hearing of the application.
3. In the meantime, the respondent filed the present preliminary objection dated 4th October, 2023, to the effect that:

“The Honourable court has no jurisdiction to entertain these proceedings by virtue of the provisions of section 10 And 11 of the County Assemblies Powers and Privileges Act No 6 of 2017”
4. Parties were directed to file submissions on the preliminary objection



Respondents' Submissions

5. The preliminary objection by the respondent is that the court lacks jurisdiction to intervene in the legislative and affiliated work of the county assembly. According to the respondent, Jurisdiction is granted by law or other like instruments. He cites the decision of the Court of Appeal in *The Owners of Motor Vessel "Lillian S" v Caltex (Kenya)Ltd* (1989) KLR.
6. The Respondent submits that that the basis of his Preliminary Objection is the fact that the activities of the Respondent are protected by the principle of the separation of powers between the arms of Government. More particularly, the respondent relies on Article 196(3) of *the Constitution* and Section 14 of the *County Government Act* 2012.
7. The Respondent submits that the Applicant was summoned to appear before the Powers and Privileges Committee to inquire into the conduct of the Applicant. The Applicant being dissatisfied with the invitation to appear before the Committee on Powers and Privileges instituted this instant judicial review application. The Applicant argues that his rights have been infringed by the Respondent, more specifically his rights to fair hearing under Article 47 and 50 as well as under the Fair Administrative Actions Act, 2015.
8. The Respondent submits that the Powers and Privileges Committee is an internal organ of the County Assembly empowered to make recommendations in their report which must be adopted and ratified by the County Assembly.
9. The Respondent argues that it is only after a resolution has been made by the County Assembly that the procedure and method in reaching that decision can be challenged in any court of law.
10. The respondent points out that the County Assembly has not made any resolution on the matter which would provide this Honourable Court with material to interrogate as to its compliance with *the Constitution* and the Fair Administrative Actions Act. The Applicant has not demonstrated any violation or infringement of their constitutional rights, illegality of the actions of the Respondent and/or unreasonableness of the County Assembly. The issuance of the summons to the Applicant is purposed to kick start a certain process of the County Assembly.
11. Finally, the Respondent submits that the jurisdiction of this Honourable Court can only be invoked in the event of an exercise of jurisdiction by way of breach of *the Constitution* and the Respondent submits that there has been no violation of *the Constitution*.

Applicant's Submissions

12. The applicant, in response to the respondents' objection submits that applicant was summoned by the Committee on Powers and Privileges. He urges that the said committee has authority to summon him since the summons are issued to him in respect of actions allegedly committed by him outside of the premises of the County Assembly.
13. The applicant submits that the *County Assemblies Powers and Privileges Act*, was enacted with a specific purpose, which is to regulate the powers, privileges, and immunities of county assemblies, their committees, and members. That the long title to the Act primarily focuses on regulating conduct within the precincts of county assemblies. The scope of the Act is clearly limited to actions occurring within the assembly premises.
14. According to the applicant, Section 15 of the Act establishes the Committee of Powers and Privileges and outlines its functions. While this committee is empowered to inquire into the conduct of a member



whose actions are alleged to constitute a breach of privilege, Section 16 explicitly references conduct violating specific sections of the Act, namely, sections 25, 26, 27 or 29. Section 26 lists prohibited acts, but these prohibitions are in respect to county assemblies and their members.

15. In this case, the Applicant has been summoned before the Committee of Powers and Privileges based on allegations of utterances made outside the premises of the county assembly. The applicant stresses that the Act, understood from its purpose as set out in the long title and the relevant sections, does not encompass actions taken outside the precincts of the county assembly.
16. The applicant thus submits that the Committee of Powers and Privileges lacks the jurisdiction to summon the Applicant for actions taken outside the county assembly precincts, which are not governed by the [County Assemblies Powers and Privileges Act](#). The Applicant has every right to approach this honourable court to seek redress and protect their fundamental rights.
17. Both parties relied on authorities which are referred to below.

Issues for Determination

18. The only issue for determination is whether the court is properly seized with jurisdiction to entertain the proceedings filed by the applicant in light of the provisions of sections 10 and 11 of the County Assemblies Power and Privileges Act, No 6 of 2017

Analysis and Determination

19. The locus classicus on jurisdiction is the celebrated case of the Court of Appeal, Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] KLR 1. There, Nyarangi J (as he then was) held thus:

“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.”
20. The applicant submits that: without jurisdiction a judicial or quasi-judicial body acts in vain; that the Committee of Powers and Privileges lacks the jurisdiction to summon the Applicant for actions taken outside the County Assembly precincts, which are not governed by the [County Assemblies Powers and Privileges Act](#). In this case, the applicant states he has every right to approach this honourable court to seek redress and protect his fundamental rights.
21. In the case of Ruth Wambui Ndirangu & 2 others v Clerk County Assembly of Embu & 3 others Constitutional Petition No. 16 of 2018 [2019] eKLR the court held that Sections 10 and 11 of the County Assemblies Powers & Privileges Act 2017 did not oust the supervisory jurisdiction of the court as provided in [the Constitution](#).
22. The Respondent submits that the Applicant was summoned to appear before the Committee on Powers and Privileges to inquire into the conduct of the Applicant. The Applicant being dissatisfied with the invitation to appear before the Committee on Powers and Privileges instituted this instant judicial review application. However, the Applicant argues that his rights have been infringed by the Respondent, more specifically his rights to fair hearing under Article 47 and 50 as well as under the Fair Administrative Actions Act, 2015.



23. Section 10 and 11 of the [County Assemblies Powers and Privileges Act](#) provides for the Committee's proceedings not to be questioned in courts in as follows:

- “ 10. No proceedings or decision of a County Assembly or the Committee of Powers and Privileges acting in accordance with this Act shall be questioned in any court.
11. Immunity from legal proceedings
- (1) No civil or criminal proceedings shall be instituted against any Member for words spoken before, or written in a report to a county assembly or a Committee, or by reason of any matter or thing brought by him or her therein by a report, petition, Bill, resolution, motion or other document written to a county assembly.
- (2) No civil suit shall be commenced against the Speaker, the leader of the majority party, the leader of the minority party, a chairperson of a committees or any member for any act done or ordered by them in the discharge of the functions of their office.
- (3) The Clerk or other members of staff shall not be liable to be sued in a civil court or joined in any civil proceedings for an act done or ordered to be done in the discharge of their functions relating to proceedings of a county assembly or its committees.”

Jurisdiction of the High Court

24. It is not seriously disputed by any party that the High Court has over-arching powers to look into the lawfulness of a process by which a decision of a judicial or quasi-judicial body was arrived at and can set it aside if the process was flawed.
25. The provisions of Article 165(3) and 165 (6) of [the Constitution](#) clearly settle the question of the High Court's overall jurisdiction to settle any questions of constitutional interpretation and any question as to whether anything done under the authority of [the Constitution](#) or any law is inconsistent with or in contravention of [the Constitution](#).
26. The relevant provisions of Article 165(3) and provide as follows:

- “ 3. 3. Subject to clause (5), the High Court shall have—
- a. unlimited original jurisdiction in criminal and civil matters;
- b. jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;
- c. jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;
- d. jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—
- i. the question whether any law is inconsistent with or in contravention of this Constitution;



- ii. the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;
 - iii. any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and
 - iv. a question relating to conflict of laws under Article 191; and
 - e. any other jurisdiction, original or appellate, conferred on it by legislation.” (Emphasis added).
27. There are several jurisdictions granted to the High Court in those provisions: unlimited original jurisdiction; determinative jurisdiction in respect of the bill of rights; constitutional interpretative jurisdiction; and appellate jurisdiction.
28. In addition to the over-arching jurisdiction of the High Court to interrogate any matters constitution, Article 165(6) grants the High Court an additional and sweeping supervisory jurisdiction over other non-superior entities that only the High Court has. Article 165(6) and (7) provides as follows:
- “(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.
 - (7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice” (Emphasis added).
29. As already specified, Article 165 (3) (d) (ii) provides that the High Court has jurisdiction to hear any question respecting the interpretation of *the constitution* or whether anything said to be done under the authority of *the Constitution* or of any law is inconsistent with or in contravention of *the Constitution*.
30. Read together, Articles 165(3) and 165(6) and (7), clearly enure in the High Court in its varied original, determinative, bill of rights; constitutional interpretative and supervisory jurisdictions, the power to evaluate the constitutionality of any act of a state organ including a County Assembly or any entity or body purporting to exercise authority under *the Constitution* or under any law.
31. Indeed, the High Court’s supervisory jurisdiction over other entities other than superior courts is so broad that the Court may, in its unfettered discretion, call for the record of the proceedings of any entity that is not a superior court and “may make any order or give any direction it considers appropriate to ensure the fair administration of justice”. This constitutional supervisory jurisdiction appears to be of a character of a judicial review nature.
32. There is no provision that suggests that any of the aforesaid jurisdictions of the High Court can be ousted.
33. County Assemblies are entities or state organs obligated to operate in compliance with *the Constitution* and the law. Article 2 provides that *the Constitution* is the supreme law of the Republic and binds all persons and all State organs at all levels of government and that no person or body may claim or exercise state authority except as authorised under *the Constitution*.



34. Thus, where a violation occurs, this Court has power to assert its authority and the supremacy of *the Constitution*.

35. As I understand it, the objection taken by the respondent to the Court's jurisdiction is not that this Court does not have the jurisdictions donated under Article 165. What they are saying is that the investigation of a Member of the County Assembly is a legislative function; that such a legislative function is protected under Sections 10 and 11 of the *County Assemblies Powers and Privileges Act*, which is enacted pursuant to the provisions of Article 196(3) of *the Constitution*.

36. Article 196(3) of *the Constitution* provides that:

“Parliament shall enact legislation providing for the powers, privileges and immunities of county assemblies, their committees and members.”

37. Now, what is required under the Act is that:

“No proceedings or decision of a County Assembly or the Committee of Powers and Privileges acting in accordance with this Act shall be questioned in any court”

This provision must be understood within the broader context of the constitutional separation of powers

38. The sovereign power of the people under Article 1(3) of *the Constitution* is delegated to the Executive, the Judiciary, and Parliament and legislative assemblies in the county governments. It is this distinctive delegation sovereign power that distinguishes and separates the arms of state from each other.

39. The concept of separation of powers is thus an important one to keep in consideration when dealing with the interphase between legislative process or power and judicial intervention thereof.

40. In the South African case, *Doctors for Life International v. Speaker of the National Assembly and Others* (CCT 12/05) [2006] ZACC 11, at para.68, it was held:

“Courts [in the Commonwealth] have traditionally resisted intrusions into the internal procedures of other branches of government. They have done this out of comity and, in particular, out of respect for the principle of separation of powers. But at the same time they have claimed the right as well as the duty to intervene in order to prevent the violation of *the Constitution*. To reconcile their judicial role to uphold *the Constitution*, on the one hand, and the need to respect the other branches of government, on the other hand, courts have developed a ‘settled practice’ or general rule of jurisdiction that governs judicial intervention in the legislative process.”

41. In the Supreme Court Advisory opinion in *Speaker of the Senate & Another v Attorney General & 4 Others*[2013] the Supreme Court recognised this “institutional comity” vis a vis the court's power to intervene saying:

“[60] It makes practical sense that the scope for the Court's intervention in the course of a running legislative process, should be left to the discretion of the Court, exercised on the basis of the exigency of each case. The relevant considerations may be factors such as: the likelihood of the resulting statute being valid or invalid; the harm that may be occasioned by an invalid statute; the prospects of securing remedy, where invalidity is the outcome; the risk that may attend a possible violation of *the Constitution*.



42. The Supreme Court went further to explain distinct functions of the various organs of state, whilst at the same time reiterating that notwithstanding their respective constitutional distinctiveness, each entity must always to abide by the prescriptions of *the Constitution*, and none can operate besides or outside the four corners of *the Constitution*. The Court stated:

[61]....This Court recognizes the fact that *the 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 *the 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 *the Constitution*. It is therefore clear that while the legislative authority lies with Parliament, the same is to be exercised subject to the dictates of *the 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 *the Constitution*. It cannot operate besides or outside the four corners of *the Constitution*....”

43. The Supreme Court did however, further caution that:

“This Court will not question each and every procedural infraction that may occur in either of the Houses of Parliament. The institutional comity between the arms of government must not be endangered by the unwarranted intrusions into the workings of one arm by another”

44. The supervisory opinion of the Supreme Court is binding on this court see: In the Matter of Interim Independent Electoral Commission [2011] eKLR where at paragraphs 93 and 94 of its opinion, the Supreme Court stated:

“[93]While an Advisory Opinion may not be capable of enforcement in the same way as ordinary decisions of the Courts (in the shape of Rulings, Judgments, Decrees or Orders), it must be treated as an authoritative statement of the law. The Opinion must guide the conduct of not just the organ(s) that sought it, but all governmental or public action thereafter. To hold otherwise, would be to reduce Article 163(6) of *the Constitution* to an “idle provision”, of little juridical value. The binding nature of Advisory Opinions is consistent with the values of *the Constitution*, particularly the rule of law.

(94) For the above reasons, we decide that an Opinion of the Supreme Court is binding as much as any other decision of the Court, as herein indicated.”

45. In the present case the respondent is clearly arguing that the legislative process of the County Assembly has barely only commenced; that all that has happened to date is the issuance of a summons, and no more. They argue that the Assembly should be entitled to conclude its process before the court engages in any intervention. This is not an idle argument.

46. The respondent cited the case of Margaret Lorna Kariuki & another v County Assembly of Embu & another; National Forum for County Assemblies (Interested Party) [2019] eKLR, where a preliminary objection similar to the one herein was dealt with by Muchemi J. There, the petitioners had sought refuge from being summoned to appear before the County Assembly. The preliminary was raised by the Embu County Assembly on the basis that the petition filed sought to challenge the proceedings of the County Assembly and its committees against the express provisions of section 10 of the *County Assemblies Powers and Privileges Act*, 2017



47. Muchemi, J, relying on the Supreme Court Opinion in Speaker of the National Assembly case, stated that

48. She, correctly in my view, found that the petitioners jumped the gun in filing the petition, and ultimately dismissed the petition holding that:

“The petitioners ought to wait for the process to be finalised and a decision made which they may choose to challenge for its unconstitutionality.”

49. In my view, the applicant in this case has also jumped the gun. As a result he is -not able to demonstrate any violation or infringement of his constitutional rights or fundamental freedoms by the County Assembly. The summons is to appear before the Powers and Privileges Committee to inquire into his conduct. He ought to wait for the committee to hear, give a verdict and then challenge its constitutionality in this Court.

Conclusion

50. The golden thread running through the law and the authorities on jurisdiction in circumstances such as these in this case, is that the High Court has unlimited jurisdiction to look into the constitutionality and lawfulness of any act or omission that violates or threatens to violate the rights of any person.

51. In the present case, however, all that the Respondent has so far been alleged to do is to issue a summons to the applicant to appear before the Committee on Powers and Privileges. The respondent is entitled to do so in law. It has made no decision subsequent to the issuance of the summons, that warrants the interference of this court.

52. Equally the applicant has not demonstrated that there has been any violation or threat of violation by the exercise of the respondent’s lawful power to issue the summons. The nearest act of the respondent to such a threat was the issuance of summons on a specified date, and then suddenly truncating the time period in such a way that the applicant had a severely curtailed period to respond appropriately. That was however remedied by the stay issued by this court.

Disposition

53. Ultimately, in my view, the application is therefore premature as no decision violative of the applicant’s rights has been demonstrated. Thus, the Court’s jurisdiction has not yet not crystallised, and the preliminary objection is well taken.

54. Accordingly, the Court orders as follows:

- a. The preliminary objection succeeds and is hereby upheld;
- b. The orders of stay issued on 4th October 2023 are hereby discharged;
- c. The respondent is at liberty to proceed with the summons, and the applicant is at liberty to defend himself therein, within the law and, ultimately, under the protection of *the Constitution*

55. Orders accordingly.

DATED AT KERUGOYA THIS 18TH DAY OF DECEMBER, 2023

R. MWONGO



JUDGE

Delivered in the presence of:

1. Shadrack Wambui holding brief Omari for the Applicant
2. Ms. Maina holding brief Ratemo for the Respondent
3. Murage, Court Assistant

