



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CONSTITUTIONAL PETITION NO. E 009 OF 2021

IN THE MATTER OF THE CONSTITUTION OF KENYA ARTICLES 1, 2(1), (2) and (5), 3(1) and (2) , 4(2), 10, 19,20, 21,22(1) and 2(b) and (c), 23(1) 24(1) 33(1) (a), .35,38 (1) 47(1) and (2), 48,50,52,93,96,165(3) (b) and (d) (ii) 73(1), 75(1) (c) 174,175, 181,196(1) (b) 200, 258, 260

AND

IN THE MATTER OF ART. 1, 2, 3, 47, 50 (B) AND (C), 181 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS PRACTICE AND PROCEDURES RULES 213

AND

IN THE MATTER OF ART 1,3, AND ART. 25(a) OF THE INTERNATIONAL CONVENTION ON CIVIL AND POLITICAL RIGHTS OF 1966

AND

IN THE MATTER OF THE COUNTY GOVERNMENT ACT 2012, SECTION 8, 30, 31 33(1) AND (2) AND 87

AND

IN THE MATTER OF THE STANDING ORDER NO. 67 OF THE WAJIR COUNTY ASSEMBLY STANDING ORDERS

AND

IN THE MATTER OF THE INTENDED REMOVAL FROM OFFICE OF THE GOVERNOR OF WAJIR COUNTY BY WAY OF IMPEACHMENT

BETWEEN

ADEN IBRAHIM MOHAMMED1ST PETITIONER

OMAR JELE ABDI2ND PETITIONER

BISHAR AHMED HUSSEIN.....3RD PETITIONER

SAFIYA MAHAMED ABDI4TH PETITIONER

YUSSUF IBRAHIM DIMBIL5TH PETITIONER

VERSUS

COUNTY ASSEMBLY OF WAJIR1ST RESPONDNET
CLERK OF THE COUNTY ASSEMBLY OF WAJIR2ND RESPONDNET
SPEAKER OF THE WJIR COUNTY ASSEMBLY3RD RESPONDENT
ABDULLAHI ISSACK4TH RESPONDENT
SPEAKER OF THE SENATE5TH RESPONDNET
THE SENATE6TH RESPONDNET

AND

HE. THE GOVERNOR OF WAJIR COUNTY

AMB. MOHAMMED ABDI MOHAMMUD1ST INTERESTED PARTY
THE DEPUTY GOVERNOR AHMED ALI MUKHTAR2ND INTERESTED PARTY
THE CHIEF REGISTRAR OF THE HIGH COURT 3RD INTERESTED PARTY
ASSUMPTION OF OFFICE OF THE GOVERNOR COMMITTEE.....4TH INTERESTED PARTY

RULING

1. When this matter came up on the 20/5/2021 for inter parties hearing of the petitioners' application for conservatory orders, several events had taken place. To wit;
 - a. The motion to impeach the governor of Wajir at the County Assembly had been moved debated and passed.
 - b. The impeachment proceedings at the senate had been concluded and the Governor impeached.
 - c. The petitioner had filed two additional applications, the first being that dated and filed on 18/5/2021 while the latest was dated and filed on 20/05/2021.
2. The two latter applications are obviously aimed at challenging the impeachment proceedings and the inevitable consequences following therefore.
3. When the matter was called out, counsel for the petitioners and that for the interested party informed the court that the notice of motion dated 24/4/2021 had now been overtaken by event in that the actions it had intended to stop had all taken place and therefore they were now seeking to have the defeated application withdrawn and the court gives direction on the most recent of the applications.
4. For the respondent a position was taken that the petitioners were forum shopping by bringing a matter affecting residents of Wajir County to Meru High court and not Garissa, Nairobi, Kitui or even Marsabit. The counsel for the respondent also complained that the court was eager and fast to give orders "left right and centre" without regard to the fact that it was obvious it had been forum shopped. On that basis counsel pleaded with the court that this petition be ordered transferred and consolidated with another petition initially filed in Nairobi as Petition No. E 146/2021 but was transferred to be heard and determined in Garissa. That request was grounded on the fact that the petition herein seeks same orders as those that pending determination at Garissa.
5. Counsel submitted that the last time matter was in court, he raised the question with the court and the court gave another date to enable counsel inquire and report to court if the judge in Garissa had resumed from leave. He also confirmed that during the intervening period, the county assembly and the senate had gone through their processes, the Governor was impeached and the Deputy was on the 18/5/2021 sworn in in the presence of a High court Judge even though the court had on the same date 18/5/2021, given order which had been overtaken by events.
6. In response to that oral application, the petitioners' counsel, while resisting instant transfer, explained that the only reason and justification of filing the matter in Meru was owing to the fact that the presiding judge at Garissa High Courts, was on leave between 19th April and 13th May 2021 and the next High court station was Meru. Having approached the court and based on the materials availed to court, they obtained orders to stop the County Assembly from debating the motion, had the orders served but the same was brazenly disobeyed. They came back to court again and obtained orders to restrain the senate from conducting the impeachment proceedings, had the orders served but the senate equally ignored and disobeyed the orders hence the need for the latest two applications.
7. They denied forum shopping the court, maintained that they were not objecting to the matter being transferred to any other court, after the pending applications are dealt with but objected to a transfer to Garissa, which they intimated, they would seek a recusal of the judge there.

The counsel stressed the point that while all was happening, the respondent chose not to file any pleadings and that the question of forum shopping was being raised for the first time yet counsel for the respondent was in court on 3/5/2021 when the orders were last extended but was now supporting the disobedience by the senate. Counsel took the position that it would have been defeatist at the time to have the matter transferred to another court. They took the view that the application for transfer was intended to perpetuate the disobedience of court orders and delay the just conclusion of the matter. The court was urged to retain its jurisdiction and to give directions on the two latest applications because this court and Garissa court have equal jurisdiction. In any event counsel contended that there was need for a formal application for transfer to be made for them to respond.

8. In his rejoinder, the respondents' counsel informed the court that there was an email from the petitioners' counsel to him in which the need for transfer was confirmed provided the counsel for the petitioners in the Garissa petition was consulted. Counsel however agreed with those of the petitioners that on the 3/5/2021 Muriithi J. had asked the parties to find out if the Garissa court was sitting having resumed from leave.

9. My task here is twofold. I need to direct if the matter needs to be transferred and if so to which court registry. Secondly, I need to give directions for the application filed under certificate of urgency while I was on duty and on a date the matter was listed for hearing.

10. On the application dated 20/5/2021 I have perused the same, I consider it to raise valid concerns for the administration of justice. I direct that it be served forthwith for the respondents to file any responses thereto within 5 days so that the applicants file and serve any submissions on it within 5 days after service with the respondent being at liberty to also file submissions within 5 days thereafter.

11. Further consideration of that application will abide the order and direction I will now give on the forum the matter will proceed hereafter.

12. We see a new and very dangerous era where counsel especially some who are designated senior counsel and those the society consider the epitome of standards of legal practice, arrogate to themselves the singular duty of demeaning the court and its officers. A very sad but also very often occurrence. That is a practice that all Kenyans of good will need to resist not for the benefit of the person of the judges who serve at any particular time but for the sake of the institution of the court and the respect for the administration of justice. That practice was displayed before me here and all I say is that it is disdainful and needs to be discouraged.

13. Having said that, I am called upon to transfer this matter on the basis that the parties are resident in Wajir County and their counsel practice in Nairobi and there is no basis to have had the matter filed in Meru. My appreciation of the law is that the location of counsel's office has never been a consideration of where a legal dispute gets filed and determined. I also appreciate that the High court exercises jurisdiction throughout the Republic even though for other equally important consideration like costs of transport and therefore costs of litigation and convenience to parties, a matter needs to be filed and determined in a court registry most proximate to the place where the dispute arose and where the parties reside. For that reason, the constitution commands of the state agencies and bodies, the Judiciary included, to take their services closest to the people.

14. On that constitutional principle, the people of Wajir have every expectation that, as a county, they have the judicial services availed for them within their county. However, that has not been done by establishing a High Court Registry within that county, with the consequence and expectation that it is only prudent that if they have to litigate in the High court or the courts of equal status, they are free to lodge their dispute in any High court registry. It is however always advisable to do so at the nearest of the available registries.

15. For this matter, I have consulted the map of Kenya and the boundaries of our counties, I have equally, taken judicial notice of the distances from Wajir Town to the various courts in the counties abutting wajir, county. My endeavor has revealed to me that the nearest court registry remains Garissa but one can opt to go to Nairobi, Kitui, Marsbit, Meru or even Garsen. For that I do not consider the decision to file this petition in Meru when the presiding judge in Garissa, was not sitting ought to invite the bad faith and impropriety imputed by the respondent's counsel. More so, I find it farfetched and preposterous that counsel uses that otherwise justifiable action to impute impropriety upon the judges serving in Meru in a manner that suggest that they had a hand in having the petition filed here.

16. Having said so I have perused the file and I may agree with the petitioners that in this matter the court orders have been rubbished and given no regard at all. I also consider that ultimately it shall be upon the court systems to determine, if not by way of reinstatement of the law, what constitutional thresholds needs to be met in matters of impeachment. For that reason the process of impeaching elected and appointed executives will continue to come to court. That future will be impacted in every way by how the respondents have regarded the proceedings in this file. I thus consider the matter in this file to present serious constitutional questions that needs the mind of more than a single judge. For that reason, instead of ordering the matter transferred, I can only consider transfer because I am yet to know what the dispute in the Garissa case is all about, I certify the matter to raise substantial questions of law which needs determination by an even number of judges. I therefore direct that the file be placed before the Honourable Chief Justice for purposes of constituting a bench in line of the provisions of article 165(4) of the constitution.

Dated, signed and delivered at Meru virtually by MS Teams this 24th day of May 2021.

Patrick J O Otieno

Judge