



**Waweru v Njeru; County Assembly of Nyandarua (Interested Party)
(Petition 5 of 2021) [2022] KEHC 10917 (KLR) (26 May 2022) (Judgment)**

Neutral citation: [2022] KEHC 10917 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU**

PETITION 5 OF 2021

JM NGUGI, J

MAY 26, 2022

**IN THE MATTER OF ARTICLES 1, 2, 3, 10, 22, 23,35, 48, 159, 174,
175, 176, 178(2), 185, 201 AND 232 OF THE CONSTITUTION OF
KENYA, 2010**

**IN THE MATTER OF SECTIONS 9A (2) OF THE COUNTY
GOVERNMENTS ACT, 2012**

AND

**IN THE MATTER OF SECTIONS 3, 4 AND 5 OF THE ACCESS TO
INFORMATION ACT, 2016**

AND

**IN THE MATTER OF STANDING ORDERS, 9,15, AND 18 OF THE
NYANDARUA COUNTY ASSEMBLY STANDING ORDERS**

AND

**IN THE MATTER OF ILLEGAL AND UNLAWFUL OCCUPATION OF THE
OFFICE OF THE DEPUTY SPEAKER NYANDARUA COUNTY
ASSEMBLY BY HON. ZACHARY MWANGI NJERU**

BETWEEN

ANTHONY WAMUGUNDA WAWERU PETITIONER

AND

ZACHARY MWANGI NJERU RESPONDENT

AND

COUNTY ASSEMBLY OF NYANDARUA INTERESTED PARTY



JUDGMENT

1. The Petition dated December 23, 2020 contains the following prayers:
 1. That this Honourable Court be pleased to declare that the Respondent assumed the Office of the Deputy Speaker of Nyandarua County Assembly in contravention of the law.
 2. That this Honourable Court be pleased to Declare that the Respondent is holding the Office of the Deputy Speaker of Nyandarua County Assembly illegally.
 3. That this Honourable Court be pleased to Declare that the Office of the Deputy Speaker of Nyandarua County Assembly vacant.
 4. That this Honourable Court be pleased to order that the Respondent does refund all the money that has accrued to him illegally since his assumption of the Office of Deputy Speaker of Nyandarua County Assembly.
 5. That this Honourable Court be pleased to order that the Interested Party does enforce orders 3 and 4 above.
 6. That this Honourable Court be pleased to grant such other orders and directions that it deems fit in the circumstances.
 7. That costs be provided.
2. This Petition is, technically, a legal challenge to the election of the Respondent as the Deputy Speaker of the Nyandarua County Assembly. That election occurred on 12/09/2017 – a little less than a week after the new term for the County Assembly began after the General Elections of August 8, 2017. This legal challenge was filed in Court on December 23, 2020. Hence, this challenge was filed 1,198 days or 3 years, 3 months and 11 days after the event. The explanation for that delay is, as will come out shortly, the stuff of sociological or contextual jurisprudence.
3. In any event, the dispute is quite straightforward.
4. After the General Elections of August 8, 2017, the Nyandarua County Assembly held its first sitting on 05/09/2017. At that sitting, the Speaker of the Assembly was elected. According to the Hansard Report for 12/09/2017, the Assembly met again at the Assembly Chamber at 2:30pm. The Hansard Report indicates that the Clerk of the Assembly called for the first order which he entitled “Election of the Deputy Speaker.” The Clerk, then, proceeded to preside over the election of the Deputy Speaker – which was uncontested after the Clerk ruled that one of the candidates had formally withdrawn from the race. The Respondent was then declared, by the Clerk, as the duly elected Deputy Speaker of the County Assembly of Nyandarua. According to the Hansard Report, the Clerk, then, proceeded to swear in the Respondent.
5. The Hansard Report shows that after he was sworn in, the Deputy Speaker assumed the Chair which had just been vacated by the Clerk and gave his maiden speech. He, thereafter, left the Chair and the substantive Speaker, Hon. Ndegwa Wahome, assumed the Chair and called for the next order.
6. The central thrust of this Petition is the argument by Petitioner and the Interested Party that this election of the Respondent as the Deputy Speaker was in contravention of the law because it was presided over by the Clerk and not the Speaker of the Assembly or any other member elected by Members of the Assembly to serve as Chair.



7. The relevant legal provisions are Article 178 of the *Constitution*; sections 9(4) and 14(1) of the *County Governments Act*; and Standing Order No. 4(5) and (6) of the Standing Orders of the Nyandarua County Assembly.
8. Article 178 of the *Constitution* provides for a Speaker of a County Assembly:
 1. Each County Assembly shall have a speaker elected by the county assembly from among persons who are not members of the assembly.
 2. A sitting of the county assembly shall be presided over by –
 - a. The speaker of the assembly; or
 - b. In the absence of the speaker, another member of the assembly elected by the assembly.
 3. Parliament shall enact legislation providing for the election and removal from office of speakers of the county assemblies.
9. Section 9(4) of the *County Governments Act*, on the other hand, provides that:

At any time in the absence of the speaker of the county assembly or in matters that directly affect the speaker, the county assembly shall elect a member to act as speaker as contemplated under Article 178(2)(b) of the *Constitution*.
10. Further, section 14(1) of the *County Governments Act* states:

A county assembly –

 - a. May make standing orders consistent with the Constitution and this Act regulating the procedure of the county assembly including, in particular, orders for the proper conduct of proceedings.
11. Under the authority provided by this section, the Nyandarua County Assembly enacted its Standing Orders. Standing Order No. 4(5) provides for a period when the Clerk of the Assembly exercises the powers of the speaker as being the period before the clerk has administered the oath or affirmation of office of the speaker. Standing Order No. 4(6), on the other hand, provides that any other time, the oath or affirmation of office shall be administered by the speaker immediately after prayers.
12. Reading these provisions together, the Petitioner and the Interested Party make the point that to the extent that the election of the Respondent as Deputy Speaker was presided over by the Clerk rather than the Speaker as provided for under Standing Order 4(5) and to the extent that the oath of office of the Deputy Speaker was administered by the Clerk rather than the Speaker as provided by Standing Order 4(6), both actions were in contravention of the law. This is so because the Standing Orders derive their legal pedigree all the way from Article 178 of the *Constitution*. They rely on *Amos Muthui Muchiri v Speaker, County Assembly of Nyeri & 3 Others* [2019] eKLR to urge the point that to the extent that the Clerk was not elected from among the members of the County Assembly to preside over the proceedings and there was a substantive speaker, his action of presiding over the election contravened the Constitution. According to them, this case accentuates the importance the Constitution attaches to the vote of a member elected to act as Chair in the absence of the Speaker. They clinch their argument with the unmistakable rigour of Justice’s Ngaah’s remarks in the *Amos Muthui Muchiri Case*:

As far as I understand, Article 178(2)(b) of the *Constitution* presupposes the existence of an “elected member” ready to step in the shoes of the speaker any time the latter is absent as



soon as the assembly is inaugurated. I cannot read any other meaning from the words “in the absence of the speaker, elected by the assembly”. I do not read this provision to imply that the election is a future event, so that the “acting speaker”, can only be elected after the departure of the substantive speaker or after his absence has been brought to the attention of the assembly. A fortiori, being the business of the assembly, it is only logical that the speaker himself will preside over the election of his deputy, or a person to preside over the sittings while he is away.

13. In the second place, the Petitioner and Interested Party argue that the election of the Respondent as Deputy Speaker was irregular because the Respondent’s opponent for the position of the Deputy Speaker did not properly withdraw his candidature.
14. In aid of this argument, the Petitioner and Interested Party rely on Standing Orders No. 15(5) and No. 9 of the Nyandarua County Assembly. The former provides that the procedure for electing a Deputy Speaker shall, with necessary modifications, be the same as that prescribed for the election of the Speaker. The latter provides that for withdrawal of a candidate. It provides that a candidate shall withdraw by written notice personally delivered to the clerk at least two hours before the ballot has started.
15. The Petitioner and Interested Party argue that in the impugned elections, the Clerk is reported in the Hansard Report to have told the Assembly that he had not received any withdrawal and that it followed that the election was between the two candidates. Immediately thereafter, however, the Clerk is reported to have allowed one of the candidates to orally withdraw his candidature on the floor of the Assembly. The Petitioner and Interested Party argue that this was in clear contravention of Standing Order 15(5) since there was no written notification of withdrawal delivered to the Clerk at least two hours before the election.
16. The Petitioner, finally, combines the two arguments to argue that the Respondent was, therefore, not supported in a ballot by the votes of two thirds of members of the County Assembly as required by law. This is because, he argues, since the Clerk presided over the elections in contravention of the law and since, he argues, there was no proper withdrawal of candidacy by the Respondent’s competitor, it follows that there was no election by way of casting of a ballot by members of the County Assembly. As such, he argues, the Respondent was not supported in a ballot by the votes of two thirds of Members of the County Assembly as contemplated in Standing Order No. 8(1) of the Standing Orders.
17. In response to these arguments, the Respondent’s answer is succinct. He argues that a Deputy Speaker is elected from among elected members of the County Assembly and that the Respondent was a duly elected member of Nyakio Ward in Nyandarua County. He further argues that he applied for the position of Deputy Speaker and that, as the Hansard Report bears him out, there were only two candidates who had complied with the requirements set out in the Standing Orders at the time of the elections. He argues that the Hansard Report clearly shows that one of the candidates withdrew from the race and that that left only one candidate for the position of the Deputy Speaker; and that his candidature was, therefore, unopposed. In the circumstances, he argues, it is logical that there was no need for secret ballot to be used as advocated for in the Standing Orders.
18. The Respondent further urges the Court to exercise restraint and not needlessly get involved in the affairs of the legislative arm of the County Government since that does not augur well for the doctrine of separation of powers. He cites *Mumo Matemu v Trusted Society of Human Rights & 5 Others* [2013] eKLR and *Justus Kariuki Mate & Another* [2017] eKLR for the proposition that “it is untenable in law for the Petitioner to ask the Court for orders whose import will result in interference of the processes of the County Assembly of Nyandarua.” The Respondent further argues that the Petitioner is asking the



Court to subvert the doctrine of separation of powers as contemplated in the Constitution of Kenya. It is the sole mandate of the County Assembly to elect a Deputy Speaker, he argues; and the Nyandarua County Assembly did that. As such, the Court can only interfere when there is a clear case of violation of the law and there was no such breach in the instant case.

19. There is no reason to belabour the point. It was a transgression of the law for the Clerk of the Assembly to preside over the election of the Deputy Speaker when the substantive Speaker had already been elected. If anyone else had to preside over the election of the Deputy Speaker, it ought to have been one other Member of the County Assembly elected by the other members. It is a simple fact: it was wrong for the Clerk to have presided that session. No amount of sophism, structural or post-structural reading of the legal texts can change that fact.
20. The question, then, is what is the implication of that transgression? The Petitioner and the Interested Party would like to invite the most radical of consequences – from a declaration that the election was null and void (four years later and with less than 2 months to the next elections) to an order that all funds received by the Respondent in his capacity as Deputy Speaker be repaid back to the Treasury. However, to answer this question, it is imperative that we be contextual.
21. First, it is important to recall that the Speaker of the County Assembly was present at the sitting in which the impugned election was carried out. We know this because the Hansard Report says that the Speaker took the chair immediately after that election. And what was the Speaker’s first order of business? It was to congratulate the elected Deputy Speaker! What emerges from this is that if anyone is liable for abdication of constitutional duty, it was the Speaker who was present but let a stranger preside over the business of the County Assembly. However, the more charitable reading is that all the persons concerned believed in good faith that the procedure they had followed was the correct one. This is what explains the Speaker’s congratulatory message to the elected Deputy Speaker.
22. So what changed along the way? Politics did. The Speaker and the Deputy Speaker diverged in their political views and this ultimately crystallized into a full-blown political war that nearly paralyzed the County Assembly. This is well known and publicized by the fact that the two and through their proxies have engaged in at least thirty-four cases before various Courts in which they have taken opposite sides. It is, as part of that political strategy that one side “discovered” that the Deputy Speaker’s election had missed the millimeter gauge of technical perfection and brought the present Petition.
23. But should justice not be done though the heavens fall? Yes, it should. But it is much better when justice can be done without the heavens falling. In the first place, as an incidence of the doctrine of separation of powers, Courts prefer that matters of internal procedures of the other two arms of government be, as much as possible, and, always as a first instance, that they be raised using the procedures and avenues provided by that arm or agency. This is why this Court stated in a somewhat related case that “the Court is ordinarily reluctant to scrutinize *ex ante* the internal operations of another arm of government where such an arm is acting with powers textually granted to it by the Constitution or written law except where it can be shown by clear and undisputed evidence that the organ is conducting itself illegally or beyond its powers.” See: *Republic v Zachary Mwangi Njeru & 6 others Ex parte James Wahome Ndegwa; County Assembly of Nyandarua & another (Interested Parties)* [2020] eKLR. The Supreme Court is in accord in *Justus Kariuki Mate & Another v Martin Nyaga Wambora & another* [2017] eKLR.
24. In the present case, the technical transgression, once discovered, would have been best raised at the County Assembly and have the Speaker issue a ruling thereon or offer an ameliorative path. That is a procedural pathway which would have best preserved the independence and integrity of the County Assembly. That this became the first port of call is, in itself, telling. That, when raised, the object of the



attack was the holder of the office rather than the Speaker who was largely responsible for the infraction, and who, ordinarily, is the symbol of the County Assembly and is typically sued for such infractions by the Assembly, completes the story.

25. What about the argument that the oral withdrawal of the Respondent's candidature was also in contravention of the Standing Orders since he was required to have given notice of his withdrawal in writing at least two hours before the elections? This objection fails even worse than the first one. It feels eerily pedantic to have to verbalize a response to it but read in context, Standing Order No. 9 is not a mandatory rule governing how a candidate must withdraw from running for Speaker or Deputy Speaker but a protective rule aimed at protecting a candidate when there is a question whether they withdrew from the race or not. Differently put, a protective rule for the benefit of a class cannot be used to penalize that class for failing to mandatorily adhere to it when it is to their advantage not do so. A person cannot be compelled to take advantage of a rule enacted for his own protection. A candidate in an election – like a person in a public office – can choose to withdraw from that election or employment in any manner that effectively withdraws his candidature or employment. A person who has unequivocally withdrawn and has so stated cannot thereafter be said not to have withdrawn and, therefore, be forced to be a participant in an election he wished not to take part in merely because he did not dot the technical “i”s or cross the technocratic “ts” in his bid to withdraw. To rule otherwise would be the apotheosis of formal legal fetishism; the most vacuous triumph of formalism over substance. A person who unequivocally withdraws from an election and is recorded in a document as official as the Hansard Report to have done so and even offers to proffer his reasons for so withdrawing (and is only stopped by the Chair) cannot, thereafter, by technical operation of the law be said not to have withdrawn four years later.
26. The bottom line is that this suit is only helpful in giving future guidance to County Assemblies about the correct procedure for the election of Deputy Speakers. It would be pointlessly talismanic to imbue it with retroactive consequence given the totality of circumstances of this case – including the passage of time -- and I hereby expressly decline to do so.
27. The final orders that recommend themselves, then, are as follows:
- a. A declaration hereby issues that the election of the Respondent as the Deputy Speaker of Nyandarua County Assembly on 12/09/2017 was in contravention of the law to the extent that the election was presided over by the Clerk rather than the Speaker of the County Assembly.
 - b. For the avoidance of doubt, the declaration in (a) shall not have any impact on the holder of the office of the Deputy Speaker of Nyandarua County Assembly for the remainder of this electoral term.
 - c. A copy of this judgment shall be made available to the County Assembly through the Clerk so that it guides future elections of Deputy Speakers.
 - d. All other orders and reliefs requested for in the Petition are hereby expressly declined.
 - e. Each party will bear its costs for this Petition.
28. Orders accordingly.

DATED AND DELIVERED AT NAKURU THIS 26TH DAY OF MAY, 2022

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JOEL NGUGI



JUDGE

