



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION

CONSTITUTIONAL PETITION NO. E005 OF 2021

AS CONSOLIDATED WITH PETITION NO. E433 OF 2020, E007 OF 2021, E009 OF 2021, E011 OF 2021, E012 OF 2021, E013 OF 2021, E015 OF 2021, 019 OF 2021 AND E021 OF 2021

IN THE MATTER CONCERNING ALLEGED VIOLATIONS OF ARTICLES 1(1), 1(3), 2(1), 2(3), 2(4), 3(1), 3(2), 6(2), 10, 38(2), 38(3)(B), 73, 74,81,94,165, 174,175, 179, 181, 182(4), 182(5), 182(6), 183, 185(1), 196, 258, 259(1), 259(3), AND 259(11) OF THE CONSTITUTION OF KENYA 2010: AND IN THE MATTER OF COUNTY GOVERNMENTS (AMENDMENT) ACT, 2020 AND IN THE MATTER OF THE COUNTY GOVERNMENT ACT, 2012 AND IN THE MATTER OF PUBLIC APPOINTMENTS (COUNTY ASSEMBLIES APPROVAL) ACT, 2017 AND IN THE MATTER OF THE ASSUMPTION OF THE OFFICE OF GOVERNOR ACT, 2019

BETWEEN

OKIYA OMTATAH OKOITI.....1ST PETITIONER

HABIB OMAR KONGO.....2ND PETITIONER

PATRICK MWANGI KIIRU.....3RD PETITIONER

JOSPHAT KARIUKI.....4TH PETITIONER

ANGELA MWIKALI.....5TH PETITIONER

MUIRURU WAWERU.....6TH PETITIONER

THIRDWAY ALLIANCE KENYA.....7TH PETITIONER

LAW SOCIETY OF KENYA.....8TH PETITIONER

KENYA HUMAN RIGHTS COMMISSION.....9TH PETITIONER

GEOFFREY MAKWORO.....10TH PETITIONER

AND

ANNE KANANU

MWENDA.....1ST RESPONDENT/CROSS-PETITIONER

NAIROBI CITY COUNTY ASSEMBLY.....2ND RESPONDENT

THE SPEAKER, NAIROBI CITY

COUNTY ASSEMBLY.....3RD RESPONDENT

THE CLERK, NAIROBI CITY

COUNTY ASSEMBLY.....4TH RESPONDENT

THE ATTORNEY GENERAL.....5TH RESPONDENT

INDEPENDENT ELECTORAL

AND BOUNDARIES COMMISSION.....6TH RESPONDENT

THE GOVERNMENT PRINTER.....7TH RESPONDENT

AND

HON. MIKE MBUVI SONKO

KIOKO GIDION.....ST INTERESTED PARTY

THE SENATE.....2ND INTERESTED PARTY

KATIBA INSTITUTE.....3RD INTERESTED PARTY

POLYCARP IGATHE.....4TH INTERESTED PARTY

JUBILEE PARTY.....5TH INTERESTED PARTY

NAIROBI CITY COUNTY EXECUTIVE.....6TH INTERESTED PARTY

KRISTINA PRATT KENYATTA.....7TH INTERESTED PARTY

JANE WERU.....8TH INTERESTED PARTY

UNITED DEMOCRATIC

MOVEMENT PARTY.....9TH INTERESTED PARTY

ISAAC CHEGE NJUGUNA.....10TH INTERESTED PARTY

BENCH RULING 6:

1. The applicant (Geoffrey Makworo) filed a Notice of Motion dated 12th January, 2021. The application was subsequently amended on 20th January, 2021. The orders being sought as per the amended application are:-

- 1) The instant application be and is hereby certified urgent.
- 2) The Amended Petition dated 20th January, 2021 and this Amended Application be deemed to be duly filed and served.
- 3) The Respondents and or their agents and or employees and or any person purporting to act on their behalf be and are hereby restrained from vetting, approving and or appointing and or swearing in the 1st Interested Party or any other person as Deputy Governor or Governor for Nairobi City County pending hearing and determination of the instant application.
 - (a) A Conservatory Order be issued restraining the Respondents and or their agents and or employees and or any other person acting on their behalf from appointing and or swearing in Anne Kananu Mwenda as the Governor Nairobi City County Government pending hearing and determination of the Petition.
 - (b) A Conservatory Order be issued against Anne Kananu Mwenda, the 1st Interested Party to restrain her from performing functions of Deputy Governor and or Governor Nairobi City County as contemplated by Section 30 (2) of the County Governments Act pending hearing and determination of this Petition.
- 4) The Respondents and or their agents and or employees and or any person purporting to act on their behalf be and are hereby restrained from vetting, approving and or appointing and or swearing in the 1st Interested Party or any other person as Deputy Governor or Governor of Nairobi City County pending hearing and determination of the Petition filed herein.
- 5) That an order be issued compelling the 4th Respondent to proceed with the by elections of Nairobi County Governor and Deputy Governor in accordance to the Constitution and statutory timelines.

6) That a conservatory order be issued against the 3rd Respondent who has been Acting Governor Nairobi County from exercising additional/extra powers during the temporary incumbency period that are not provided for under Article 182(5) of the Constitution as read as and limited by Article 134 of the Constitution.

7) That the Amended Petitioner's Notice of Motion in Petition No. E425 of 2020, Mike Mbuvi Sonko Vs The Clerk Nairobi City County be heard and determined together with this Notice of Motion.

8) Costs of the instant application shall be borne by the Respondents.

2. The application is supported by the affidavit of the applicant sworn on 12th January, 2021 and a further affidavit sworn on 20th January, 2021. The 1st Interested Party in that application (Ann Kananu Mwenda) filed a replying affidavit sworn on 12th March, 2021.

3. Counsel for the petitioner, in their written submissions state that the issue for determination is whether **Anne Kananu was validly nominated, vetted and approved as Deputy Governor, Nairobi County**. It is submitted that since only a serving deputy governor in office when a governor is impeached and removed from office by the senate can take over, then the 1st respondent, whose nomination had been revoked and not assumed the office at the time the governor was impeached, is ineligible to be vetted and appointed as a Deputy Governor.

4. The applicant argue that by the time the speaker took over the county both the Governor's and Deputy Governor's office were deemed as vacant. There was no legal basis to vet the 1st respondent as the Deputy Governor in circumstances where there is no substantive Governor to make the appointment. The situation under which the 1st respondent was vetted is contrary to section 4 of the Public Appointments (County Assemblies) (Approval) Act No. 5 of 2017.

5. Counsel further argue that upon impeachment of the Governor, the office of the Governor became vacant and there was no Deputy Governor to assume office as provided in Article 182(2) of the Constitution. According to Counsel, the provisions of Section 32D of the County Government's Act 2012 as read with Section 4 of the Public Appointments (County Assemblies) (Approval) Act required that after the vetting and approval of a Deputy Governor, a formal appointment by the Governor shall be made in writing and made under a County Public Seal which is a county symbol under Section 4 of the County Government Act, 2012.

6. Counsel for the applicant rely on Supreme Court of Kenya Reference No. 1 of 2015; **IN THE MATTER OF THE SPEAKER, COUNTY ASSEMBLY OF EMBU**, where the court stated:

“Where a vacancy occurs in the Office of the Deputy County Governor, the Governor shall within fourteen days, nominate a person to fill such vacancy. The County Assembly shall vote on the nomination within sixty days after receiving it.

Where a vacancy occurs in both the offices of County Governor and Deputy County Governor at the same time, the office of the Deputy Governor shall remain vacant until the election of a new Governor. The new Governor shall nominate a person to fill the vacancy within fourteen days after assuming office. The County Assembly shall vote on the nomination within sixty days after receiving it.”

7. Counsel for the applicant contend that once the governor was impeached there was a vacancy in both offices of the County Governor and Deputy Governor at the same time. That is why the speaker took over and the IEBC gazetted a by election for 18th February, 2021.

8. Counsel referred to the decision of the Supreme Court of India in the case of **ASIF HAMEED & OTHERS VS. STATE OF JAMMU & KASHMIR & OTHERS (1989) AIR 1899, 1889 SCR (2) 19** where the court stated:

“When a State action is challenged, the function of the court is to examine the action in accordance with Law and to determine whether the legislature or the executive has acted within the powers and functions assigned under the constitution and if not, the court must strike down the action.”

Reliance is also made to the decision of the US Supreme Court in the case of **U.S V. BUTLER: US 1(1936)** where the Supreme Court stated as follows:

“When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of the government has only one duty; to lay the article of the constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former.”

9. The applicant further argue that the action of the County Assembly to vet and swear the 1st respondent into office as the Deputy Governor is unlawful and urges the court to utilise its constitutional mandate to protect the Kenyan Citizen against unlawful acts of governments which facilitate impunity, Gubernatorial position are elective and not appointive.

10. The 1st respondent in her replying affidavit maintain that she was duly nominated by the Governor vide a letter dated 6th January, 2020. On 10th February, 2020 she was cleared by the IEBC as the only person who was validly nominated to the position of Deputy Governor, Nairobi City County. The Governor sponsored petition number 1 of 2020 to restrain her from being vetted but the petition was subsequently withdrawn. The Governor who had by then been impeached vehemently opposed the withdrawal of the petition.

11. According to the 1st respondent, she was validly nominated as a deputy governor and there is no vacancy in the position of the Governor since a substantive deputy governor is in office. The by-election lacks the requisite constitutional foundation as per Article 182(4) of the Constitution as read with Article 182 (5).

12. The application raises the question as to whether Anne Kananu was validly nominated, vetted and approved as a Deputy Governor, Nairobi County. The main petition seeks several prayers including orders of certiorari and prohibition. Prayers (a) and (b) of the amended petition seeks the following orders:

a) A declaration that Anne Kananu is ineligible to be vetted, appointed or sworn in as Deputy Governor of Nairobi City County for reasons that only a serving Deputy Governor in office when a County Governor is impeached can take over as a County Governor.

(i) A declaration that the decision of the County Assembly to vet and approve Anne Kananu Mwenda as Deputy Governor Nairobi City County on 15th January, 2021 without a formal appointment by the Governor as required by Section 32D of the County Government Act, 2012 is unlawful.

(ii) A declaration that the process of appointing Anne Kananu Mwenda as Deputy Governor, Nairobi City County when the speaker has been sworn in to act as Governor is illegal, null and void since it violates the Constitution.

(iii) A declaration that after the impeachment of a Governor and in the absence of a Deputy Governor the Speaker takes over in acting capacity with legal restrictions that apply with those Article 134 of the Constitution mutatis mutandis.

b) A declaration that the office of the Deputy County Nairobi County was vacant by the time the 1st Interested Party Hon. Mbuvi Sonko was impeached and removed from office.

13. It is evident from the nature of the dispute that granting the prayers being sought at this interlocutory stage will compromise the hearing of the main petition. Prayer 3A of the amended application has been overtaken by events as Anne Kananu was sworn in as a Deputy Governor, Nairobi City County Government on 15th January, 2021. It is only prudent that the petition be heard so that all the issues relating to the Deputy Governor are dealt with exhaustively.

14. Prayer 5 of the application seeks an order compelling the 4th respondents (IEBC) to proceed with the by election of Nairobi County Governor and Deputy Governor. We do find that this order can only be granted when the main petition is fully heard and determined.

15. According to the applicant, there is a vacancy for the position of both the Governor and Deputy Governor of Nairobi City County. This is the core issue raised in the applicant's petition. The applicant is seeking conservatory orders to restrain Anne Kananu who was sworn in as a Deputy Governor and is undertaking the functions of that office. Granting the conservatory orders at this interim stage is tantamount to determining the substance of the petition before it is fully heard. In the case of **RAJPUT –V- BARCLAYS BANK OF KENYA LTD & 3 OTHERS (2004) 2 KLR, 393** Emukule J. (as he then was) emphasised on the cardinal principle that no final orders may issue on an interlocutory application for such orders would be in the nature of final orders.

16. The upshot is that the application dated 12th January, 2021 and amended on 20th January, 2021 lacks merit and is hereby dismissed with costs.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT NAIROBI THIS 18TH DAY OF MARCH, 2021 in view of the declaration of measures restricting court operations due to Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 17th April, 2020

S. CHITEMBWE

JUDGE

W. KORIR

JUDGE

W. A. OKWANY

JUDGE