



REPUBLIC OF KENYA

IN THE HIGH COURT

AT BUNGOMA

CONSTITUTIONAL PETITION NO. 4 OF 2020

**IN THE MATTER OF ALLEGED INFRINGEMENT OF THE PROVISIONS OF
ARTICLES 1(3), 2(1)(2) &(4), 3(1), 10, 47(1)(2), 50, 73(1)(2), 176, 179, 181(2), 183(C)(D),
201, 207, 227, 232, & 236 OF THE CONSTITUTION OF KENYA 2010**

AND

**IN THE MATTER OF SECTIONS 15, 33 OF THE COUNTY GOVERNMENTS ACT, 2012
AND STANDING ORDERS NO. 60, PUBLIC FINANCE MANAGEMENT ACT NO. 18 OF 2012**

BETWEEN

HON WYCLIFFE WAFULA WANGAMATI.....PETITIONER

AND

SPEAKER, COUNTY ASSEMBLY OF BUNGOMA

CLERK COUNTY GOVERNMENT OF BUNGOMA

CHAIRMAN & MEMBERS OF THE COMMITTEE ON

PUBLIC ADMINISTRATION OF THE COUNTY

ASSEMBLY OF BUNGOMA.....RESPONDENTS

AND

BARASA NYUKURI KUNDU

MOSES WANJALA LUKOYE.....INTERESTED PARTIES

RULING

This ruling is in respect of the petitioner's application dated 29th July 2020 brought under certificate of urgency seeking in the main;-

a) Pending the hearing and determination of this application inter parties, this honourable court be pleased to issue a temporary conservatory order by which the chairman whether by himself, the members, officers, agents, servants or otherwise howsoever of the committee for Public administration and ICT County Assembly of Bungoma be inhibited and barred from meeting, convening, deliberating upon, receiving evidence, considering evidence, making any decision, resolution orders, proceedings or compiling, a report in respect of proceedings as constituted for hearing and investigating Honourable Wycliffe Wafula Wangamati relating to or touching his removal from office as Governor of the County Government of Bungoma and the said respondents herein whether by themselves, agents otherwise be further barred, restrained and prevented from convening, continuing to convene, sit, holding sittings or continuing to hold sittings ,

receiving evidence, investigating or in any other way howsoever proceeding with the process of conducting a hearing or investigation for the removal from office of Honourable Wycliffe Wafula Wangamati as Governor of the County Government of Bungoma pursuant to a public petition filed by the 1st and 2nd interested parties herein.

b) An order do issue forth barring and restraining the county Assembly of Bungoma whether by, under or through the speaker, its clerk of county or any other organ of the assembly from receiving, deliberating upon, voting on, adopting or in any way whatsoever acting on the said report in any manner that would detrimentally affect the status of the applicant as the Governor of the County Government of Bungoma.

c) An order do issue forth barring the respondents whether by themselves agents or otherwise howsoever from publishing or notifying the public of the said proceedings in any newspapers pending further orders of this court.

d) This application be heard *inter partes* on a date to be set in the discretion of this court upon service to all parties affected thereby.

e) Costs herein do abide the result of the petition.

In support of the application, the applicant depones that the 2nd interested party presented a public petition dated 22nd June, 2020 to the clerk of the County Assembly beseeching the County Assembly to consider the removal of the applicant as Governor of the County Government of Bungoma and that the County Assembly interrogates the grounds and particulars in the Public Interest Petition and consider the possibility of initiating an impeachment and removal process of the applicant from office.

That by letter dated 24th June, 2020, the Principal Legal Counsel informed the clerk that the petition meets the threshold and therefore he advised the same be forwarded to the House Business Committee for further action. That the interested parties sought to withdraw the petition on 1st July, 2020.

That the County Assembly Clerk served the applicant with a letter inviting him to a meeting scheduled for 27th July, 2020 at the County Assembly Plenary whose purpose is to schedule and manage the evidence sessions and set time frames for procedural matters as well as appraising witnesses and documents.

The applicant depones that on the said 27th July, 2020, the Committee on Public Administration and ICT held a session where the applicant's counsel raised a number of issues touching *inter alia* on the propriety, bias and partiality of the proceedings.

That the Committee in setting timelines have directed the clerk to cause publication in National Newspapers a notice of the hearing of the evidentiary sessions as if the process were an impeachment yet no Notice of Motion nor resolution supporting the motion for removal from office has not been given. That the intended Gazettement is intended to cause the impression that the applicant is being subjected to an impeachment when the contrary is true.

Finally, the applicant depones that the process and content of the inquiry is unconstitutional, illegal, capricious, arbitrary, pre-determined, injudicious and contaminated and actuated by malice, self-interest and improper motive on the part of a number of the members of the county assembly.

The application is opposed through the replying the affidavits of John K.O Mosongo, the Clerk County Assembly of Bungoma (hereinafter **'the clerk'**) and Emmanuel Mukhebi Situma, the speaker. (hereinafter **'the speaker'**).

The clerk depones that the application constitutes an abuse of the due process of the court as it is tailored to block the County Assembly from discharging its constitutional mandate. That he indeed received the public interest petition which he forwarded to the speaker for communication to the house as by law required.

That the County Assembly being a House of Representatives exercises delegated power and authority of the people. That any person has a right to petition a County Assembly to consider a matter within its authority and the public petition touched on the oversight role of the county assembly.

That as the administrative head of the assembly, he is required to oversee and facilitate the operations of the committee and therefore by forwarding the petitions to the speaker, he was executing his duties and did not therefore violate any of the applicant's constitutional rights.

That when the applicant through counsel appeared at the pre-trial conference of 27th July, 2020, he did not raise the allegations of bias as consensus was reached on almost all the issues.

He depones that in keeping with the provisions of Article 196 of the Constitution, the assembly put up a newspaper advertisement on Friday, 31st July, 2020 which did not breach the applicant's rights, that natural justice would be complied with and once a report is tabled, the rules of natural justice would be strictly adhered to.

That it would be strange to bar the committee from executing its mandate especially when it is operating on specific timelines and the application is intended to obstruct the Assembly from discharging its mandate.

The speaker on his part depones that being the chair of the House Business Committee, his office received 2 petitions which were duly

allocated for tabling in the house on 7th and 14th July, 2020.

That as matters stand, there is no Motion for impeachment in the Assembly and therefore the applicant's fears are unfounded. That the applicant is a holder of a constitutional office and therefore not immune from public scrutiny.

The petitioner thereafter filed his written submissions on 26th August, 2020. Mr. Wasilwa raised the following issues for determination.

- a) Whether the threshold for grant of conservatory orders has been met by the applicant in the Notice of Motion dated 29th July, 2020.
- b) Whether having regard to Articles 1(2), 1(3), 1(4)(b), 10(2)(a), 181(2), 232(1)(b) of the constitution, sections 33 of the county governments Act and Standing Orders No. 60 of the Bungoma County Assembly, the proper procedure for the removal of a Governor is by way of a public interest petition.
- c) Whether a public petition under Section 15(1) of the County Governments Act and standing order No. 19, 200 and 206, a substitute to or additional mechanism to commence the removal of a Governor from office.
- d) Whether the intended proceedings by the committee on public administration & ICT intended to remove the governor from office is ultra vires the jurisdictional parameters of a public petition as contemplated by section 15 of the county governments act.
- e) What orders commend themselves to this court at the interlocutory stage.

The cases of *Mumo Matemu Vs Trusted Society of Human Rights Alliance (2013) eKLR*, *County Assembly of Machakos vs Governor Machakos County (2018) eKLR*, *Charity Ngilu vs County Assembly of Kitui(2020) eKLR* and *Anne Mumbi Waiguru Vs County Assembly of Kirinyaga (2020)eKLR* have been cited.

The respondents represented by Mr. Makali filed their submissions on 18th August, 2020 reiterating the position that the applicant has not met the threshold for the grant of conservatory orders and that the court should not interfere with the respondent's Legislative and oversight roles.

He cited the cases of *Justus Kariuki Mate & Anor V Martin Nyaga Wambora & Anor (2017) eKLR*, *Charity Ngilu Vs County Assembly of Kitui& 2 Ors (2020) eKLR*, *Anne Mumbi Waiguru Vs County Assembly of Kirinyaga (2020) eKLR*, *Mwangi Wa Iria & 2 Ors V Speaker Muranga County Assembly & 2 Ors (2015) eKLR* and *Okiya Omtata V National Assembly of Kenya & Ors (2019) eKLR* in support of his proposition.

Determination

The undisputed facts of this matter are that the respondents having received a petition from the interested parties triggered a legal mechanism that would ultimately lead to the removal of the applicant as the Governor of the County Government of Bungoma.

It is also common ground that the applicant pursuant to the petition was invited for a Pre-trial Status Conference sitting on the 27th July, 2020 where he was ably represented by counsel. The Hansard annexed to the respondents' replying affidavits bears evidence. The directions on disposal of the Public Interest Petition as well as time lines to exchange responses were taken.

It would however appear that after the status conference and the committee having taken the decision to advertise the sittings of the assembly and inviting views from members of the public, the applicant was aggrieved. This court notes from the clerk's replying affidavit that a newspaper publication of 31/7/2020 carried the notice.

The applicant's main contention and or concern is that the Committee's proceedings will gravely violate his rights to a fair administrative action, fair hearing, impartiality and reasonable notice and opportunity to prepare a wholesome response against the rules of natural justice.

The applicant takes issue with the pretrial utterances, social media publications, press statements in local media and speeches made by the chair of the committee as some of the reasons informing the application.

The applicant also faults the process *to wit* whether citizens petition brought under Section 15 of the County Government's Act is proper in light of the express provisions of section 33 of the same Act, that the 1st interested party's petition raises issues that are pending before other standing and *ad hoc* committees.

In countering these, the respondents submit that the rules of natural justice will be followed strictly and that if an order of a conservatory order is issued, this court will have interfered with the county Assembly's constitutional mandates. Reliance has been placed in the case of *Justus Kariuki Mate & Anor V Martin Nyaga Wambora & Anor (2017)eKLR* for that proposition.

That being the case, the court is alive to the clear constitutional mandates of every state organ and body and the principles of separation of power. It is indeed true that unless there is a glaring breach of the law, there is a clear threat of infringement on individual rights; the courts will not interfere with the internal processes of that institution.

This court is in agreement that the impeachment of a Governor is a constitutional function donated to the County assemblies in performance

of its oversight functions that is statutorily regulated.

The question then that begs an answer is whether in the circumstances of this case, an interlocutory relief should be granted in favour of the applicant. This court is under duty to balance both the applicant's right to be subjected to a fair process viz-a-viz the respondent's constitutional duty to institute checks and balances on the applicant. The main prayer by the Petitioner in this petition is grant of conservatory orders.

The principles guiding the grant of the relief were enunciated in the case of *Gatirau Peter Munya Vs Dickson Mwenda Kithinji & 2 Ors. (2014) eKLR* where the Supreme Court held;

“conservatory orders’ bear a more decided public Law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as the “prospects of irreparable harm” occurring during the pendency of a case; or “high probability of success” in the applicant’s case for orders of stay. Conservatory orders consequently, should be granted on the inherent merit of the case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes The principles to be considered before a Court of Law may grant stay of execution have been crystallized through a long line of judicial authorities at the High Court and Court of Appeal These principles continue to hold sway not only at the Lower Courts, but in this Court as well. However, in the context of the Constitution of Kenya, 2010, a third condition may be added, namely.... That it is in the public interest that the order of stay be granted. This third condition is dictated by the expanded scope of the Bill of Rights, and the public spiritedness that run through the Constitution.”

The court further stated:

“Bearing in mind the nature of the competing claims, against the background of the public cause, we have focused our perception on the public interest, and the concept of good governance, that runs in tandem with the conscientious deployment of the scarce resources drawn from the public. Proper husbandry over public monetary and other resources, we take judicial notice, is a major challenge to all active institutions and processes of governance; and the Courts, by their established attribute of line-drawing, must ever have an interest in contributing to the safeguarding of such resources.... By our sense of responsibility, the Court’s contribution to good governance in that context, takes the form of an expedited hearing for the appeal. Just that.”
(emphasis is mine)

An applicant seeking conservatory orders must demonstrate that unless the orders are granted his constitutional rights will be violated or threatened. In *Martin Nyaga Wambora v Speaker of The County of Assembly of Embu & 3 others {2014} eKLR*, where Mwongo J, expressed himself as follows:

“To those erudite words I would only highlight the importance of demonstration of “real danger.” The danger must be imminent and evident, true and actual and not fictitious; so much so that it deserves immediate remedial attention or redress by the Court. Thus, an allegedly threatened violation that is remote and unlikely will not attract the court’s attention.”

In this case the applicant contends that his constitutional rights are threatened or will be violated if the proceedings before the assembly are allowed to go citing utterances from some members of the assembly and that the process will not be fair.

He has not laid before this court material to support his apprehension. Court will be reluctant to restrain a legal process unless it is shown that the process as designed or executed is inherently unfair and a breach of the constitutional rights of the applicant. This has not been demonstrated in this application.

1. After considering the application, response and submissions, I do not find that the applicant has demonstrated grounds for grant of the conservatory orders prayed for and this application is therefore dismissed with costs.

DATED and SIGNED at BUNGOMA this 30th day July, 2021.

S N RIECHI

JUDGE