



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CONSTITUTIONAL PETITION NO. E006 OF 2020

YAHYA AHMED SHEE.....PETITIONER

VERSUS

THE SPEAKER COUNTY ASSEMBLY OF LAMU.....RESPONDENT

JUBILEE PARTY.....1ST INTERESTED PARTY

KENYA AFRICAN NATIONAL UNION.....2ND INTERESTED PARTY

HON. SHEIKH ABOUD.....3RD INTERESTED PARTY

HON. ANAB MOHAMED.....4TH INTERESTED PARTY

HON. ANTONY NJOMO MAINA.....5TH INTERESTED PARTY

HON. FAHAD DINI ADNAN.....6TH INTERESTED PARTY

HON. ZULEKA MOHAMED MJAHD.....7TH INTERESTED PARTY

Coram: Justice Reuben Nyakundi

Hassan Alawi & Co. Advocates

Gregory Ndege & Associates

RULING

The petition raises a meaningful interpretation of the political question doctrine which in my view implies something in respect of the jurisdiction by the courts to enter into the realm of deciding of the political question, in particular issues to do with Majority Leader, Coalition Minority Leader of County Assembly.

I think in the first instance political questions are better left to be determined by the various organs of a functional political party. In the present notice of motion, the applicant moved the court under **Section 1A, 1B & 3A** of the Civil Procedure Act **Section 7, 9, 11 and 12** of the Fair Administrative Act 2015 seeking the following orders:

- 1. That the 3rd, 4th, 5th, 6th and 7th Interested Parties be hereby stayed, prohibited from acting as the Coalition Majority Leader, Coalition Deputy Majority Leader, Coalition Majority Whip and Deputy Coalition Majority Whip at Lamu County Assembly, receiving any privileges, conducting any business in reference to the aforementioned seats, pending the final hearing and determination of this application.**
- 2. That the 3rd, 4th, 5th, 6th and 7th Interested Parties be hereby stayed, prohibited from acting as the Coalition Majority Leader, Coalition Deputy Majority Leader, Coalition Majority Whip and Deputy Coalition Majority Whip at Lamu County Assembly, receiving any privileges, conducting any business in reference to the aforementioned positions, pending the final hearing and determination of this petition.**

3. That pending the final hearing and determination of this application the offices of the Coalition Majority Leader, Coalition Deputy Majority Leader, Coalition Majority Whip and Deputy Coalition Majority Whip of Lamu County Assembly be hereby declared vacant.

4. That pending the final hearing and determination of this petition the offices of the Coalition Majority Leader, Coalition Deputy Majority Leader, Coalition Majority Whip and Deputy Coalition Majority Whip of Lamu County Assembly be hereby declared vacant.

5. That costs of this application be borne by the respondent.

Background

As deduced from the face of the motion and affidavit evidence on **8/7/2020**, the County Assembly Members belonging to Jubilee and Kenya African National Union held a meeting as members of the coalition and agreed to make changes to the County Assembly Leadership. The changes were ratified of the Jubilee Party and the changes communicated to the Speaker of the County Assembly in terms of **Standing Order No. 15 (5) of the County Assemblies of Lamu**.

That despite the changes, the Speaker has refused to perform his statutory mandate of amending the changes on the floor of the Assembly therefore it's only this court which should compel the Speaker to effect the changes as manifested in the coalition meeting.

In addition, the applicant on oath also filed an affidavit dated 13/11/2020. In reply, the Deputy Director of Legal Affairs and Regional Director of Jubilee Party affirmed as follows on the grant of the orders applied for by the applicant. The 1st Interested Party representative further averred that in July 2020 a caucus meeting was authorized within the provisions of the Party Constitution. That in attendance were members of the Legislative Assembly of Lamu County. Further the 1st Interested Party on oath asserted that the agenda of the meeting, among others was change of Office of the Coalition Majority Leader, Coalition Deputy Majority Leader, Coalition Majority Whip and Deputy Coalition Majority Whip at Lamu County Assembly. That indeed the changes were made and communication sent to the Secretary General for ratification and pursuant to that ratification the respondent was informed of the resolution.

The 3rd, 5th and 7th Interested Parties in a joint affidavit on oath stated as follows *inter alia*:

i. That the appellant has not attached any minutes as proof of the Coalition Meeting or a resolution thereof on the proposed changes. Further, the Interested Parties acknowledged that indeed the applicant was the Majority Leader and a Member of the County Assembly Service Board before changes were made at a party meeting of 24th July, 2018.

ii. That in the Applicant's Coalition Party in a meeting held on 16/6/2019, it was resolved that as a Majority Leader he be removed and in his place Falid Dini Adnan was appointed vide annexed copy of the minutes marked as AS-2.

iii. That the County Speaker has already communicated to the applicant why he was removed from the said position, as proves by the letter marked AS-5.

In the pendency of the notice of motion, the respondent filed and served a preliminary objection to the petition filed in court on 4/2/2021 premised as follows; **the petition is prematurely before this honorable court as the petitioner has neither exhausted the forum established under the Political Parties Act.**

The application was argued by way of written submissions. The petition before the court seeks the reliefs against Speaker of the Assembly to be compelled to forthwith receive and announce the changes of leadership in the County Assembly of Lamu service in the letter dated 10/7/2020 from the Jubilee Party of 13/7/2020.

A permanent order to remove into the High Court to prohibit the 3rd, 4th, 5th, 6th and 7th Interested Parties prohibiting them from acting as the Coalition Majority Leader, Coalition Deputy Majority Leader, Coalition Majority Whip and Deputy Coalition Majority Whip at Lamu County Assembly.

A declaration that the Speaker of the County Assembly has infringed, threatened the fundamental rights of the petitioner by failing to announce the communication of the 1st and 2nd Interested Parties in their letter dated 10/7/2020. It's with this background in mind that I endeavor to determine the application.

Determination

From where I sit the fundamental question to be considered is whether this court has jurisdiction to determine the motion or the petition for that matter. The context of the petition and interlocutory application is meant to address coalition political party matters between Jubilee

Party and Kenya African National Union.

I would observe very clearly here that under **Article 23 (1) of the Constitution** this court has jurisdiction in accordance with **Article 165** to hear and determine applications for redress of a denial, violation or infringement of or threat to, a right or fundamental freedom in the Bill of Rights. Thus the jurisdiction flows from the Constitution and other enabling statutes. The test therefore is whether keeping in view the pleadings in the petition and the court's power to grant the appropriate relief under **Section 23 (3) of the Constitution** the court as constituted has original jurisdiction to entertain the petition.

Considerations of questions of jurisdiction in litigation in our system of courts is of primary importance to the issues at stake. In every claim, or dispute jurisdiction is a condition precedent to remedial action based on personal or of the subject matter. The Constitution carries out jurisdiction of the various courts and the sum total of that judicial power is exercisable by the well settled provisions in the Constitution or other enabling statutes.

In the law of jurisdiction under the principles espoused in **Owners of the Motor Vehicle Lilian S' v Caltex Oil (Kenya) Ltd (1989) KLR** and **Samuel Kamau Macharia & Another v Kenya Commercial Bank Ltd & 2 Others (2012) eKLR** courts in principle are not free to exercise prescriptive jurisdiction over a given claim, dispute or legal contest as they please except by virtue of that jurisdiction that flows from either the Constitution or legislation or both. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by Law. The jurisdiction exercised by the courts is typically demonstrated by the terms adjudicative or adjudicatory jurisdiction.

In **Black's Law Dictionary** it defines jurisdiction as **"the power of the court to decide a matter in controversy, presupposes, the existence of a duly constituted court with control over the subject matter and the parts."** It also defines the power of courts to **"inquire unto facts, apply the law, make decisions and declare judgment. A court is said to be competent to hear and determine a dispute when its properly constituted and the subject matter in issue is within its jurisdiction, and there is no feature in the case which ousts the jurisdiction of the court to exercise such jurisdiction."**

Going by the above guiding principles, its obvious from the contents of the petition and subsequent affidavits, both parties are members of Jubilee and Kenya National Union Political Parties. They were elected as Members of Lamu County Assembly under the umbrella of the aforesaid political parties. The controversy that has arisen on who gets appointed the Majority Leader, the Deputy Minority Leader, the Chief Whip or Deputy Chief Whip fall within the area of jurisdiction provided for in the **Political Parties Act**. It is worth mentioning here that under **Section 40 of the Act**, it provides as follows that the Political Parties Tribunal shall determine:

- a. Disputes between the members of a political party.
- b. Disputes between a member of a political party and a political party.
- c. Dispute between political parties; and
- d. Appeals from the decisions of the Registrar.....

All that needs to be said here is that a matter or the petition as presented challenges the inaction of the Assembly Speaker to recognize the changes effected by the Coalition Parties in appropriating Party's Leadership in the County Assembly.

The court is of the view that the pronouncement by the Speaker in respect of party resolutions on the newly constituted party leadership could be a tier to be governed by the Standing Orders of the Assembly.

In order to determine whether or not the Speaker has acted ultra-vires and as a result infringed or violated a right or fundamental freedom on the Bill of Rights, the following questions should be considered.

- a. **Has the Speaker acted in violation of natural justice or adopted a wrong procedure or is guilty of abuse of power which transgresses the rights of the applicant?**
- b. **Whether in examining the relevant materials the court can satisfy itself that there was danger of the Speaker to have acted with a real likelihood of bias of having not recognized and adopted the resolution, and in fact caused an injustice to the applicant and the impugned decision should not be allowed to stand.**
- c. **Thirdly, the third question which after arise is whether this is a typical petition for a mandatory order to issue to compel the Speaker to promote and ask the Assembly to adopt the changes on Leadership by the coalition members.**

In all these, an issue which needs to be clarified is that the duty to hear and decide any case arising within the County Assembly is vested with the Speaker. It is common knowledge that the County Assembly has promulgated legislation and standing orders which regulates the day to day business of the Assembly. I can hardly however visualize any evidence of case where the court has been told that the impugned decision by the Speaker violates or infringes the Constitution and to the extent it raises a call for jurisdiction of the court to declare it annulity.

For a petitioner to be competent before this court, the grounds in the petition must relate to and raise questions of constitutionality or unconstitutionality of the Speaker's decision not to effect changes as demanded in the coalition agreement. In the instant case, the grounds in the petition and notice of motion are all questions for County Assembly internal mechanisms or the Political Parties Arbitration arising out of the rejection by the Speaker in effecting the expected leadership changes.

Let me say here the position as it is now, is rather sad in the sense that the High Court while exercising constitutional jurisdiction is precluded from looking at the statutory powers that may arise in the exercise of the Speaker's constitutional jurisdiction, simply, because those incidental transactions in the business of the Assembly appear to border on infringement of the Constitution. It is firmly established that the High Court's subject matter jurisdiction is defeated by the absence of a valid cause of action, devoid of merit as to invoke a constitutional controversy.

I believe even to accord an order of Mandamus to issue against the Speaker may be wrong given the time line between the alleged decision by the Speaker and declining to exercise discretion which has to be distinguished by the statutory duty, making it difficult to intervene in order to change the collateral proceedings. The most obvious such proceedings are expressly excluded by the Constitution in order to give effect to the doctrine of the separation of powers.

In such matters where an inferior tribunal merely makes a wrong decision within its jurisdiction as opposed to refusing to exercise it, a mandatory order cannot be employed to make it change its conclusion. This is merely the familiar rule that the court cannot interfere with the action as being ultra-vires. This grounding legal proportion on separation of powers is well stated in the case of **Speaker of National Assembly vs Attorney General & 3 Others [2013] eKLR** that:

“Parliament must operate under the Constitution which is the supreme law of the land. The English tradition of Parliamentary supremacy does not comment itself to nascent democracies such as ours. Where the Constitution decrees a specific procedure to be followed in the enactment of legislation, both Houses of Parliament are bound to follow that procedure. If Parliament violates the procedural requirements of the supreme law of the land, it is for the courts of law, not least the Supreme Court, to assert the authority and supremacy of the Constitution. It would be different if the procedure in question was not constitutionally mandated. This court would be averse to questioning Parliamentary procedures that are formulated by the Houses to regulate their internal workings as long as the same does not breach the Constitution. Where however, as in this case, one of the Houses is alleging that the other has violated the Constitution, and moved the court to make a determination by way of an Advisory Opinion, it would be remiss of the court does not violate the doctrine of separation of powers. It is simply performing its solemn duty under the Constitution and the Supreme Court Act.”

The judicial basis of this jurisdiction is therefore the authority of the Judiciary to uphold, to protect and to fulfil the judicial function of administering justice according to law. Thus the streams of evidence by the petitioner has failed to draw a distinct between the jurisdiction of the Speaker of the County Assembly, that is explicitly provided for the statute and the Standing Orders vested in or capable of being exercised as such by the holder of the office. Therefore, it is not possible to extrapolate from this aspect of the petition a principle on the separation of powers and the constitutional jurisdiction of the court to exclusively review the decision by the Speaker of the County Assembly.

In absence of jurisdiction, it's evident that any orders issued by the court would thereby rendered inefficacious. For those reasons the petition stands dismissed with no orders as to costs.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 18TH DAY OF MARCH, 2021

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R. NYAKUNDI

JUDGE

In the presence of:

Eaazee for the respondent