



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT BUNGOMA**

**CONSTITUTIONAL PETITION NO. 3 OF 2020**

**IN THE MATTER OF ARTICLES 2(1), 3(1) & (2), 10(1) & (2), 19, 20(1) & (3) 21, 23 35, 174, 175, 176, 196, 200(2)(d), 232 & 258 OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF SECTIONS 3, 8 & 14 OF THE COUNTY GOVERNMENTS ACT**

**AND**

**IN THE MATTER OF STANDING ORDER NO. 24, 25, 26 & 36 OF THE COUNTY ASSEMBLY OF BUNGOMA**

**AND**

**IN THE MATTER OF CONTRAVENTION OF ARTICLES 2(1), 3(1) & (2), 10(1) & (2), 21, 35, 174, 175, 196 (1) OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF CONTRAVENTION OF STANDING ORDER NO. 24, 25, 26 & 36 OF THE COUNTY ASSEMBLY OF BUNGOMA**

**AND**

**IN THE MATTER OF ILLEGAL SITTING BY THE COUNTY ASSEMBLY OF BUNGOMA ON THE 14<sup>TH</sup> MAY, 2020.**

**BETWEEN**

**JOHN MAJOR MUKENYA .....PETITIONER**

**AND**

**THE CLERK COUNTY**

**ASSEMBLY OF BUNGOMA.....1<sup>ST</sup> RESPONDENT**

**THE SPEAKER COUNTY**

**ASSEMBLY OF BUNGOMA .....2<sup>ND</sup> RESPONDENT**

**COUNTY ASSEMBLY OF BUNGOMA.....3<sup>RD</sup> RESPONDENT**

**AND**

**FLORENCE FULANO WEKESA.....1<sup>ST</sup> INTERESTED PARTY**

**EVERLYNE NABWELELEA MUTYEMBU.....2<sup>ND</sup> INTERESTED PARTY**

LUKE OPWORA.....3<sup>RD</sup> INTERESTED PARTY

JOSEPH NYONGESA JUMA.....4<sup>TH</sup> INTERESTED PARTY

MESHACK SIMIYU WEKESA.....5<sup>TH</sup> INTERESTED PARTY

JOSEPH MAGUDA.....6<sup>TH</sup> INTERESTED PARTY

### J U D G E M E N T

The petitioner John Major Mukenya is a resident of Bungoma County. His petition is premised on the constitutional provisions of articles 174-176 of the constitution on objects of devolution in particular, promotion of democratic and accountable exercise of power, enhancement of participation of people in matters of decision making.

The petitioner avers that article 176 establishes the county government which is the county executive and the county assembly. Article 175 establishes the principles of devolved government and article 200(2)(a) mandates parliament to enact legislation in respect of procedures of county assembly and the executive.

Parliament enacted the county governments act no. 17 of 2012. Section 3 provides for the object and purpose of the enactment to wit; providing for the procedure of assemblies and the executive committees including the chairing and frequency of meetings, quorum and voting amongst others.

Section 8 provides for the role of the county assembly and mandates it to enact legislation required to give effect to the act among other roles. Section 14 provides for the procedures and committees of the county assembly including the power to enact standing orders regulating the procedure of the county assembly including the order of proper conduct of proceedings.

Standing order no. 24 of the county assembly of Bungoma stipulates the regular sessions of the county assembly. Standing order no. 25 provides for the calendar of the county assembly. Standing order no. 26 provides for how special sittings are to be conducted and making the gazettment of such special; sittings mandatory while standing order no. 36 obligates the clerk of the county assembly to prepare and publish on the county assembly website weekly programmes showing the business of the county assembly and the schedule of sittings of various committees and to circulate the programme to members, county departments and the media not later than the Friday of the week preceding such business.

The petitioner avers that by an online article in the star newspaper of 16<sup>th</sup> may, 2020, the petitioner learnt of the purported sittings of the county assembly of Bungoma held on 14<sup>th</sup> may, 2020 that resulted in the change of leadership of the assembly among other resolutions. Before the said sittings, he was aware that the 3<sup>rd</sup> respondent was on recess according to its 2020 calendar.

He depones that whereas the calendar indicated the 3<sup>rd</sup> respondent was on recess and the closure of the 3<sup>rd</sup> respondents business and premises, he legitimately expected as per the constitution, the County Governments Act and the standing orders the 2<sup>nd</sup> respondent to gazette such sittings in the Kenya Gazette since it was a special sitting.

He further states that he got the order paper for the 14<sup>th</sup> may, 2020 showing that indeed the 3<sup>rd</sup> respondent had sittings on the day despite non-gazettment, the 2<sup>nd</sup> respondent illegally and unconstitutionally convened and chaired the session and purportedly changed the leadership of the assembly by removing the 1<sup>st</sup> -3<sup>rd</sup> interested parties from their positions and replacing them with the 4<sup>th</sup> -6<sup>th</sup> interested parties.

That by reason of the above misgivings, the sitting of 14/5/2020 were illegal, null and void and therefore no resolution of or communication flowing therefrom can stand in law. As such, the petitioner prays for;

***a. A declaration that the 3<sup>rd</sup> respondents sitting of the 14<sup>th</sup> May, 2020 was not only illegal and unlawful but also unconstitutional and contrary to the Bungoma county assembly standing orders for want of gazettment.***

***b. A declaration that the acts of the 2<sup>nd</sup> respondent in convening, chairing and making communication on the un-gazetted special sitting of 14<sup>th</sup> May, 2020 was not only illegal and unlawful but also unconstitutional and contrary to the Bungoma County Assembly Standing Orders.***

***c. A declaration that the acts of the 1<sup>st</sup> respondent in organizing, facilitating and mobilizing the sitting of the 14<sup>th</sup> May, 2020 was not only illegal and unlawful but also unconstitutional and contrary to the Bungoma county assembly standing orders as the order paper and sitting was never published on the 3<sup>rd</sup> respondents website.***

***d. An order of certiorari do issue quashing the communication of the 2<sup>nd</sup> respondent and the resolutions made by the 3<sup>rd</sup> respondent on the changes of leadership of the assembly together with any such other resolution on the non-gazetted sitting of the 14<sup>th</sup> day of May 2020 and the proceedings thereof be expunged from the Hansard of the 3<sup>rd</sup> respondent.***

***e. Any other relief and costs of the petition.***

The petition is supported by the petitioner's supporting affidavit sworn on 19<sup>th</sup> May 2020 in which he has reiterated the grounds of the petition.

Emmanuel Mukhebi Situma filed a replying affidavit on behalf of the respondents sworn on 22<sup>nd</sup> May, 2020. He deposed that as the speaker of the 3<sup>rd</sup> respondent, he received a request for special sitting of the county assembly from the minority leader. That he did a letter calling for the special sitting, he did a notice and sent to the government printers for publication.

That having completed all the requirements, it was the duty of the government printers to publish the gazette for which he has no control. He convened a special sitting and communicated the communication from the NASA coalition to the house and he cannot rescind.

### **Analysis and Determination**

After perusing the petition together with the affidavits on record and the rival submissions, this court is of the view that the issue to be answered is; **whether the 3<sup>rd</sup> respondent's sitting on 14<sup>th</sup> May, 2020 was convened in accordance with the law and whether the resolutions emanating from that sitting ought to stand.**

It is not challenged that the respondents did hold a sitting of the 3<sup>rd</sup> respondent on the 14<sup>th</sup> May, 2020. It is also not in dispute that a number of resolutions were arrived at and actions taken on the basis of the resolutions. Such resolutions include the changes in House leadership which the petitioner seeks to halt by quashing the decision. The main challenge on the resolutions is that the sitting was convened without following the laid down legal procedure rendering the resolutions unconstitutional mainly that the notice for the special sitting was not advertised in the Kenya Gazette.

This fact of failure to gazette has not been disputed by the respondents. The 2<sup>nd</sup> respondent stated that he sent the notice to the Government Printer and even paid publication fees. That whether it was gazetted or not is an act beyond his control.

The question then that must be answered in the circumstances is whether the issue of notice by the respondent to the Government Printer suffices even without a formal gazette notice. It is clear that at the time the respondents conducted its business on the 14<sup>th</sup> May, 2020, there was no Gazette in place for the special sitting.

Section 14 empowers the county assembly to make standing orders to guide its internal processes. Pursuant to this provision, the 3<sup>rd</sup> respondent enacted its standing orders on 27<sup>th</sup> June, 2016. Standing Order 26 provides as follows;

- 1. Whenever during a session the County Assembly stands adjourned, whether or not a day has been appointed for the next meeting, the Speaker may, on the request of the Leader of the Majority Party or Coalition of Parties or the Leader of the Minority Party or Coalition of parties, appoint a day for special sitting of the County Assembly.***
- 2. The Speaker may allow a request under paragraph (1) if the Speaker is satisfied that the business proposed to be transacted relates to any urgent and exceptional business as the Speaker may allow.***
- 3. The Speaker shall, by notice in the Gazette, notify the Members of the place, date and time appointed for the special sitting of the County Assembly.***
- 4. Whenever the County Assembly meets for a special sitting under paragraph (1), the Speaker shall specify the business to be transacted on the day or days appointed and the business so specified shall be the only business before the County Assembly during the special sitting, following which the County Assembly shall stand adjourned until the day appointed in the County Assembly calendar.***

Section 2 of the County Governments Act defines **County Gazette** to mean a gazette published by the authority of the County Government or a supplement of such gazette.

The operative word in standing order 26 is; **shall** which denotes mandatory. It is therefore mandatory for the speaker to ensure the special sitting is gazetted in line with the provision of the law.

It is therefore the finding of this court that failure by the 2<sup>nd</sup> respondent to cause gazetting of the special sitting held on 14<sup>th</sup> May, 2020 is contrary to the law particularly the third respondent's Standing Order No. 26 and any resolution passed in the sitting is of no effect.

On the same vein, this court notes that the notice issued by the speaker is in the following terms;

***Notice is hereby given to all members of the County Assembly of Bungoma that; pursuant to Standing Order Number 26 of the Bungoma County Assembly Standing Orders, on the request of the Bungoma County Assembly Deputy Minority Leader, I have appointed Thursday, 14<sup>th</sup> May, 2020 (Afternoon Sitting) at 2. 30 pm to transact the following business;***

- 1. Amendment of the County Assembly of Bungoma Legislative Calendar 2020 given the Covid-19 pandemic amongst other exigencies.***

I have perused the Hansard of the day. Other business were transacted for example the changes in the house leadership by replacement of the

1<sup>st</sup> – 3<sup>rd</sup> interested parties by the 4<sup>th</sup> -6<sup>th</sup> interested parties. This order had not been communicated to members in the notice. The notice only contemplated the amendment of the Legislative Calendar.

So much so that, even if the 2<sup>nd</sup> respondent had properly convened the special sitting, the agenda of changes in house leadership should not have been discussed and resolutions reached without prior notice of their being on the agenda.

In the circumstances and for the reasons stated above, I allow the petition and issue the following orders:

- 1. A declaration is hereby given that the 3<sup>rd</sup> respondents sitting of the 14<sup>th</sup> May, 2020 was unconstitutional and contrary to the Bungoma county assembly standing orders for failure by the 2<sup>nd</sup> respondent to gazette the special sittings.***
- 2. The purported changes of leadership of the county assembly is hereby quashed and the status-quo obtaining before the 14<sup>th</sup> May, 2020 regarding the 1<sup>st</sup> to the 3<sup>rd</sup> parties be maintained.***
- 3. There shall be order as to costs.***

**DATED and SIGNED at BUNGOMA this 30<sup>th</sup> day July, 2021.**

**S N RIECHI**

**JUDGE**