



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**PETITION NO. 15 OF 2021**

**IN THE MATTER OF THE ALLEGED INFRINGEMENT OF THE PROVISIONS OF ARTICLES 2(1), 2(2), 2(4), 3(1), 10, 21(1), 22, 23(1), 23(3), 28, 41, 47, 178, 258 AND 259(1) OF THE CONSTITUTION OF KENYA 2010;**

**AND**

**IN THE MATTER OF SECOND ASSEMBLY FOURTH SESSION KISII COUNTY ASSEMBLY;**

**AND**

**IN THE MATTER OF THE COUNTY GOVERNMENT ACT NO. 17 OF 2012**

**BETWEEN**

**HON. DAVINS OKINDO NGOGE.....PETITIONER/APPLICANT**

**AND**

**KISII COUNTY ASSEMBLY.....1<sup>ST</sup> RESPONDENT**

**HON. DAVID ONDIMU KOMBO.....2<sup>ND</sup> RESPONDENT**

**мбака омвоyo.....3<sup>RD</sup> RESPONDENT**

**KISII COUNTY COMMISSIONER.....4<sup>TH</sup> RESPONDENT**

**KISII COUNTY POLICE COMMISSIONER.....5<sup>TH</sup> RESPONDENT**

**ATTORNEY GENERAL.....6<sup>TH</sup> RESPONDENT**

**RULING**

1. The subject of this ruling is a Notice of Motion filed on 11<sup>th</sup> June 2021 by the Petitioner seeking orders that;

1) Spent;

2) Pending the hearing and final determination of the application herein, there be, and is hereby issued an order of temporary injunction restraining the 4<sup>th</sup> and 5<sup>th</sup> Respondents, their agents or any police officers under instructions of the 4<sup>th</sup> & 5<sup>th</sup> Respondents and/or goons, agents, servants or anyone under the command of the 2<sup>nd</sup> & 3<sup>rd</sup> Respondents from blocking, barricading and/or in any other way entering the precincts of a Gazetted and protected area known as the Kisii County Assembly;

3) Pending the hearing and final determination of this application, there be and is hereby issued an order directed at the 4<sup>th</sup> and 5<sup>th</sup> Respondents and/or any other officer acting under their command and control to forthwith release the Kisii County Assembly mace to the sergeant at arms of Kisii County Assembly unconditionally for delivery to the Kisii County Assembly at all times during the Assembly sessions;

4) Pending the hearing and final determination of this application, the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents are barred by way of an order of

mandatory injunction from performing any functions of the office of speaker and clerk of the Kisii County Assembly respectively.

5) In view of the Provisions of Rule 7 of the Rules and Regulations guiding the conducting within the precincts of the Kisii County Assembly, the 4<sup>th</sup> & 5<sup>th</sup> Respondents, their agents and or officers under their control are strangers to the Assembly and are therefore barred by an order of a permanent injunction from accessing, entering and/or enforcing any security checks within the precincts of the Kisii County Assembly pending the hearing and final determination of the Petition herein.

6) In view of the resolution made by the Kisii County assembly on 26<sup>th</sup> May 2021 removing the 2<sup>nd</sup> Respondent, Hon. David Ondimu Kombo, from the office of Speaker of Kisii County assembly, an order of injunction is hereby issued restraining the 2<sup>nd</sup> respondent from entering, accessing the assembly precincts and offices of the Kisii County Assembly and/or performing any functions of the office of speaker and chair of the County Assembly Service Board pending the hearing and final determination of the Petition herein.

7) Pending the hearing and final determination of this petition there be issued and is hereby issued an order of a mandatory injunction directed at the 3<sup>rd</sup> respondent from making any official communication and/or performing any functions of the clerk of the Kisii County Assembly unless with written authority from the Kisii County Assembly Service Board.

8) Costs of this applicant be awarded to the applicant.

2. The Petitioner claims, that over time, there have been leadership wrangles in the County Assembly of Kisii (“the Assembly”). Several reconciliation meetings were held and it was resolved that the Speaker of the Assembly, the 2<sup>nd</sup> Respondent Hon. David Ondimu Kombo, cease to discharge his duties and an acting clerk preside the assembly in place of the 2<sup>nd</sup> Respondent. A motion was processed for the removal of the Speaker but the vote counting process was disrupted after the Speaker moved to challenge the process in the Employment and Labour Relations Court at Kisumu. The Petitioner averred that the court delivered a ruling allowing the process of impeachment to continue.

3. Ultimately, the Assembly impeached the Speaker by resolution on 26<sup>th</sup> May 2021 effectively removing him from office. Being dissatisfied with his removal, the 2<sup>nd</sup> respondent filed Constitutional Petition No. 10 of 2021 in which he was given orders of stay. The Petitioner claimed that the 2<sup>nd</sup> respondent had misused the orders of the court to the detriment of public good. He was of the view that the orders issued by court did not reinstate the 2<sup>nd</sup> respondent or quash the resolution of the Kisii County Assembly to remove him from office and as such the 2<sup>nd</sup> Respondent stands removed from office of Speaker of the Assembly.

4. The Petitioner averred that the 2<sup>nd</sup> Respondent was now using this court's orders of 28<sup>th</sup> May 2021 to connive with the 4<sup>th</sup> and 5<sup>th</sup> Respondents to deny the Assembly access to the mace which was the symbol of authority of the house. He claimed that the 2<sup>nd</sup> Respondent was also using this court's orders issued on the 28<sup>th</sup> May 2021, to instruct Police officers to block the representatives of the people of Kisii County from accessing the House to perform their legislative, oversight and representative mandate.

5. The Petitioner claimed that on 8<sup>th</sup> June, 2021 in a bid to enforce the court orders, police officers under the command of the 4<sup>th</sup> and 5<sup>th</sup> Respondents with goons hired by 2<sup>nd</sup> Respondent lobbed teargas canisters within the precincts of the assembly and in the process beat up members of the County Assembly in a bid to disperse them from their place of work, which was a violation of the Petitioner's labour rights. In the process some of the Honourable members of the county assembly were severely injured and had to seek medical attention in hospital.

6. The 2<sup>nd</sup> Respondent was accused of intimidating unauthorized officers to purport to cancel a gazette notice duly signed by an authorized officer under the law in an attempt to intimidate county assembly members from discharging their mandate. The Petitioner was apprehensive that unless the respondents were stopped from misusing the court orders issued on the 28<sup>th</sup> May 2021 the integrity and independence of the court would be subjected to ridicule and dishonor. He averred that there was real and present danger that the Respondents would misuse the court orders to mistreat representatives of the people and defeat the popular will of the residents of Kisii County with a view to paralyzing the operations of the Kisii County Assembly thereby denying the people of Kisii County essential services.

7. The Clerk of the Assembly, James Nyaoga, swore an affidavit on behalf of the 1<sup>st</sup> respondent on 24<sup>th</sup> June 202. He claimed that Hon. Matundura a member of the 1<sup>st</sup> respondent had given prior notice of his intention to move a motion for the removal of the 2<sup>nd</sup> Respondent as the Speaker. When the Assembly sat on 18<sup>th</sup> November, 2020, Hon. Matundura rose to address the Assembly under Standing Order 58 of the Kisii County Assembly Standing Orders which provides for the removal of a County Assembly Speaker. The Clerk claimed that he had notified the 2<sup>nd</sup> respondent of the motion through a letter dated 20<sup>th</sup> November 2020 and invited him to respond in writing and the 2<sup>nd</sup> Respondent had replied on 23<sup>rd</sup> November 2020 and on 24<sup>th</sup> November 2020.

8. The motion for impeachment was moved on 1<sup>st</sup> December 2020 before the floor of the House and the 2<sup>nd</sup> Respondent was accorded an opportunity to respond to the allegation. However, chaos ensued when the motion was put to vote bringing the process to a halt. The Clerk claimed that the 2<sup>nd</sup> respondent reconvened the Assembly sitting in the afternoon and declared the motion defeated. However, pursuant to the court's ruling in Petition No. E001 of 2021 filed by the 2<sup>nd</sup> Respondent, the court allowed the 1<sup>st</sup> Respondent to proceed with the impeachment proceedings. On 26<sup>th</sup> May 2021, the members of the 1<sup>st</sup> Respondent resumed and finalized the impeachment process by accruing the two-thirds majority vote in favour of the motion for impeachment. In his view, the resumption of the sitting on 26<sup>th</sup> May 2021 was done in accordance with standing order No. 29 of the Kisii County Assembly standing orders.

9. James Nyaoga was aware that following the decision of the assembly to remove him from the position of speaker, the 2<sup>nd</sup> Respondent moved to this court vide Constitutional Petition No.10 of 2021 which Petition was pending hearing and determination by the court. He averred that the 2<sup>nd</sup> Respondent had used interim orders issued to him to cause a stalemate of the 1<sup>st</sup> Respondent's operations which had now

ground to a halt.

10. The Clerk averred that on 23<sup>rd</sup> June 2021, the 2<sup>nd</sup> Respondent had gone to the County assembly escorted by anti-riot police officers whom he allowed to access the assembly chamber contrary the Speaker's Rules and regulations on conduct of the Public. He averred that currently the assembly was at a critical stage of debating the 2021/2022 financial year budget which ought to be finalized by the 30<sup>th</sup> June 2021 to unlock funding to the county.

11. The Clerk deposed that the mace which is a property of the assembly was kept at the office of the 4<sup>th</sup> respondent for security reasons but would ordinarily be under the custody of the sergeant at arms of the assembly. He averred that the 4<sup>th</sup> and 5<sup>th</sup> respondents had custody of the mace which is the county assembly's symbol of authority and the 1<sup>st</sup> Respondent could not proceed with its sitting without the mace. He averred that to date, the 1<sup>st</sup> Respondent was constrained in carrying out its functions which had a ripple effect on the service delivery to the people of Kisii County. He urged the court to intervene in solving the impasse that was currently existing to enable timely and efficient delivery of services. He also urged the court to allow the petitioner who was the Deputy Speaker of the County assembly, to preside over sittings of the Assembly as provided under Article 178 (2) (b) of the Constitution.

12. In response to the application, the 2<sup>nd</sup> respondent swore an affidavit on 25<sup>th</sup> June 2021 confirming that he had moved to this court vide Kisii High Court Constitutional Petition 10 of 2021 seeking to challenge the process culminating in his impeachment as communicated by the 1<sup>st</sup> Respondent vide a Notice issued on the 26<sup>th</sup> May, 2021. The 2<sup>nd</sup> respondent stated that the scheme by Hon. Samuel Ang'asa Onukoh to purport to carry out a fresh count of votes cast way back in 2020 was suspect and a plot to cook up figures. He deposed that the motion for his impeachment was not presented as required by the law as he was never served with sufficient Notice to help him prepare for his defense. The 2<sup>nd</sup> respondent claimed that he had been informed that the members agreed to conduct a roll call voting under Standing Order 69 of the Assembly Standing Orders but the presiding officer failed to comply with the requirement under Standing Order 69 (4), that the Clerk was supposed to be directed to call out the names of the members in alphabetical order. He instead took the role to call out the names of the members himself and as each member was called out, they received the ballot paper and proceeded to the polling booth to cast their vote.

13. The 2<sup>nd</sup> respondent averred that according to the roll call there were sixty-six (66) members present and eligible to cast their votes. The 2<sup>nd</sup> respondent averred contrary to Standing Orders which provide that the voting by a member on any motion shall only be restricted to those members who are present, Hon. Bilancio Maturwe, and Hon. Harriet Kerubo Ongera, who were absent, were allowed to vote by declaring which side they were voting for on phone.

14. The 2<sup>nd</sup> respondent had also been informed that when the presiding officer had sorted out the votes, Hon. Vincent Gitene Onyando, Hon. Anunda Riyenga and Hon. Eric Janganya, had stormed the Speaker's table and caused a commotion which was captured by the Hansard cameras. The members of the Assembly tore the ballot papers and sprinkled water on them to destroy evidence. That notwithstanding, the presiding officer had, during the commotion, announced that, in his estimation, the votes for "Ayes" met the threshold to impeach the Speaker. The 2<sup>nd</sup> respondent averred that on pronouncement of the impeachment, Hon. Samuel Nyambeki Ongono, Hon. John Maisiba Ombati and Hon. Evans Mokoro Omwansu complained to the County Assembly under Standing Order 71 but the presiding officer failed to correct the error by directing a repeat of the roll call voting. He averred that the presiding officer committed serious breaches of the Standing Orders by announcing imaginary and fictitious results of the roll call voting and deliberately gave false information to the Assembly. It was his position that the threshold for the removal of Speaker was not met since 75% of all the members of the County Assembly did not vote to impeach him.

15. The 2<sup>nd</sup> respondent also claimed that on the day of the purported impeachment, the order paper was prepared unprocedurally as it was prepared and printed a few minutes to the time the business of the day started, contrary to Standing Order 35(2). He claimed that a motion for a resolution to remove the Speaker had to be presided over by a member of the County Assembly elected to act as Speaker as contemplated under article 178 (2)(b) of the Constitution. However, when the House sat to impeach the Speaker it was presided by member not elected under article 178 (2) (b) of the Constitution, in total disregard of the Deputy Speaker who was constitutionally elected as provided for under Standing Order 58 (3).

16. He further averred that the presiding officer misinterpreted Standing Order 29 to resume an interrupted debate in a different session. He contended that being a new session, the House Business Committee did not meet to introduce business in the house which was a serious breach of Standing Order 152 (5) (d) and (c). He was of the view that if a motion was not dispensed with in the same session, it could only be introduced afresh in the next session provided it was allotted time by the House Business Committee.

17. The 2<sup>nd</sup> respondent contended that the inclusion of the Attorney General in this Petition for purposes of withdrawing Police Officers who were mandated to enforce law and order was misguided and an abuse of court process. He stated that an order of injunction against him could not be issued in the manner sought as to do so would offend the principle of law that a public body or officer cannot be directed to perform an administrative, statutory or legal duty in a particular manner. In his view, the issues raised in the application were weighty Constitutional matters that could not be determined in the interim, without calling for evidence. The 2<sup>nd</sup> respondent concluded by stating that the application did not meet the requisite legal threshold for grant of conservatory orders and was frivolous, scandalous, vexatious and a perverse abuse of the process of the Honourable Court.

18. For his part, the 3<sup>rd</sup> respondent who is the Deputy Clerk of the 1<sup>st</sup> respondent swore an affidavit on 25<sup>th</sup> June 2021 claiming that complaints raised against the Clerk of the Assembly for sexual harassment of the staff at the Kisii county which led to his suspension by the Board on 21<sup>st</sup> May 2021. On 26<sup>th</sup> May 2021 the County Assembly attempted unsuccessfully impeach the Speaker and on the following day, the Deputy Speaker who was not authorized to sit in the Board convened a meeting and purported to lift the suspension of the Clerk.

19. After those events the Deputy Speaker issued a letter attempting to de-gazette the Speaker. On 31<sup>st</sup> May 2021, the Clerk declared a vacancy of the office of the Speaker and invited Applicants to pick nomination letters while he was still under suspension. Mbaka Omwoyo averred that at the time the Clerk was declaring the vacancy he had no capacity and therefore his acts were null and void. He also deposed

that at the time the Clerk was declaring the seat of the Speaker vacant, the Speaker had a court order restraining the respondent from making such a declaration. The Deputy Clerk therefore filed a gazette notice revoking the Clerks' earlier notice. He asserted that his actions had been above board and every single engagement he had had was within the law. He therefore urged the court to dismiss the application.

20. The 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> respondents did not enter appearance in the matter or participate in the proceedings.

## **SUBMISSIONS**

21. The application was canvassed by way of written submissions which were highlighted by the parties' learned counsels on 7<sup>th</sup> July 2021.

22. Relying on the case of *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others [2014] eKLR*, the petitioner's counsel identified three issues to be resolved in the determination of the application. The first was whether a *prima facie* case had been made out, the second was whether there was a danger that the petition would be rendered nugatory if conservatory orders were not granted and the third was whether the grant of the orders sought would be in the public interest.

23. The petitioner's counsel submitted that the petitioner had made out a *prima facie* case, as the 2<sup>nd</sup> respondent had not denied that he had misrepresented the import and terms of the court order in Petition No. 10 of 2021, which led the 4<sup>th</sup> and 5<sup>th</sup> respondents, through police officers in their command to storm into the County Assembly Chamber and assault members, in violation of **Section 26 (1) of the County Governments Powers & Privileges Act**.

24. Counsel submitted that the Assembly was at a crucial point of the financial calendar and needed to discharge its budgetary duties. He argued that the crippling of the County Assembly's affairs was inimical to good governance, the objects of devolution and the principles of public finance. Counsel submitted that in the absence of conservatory orders, the 1<sup>st</sup> respondent's discharge of its duties would be irreparably threatened. Counsel argued that despite the passage of a resolution for the 2<sup>nd</sup> respondent's removal from the Office of Speaker, the continuity of county assembly's functions was paramount and the Constitution authorized the petitioner to preside over the assembly sittings.

25. Counsel was of the view that although the interim orders had been issued in favour of the 1<sup>st</sup> respondent, they could not in any way be construed as a reinstatement or nullification of the resolution passed by the house for his removal. Moreover, the interests of Kisii County residents outweighed the interests of the 2<sup>nd</sup> respondent.

26. The court was referred to the case of *Justus Kariuki Mate vs Martin Nyaga Wambora & Another [2017] eKLR*, where the Supreme Court considered, *inter alia*, court intervention on on-going processes of another arm or government, and called for balance in the exercise of the mandates of the different arms of government particularly in the issuance of conservatory orders that were likely to hamstring the constitutional mandate of the County Assembly. Counsel argued that if not checked the misrepresentation of this court's orders by the 2<sup>nd</sup> respondent ran the risk of violating the rights of the Members of the Assembly and the people at large.

27. It was submitted that the public interest, in this cause, lay in the granting of appropriate conservatory orders that would allow the County Assembly to function; even while its former Speaker mounted proceedings to challenge his removal.

28. In the same vein, counsel for the 1<sup>st</sup> respondent submitted that the Assembly was empowered under **Article 178 (3) of the Constitution, Section 11 of the County Governments Act** and its **Standing Order 58** to remove the Speaker from office. He submitted that the 2<sup>nd</sup> respondent had obtained interim orders which had almost ground the Assembly business into paralysis. Counsel argued that the proceedings of the Assembly were privileged and not amenable to be questioned in any Court of Law as provided under **Section 12 of the Parliamentary Powers and Privileges Act**. Citing the cases of *Canada (House of Commons) vs Vaid [2005] SCR 667; 2002 SCC 30* and *Harvey vs New Brunswick (Attorney General), Martin Nyaga Wambora & Another [2017] eKLR* as well as the scholarly works of Goy F. Sincliar on **[Parliamentary privilege and polarization of Constitutional Discourse in New Zealand found at Wakaito Law Review Vol. 141]** counsel submitted that certain matters fell within the parliament's exclusive sphere of jurisdiction which the courts should not stray into.

29. Counsel contended that since the 1<sup>st</sup> Respondent had demonstrated that the Assembly was clothed with the power of removal of a Speaker and **Section 12 of the Parliamentary Powers and Privileges Act, 2017** prohibits questioning of Parliamentary proceedings in a Court of Law, the Petitioner had demonstrated a case with a probability of success.

30. As to whether the orders sought could be compensated by way of damages, counsel submitted that the Assembly was at a crucial stage of debating and passing the budget for the 2021/2022 financial year which would unlock funding to the County Government to run crucial activities among them Health services. He therefore prayed that the court unlocks the impasse in the proceedings of the assembly as the or orders sought could not be replaced any an award of damages.

31. It was also argued that the balance of convenience weighed towards grant of the interim orders as unlocking the operations of the Assembly would be in the wider public interest.

32. Counsel urged that **section 4 of the County Assemblies Powers and Privileges Act 2017** allowed the persons of a national security organ to enter the county assembly precincts with the instructions of the Speaker, therefore, the 2<sup>nd</sup> respondent lacked the legal capacity or authority to issue instructions to the 4<sup>th</sup> and 5<sup>th</sup> Respondents. Equally, the acts of the 4<sup>th</sup> and 5<sup>th</sup> Respondents to keep in their custody the mace at the behest of the 2<sup>nd</sup> Respondent was irregular and illegal. He therefore urged the court to direct the release of the mace to the 1<sup>st</sup> respondent's sergeant at arms.

33. On the other hand, the 2<sup>nd</sup> respondent's counsel argued that the application and the entire Petition amounted to an appeal or a review of

this court's orders issued on 28<sup>th</sup> May, 2021 in Petition 10 of 2021 which stayed all the communications, resolutions or decisions contained in the Notice dated the 26<sup>th</sup> May, 2021 declaring that the 2<sup>nd</sup> Respondent had been impeached from the office of the Speaker of the County Assembly of Kisii. Therefore, the position of the 2<sup>nd</sup> Respondent as the Speaker of the County Assembly of Kisii was preserved and he retained all the powers associated with his office as the Speaker. He argued that if the petitioner was aggrieved by the orders, he had a right to apply to be enjoined and apply for review or setting aside of the orders. That it was an abuse of the process of the Court for the Petitioner to lodge the instant Petition seeking orders that would be in direct conflict with the orders that are currently in place.

34. The petitioner's counsel further submitted that a mandatory injunction should not to be issued at an interlocutory stage in the absence of clear special circumstances. He argued that in this case, there were no special circumstances that had been highlighted to warrant the issuance of the mandatory orders of injunction sought. Counsel urged that the applicant had not shown that there was danger which is imminent and evident, in the event that the 2<sup>nd</sup> respondent continued discharging his constitutional mandate. Counsel argued that the court could not make definite findings on the fate of the petition, when it was clear that the Petitioner had not made out a case for the grant of the conservatory orders.

35. According to counsel, the petitioner's move to institute the instant application which essentially sought to defeat the orders that were issued by this Court in Petition No. 10 of 2021 amounted to an abuse of the process of the Court and the application ought to be dismissed.

36. For his part, counsel for the 3<sup>rd</sup> respondent argued that the Clerk of the Assembly was on suspension on allegations of gross misconduct and could not perform his functions as provided under County Assembly Services Act at Section 19 and 20. This court was urged not to issue the orders sought as it would paralyze the functions of the County Government since the Clerk was still on suspension and the functions of the Assembly had to continue in his absence.

### **ANALYSIS AND DETERMINATION**

37. After a careful analysis of the application, the responses and the submissions by learned counsel, this court distilled the following issues for determination;

- 1) Whether the 2<sup>nd</sup> and 3<sup>rd</sup> respondents should be barred from performing the functions of the office of speaker and clerk of the Kisii County Assembly respectively
- 2) Whether a temporary injunction should issue restraining the 4<sup>th</sup> and 5<sup>th</sup> Respondents, from interfering, blocking, entering or enforcing any security checks within the precincts of the Kisii County Assembly.

38. The petitioner has sought orders to bar the 2<sup>nd</sup> and 3<sup>rd</sup> respondents from performing the functions of Speaker and Clerk of the Kisii County Assembly respectively.

39. Although the petitioner's submissions focused on conservatory orders, the orders sought in the application were in the nature of injunctions. A permanent injunction is granted upon the hearing of the suit and determines the rights of the parties fully after hearing the merits of their cases. The permanent injunction sought by the petitioner cannot therefore be granted at this stage. For interlocutory injunctions, it is trite law that the applicant must firstly establish a *prima facie* case with a probability of success; secondly, the applicant must show that he will otherwise suffer irreparable harm which would not adequately be compensated by an award of damages if the orders sought are not granted and if the court is in doubt, it will decide the application on a balance of convenience.

40. A *prima facie* case is defined as a case in which the material presented before the Court will lead it to conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter. (*See Mrao Ltd v First American Bank of Kenya Ltd & 2 others CA MSA Civil Appeal No 39 of 2002 [2003] eKLR*)

41. The agreed facts in this matter are that on 26<sup>th</sup> May 2021, a motion was passed for the impeachment of the 2<sup>nd</sup> respondent from the position of the Speaker of the Kisii County Assembly. Dissatisfied with the manner in which he had been removed from office, the 2<sup>nd</sup> respondent filed Constitutional Petition No. 10 of 2021 against the Assembly, one Hon. Samuel Ang'asa Onukoh, the Clerk of the County Assembly of Kisii and the County Assembly Service Board, challenging the legality of the process. He sought and was granted the following interim orders by the court in that matter on 28<sup>th</sup> May 2021;

- 1) That the instant application be and is hereby certified urgent and the motion petition be served by close of business on 31<sup>st</sup> May 2021;
- 2) That pending the hearing and determination of the instant Notice of Motion Application, an order of stay be and is hereby issued, staying the communication, resolution and or decision contained in the Notice dated the 26<sup>th</sup> of May, 2021, purporting that the Petitioner/Applicant has been impeached from the office of the Speaker of the County Assembly of KISII;
- 3) That pending the hearing and determination of the instant Notice of Motion, an order of Temporary Injunction be and is hereby issued restraining the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, their agents, servants and or persons acting under their instructions from de-gazetting, the Petitioner/ Applicant as the Speaker of the County Assembly of and or in the alternative, if de-gazetted, an order be issued suspending any such de-gazettement;
- 4) That pending the hearing and determination of the instant Notice of Motion, an order of interim injunction be and is hereby issued restraining the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, their agents, servants and or anyone acting under their instructions from declaring a

vacancy in the office of the Speaker of the County Assembly of KISII by way of Gazettement or otherwise and or in the alternative if so declared or gazetted, an order suspending any such declaration and or gazettement;

5) That pending the hearing and determination of the Application herein, an interim order of Injunction be and is hereby issued restraining the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, their agents and or servants from preventing and or obstructing the Petitioner/ Applicant from accessing the 1<sup>st</sup> Respondent's precincts and or from interfering with the Petitioner/Applicant's execution of the Lawful duties of his office as the Speaker of the 1<sup>st</sup> Respondent;

6) That pending the hearing and determination of the Annexed Petition herewith, an order of stay be and is hereby issued, staying the communication, resolution and or decision of contained in the Notice dated the 26<sup>th</sup> of May, 2021, purporting that the Petitioner/Applicant has been impeached from the office of the Speaker of, the County Assembly of KISII;

7) That pending the hearing and determination of the Annexed Petition herewith, an order of temporary injunction be and is hereby issued restraining the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, their agents, servants and or persons acting and their instructions from degazetting the Petitioner/ Applicant as the Speaker of the County Assembly of KISII and or in the alternative, if degazetted, an order be issued suspending any such de-gazettement;

8) That arguments in regard to conservatory orders be canvassed before high court 1 via teams at Kisii on 4.6.21

42. In the present application, the Petitioner and the Clerk of the Assembly contend that the 2<sup>nd</sup> respondent misrepresented the above orders of this court to the 4<sup>th</sup> and 5<sup>th</sup> respondent, causing them to storm into the 1<sup>st</sup> respondent's chamber and tear gas, assault and deny members access to the chamber. They asserted that a *prima facie* case had been established to warrant the issuance of the temporary injunctive reliefs sought as the removal of the 2<sup>nd</sup> respondent was done in accordance with the Constitution, **Section 11** of the **County Governments Act** and the 1<sup>st</sup> respondent's Standing Orders. They argued that this court is precluded from questioning the proceedings of the Assembly under **Section 12** of the **County Assemblies Powers and Privileges Act** which provides that, "*no proceedings or decision of the Assembly or committee of privileges acting in accordance with this Act shall be questioned in any Court of Law.*"

43. However, a reading of the orders of the court issued in Petition No. 10 of 2021 shows that the County Assembly and the Clerk of the Assembly were barred from de-gazetting the 2<sup>nd</sup> respondent as the Speaker of the Assembly and declaring his office vacant pending the determination of that matter. They were also barred from preventing the 2<sup>nd</sup> respondent from conducting the duties of the Speaker. The resolution contained in the Notice dated the 26<sup>th</sup> of May, 2021, by which the 2<sup>nd</sup> respondent was impeached from the office of the Speaker of the Assembly was also stayed by the court in Petition No. 10 of 2021.

44. The petitioner faulted the 3<sup>rd</sup> respondent for publishing a gazette Notice revoking an earlier notice issued by the Clerk declaring the office of the Speaker vacant, but it is clear that the court had issued interim orders restraining the Assembly and the Clerk from declaring a vacancy in the office.

45. While it would be unlawful for the 4<sup>th</sup> and 5<sup>th</sup> respondents or any officers under them to use excessive force, it is noteworthy that under **Section 4** of the **County Assemblies Powers and Privileges Act** the Speaker of the Assembly can authorize an officer of a national security organ to enter and remain in the precincts of a County Assembly to perform any function therein. Since the orders of the court in Petition No. 10 of 2021 prevented the obstruction of the 2<sup>nd</sup> respondent from executing his lawful duties as the Speaker of the Assembly, it follows that he would have the capacity to authorize officers of a national security organ to enter and remain within the precincts of the county assembly.

46. The applicant has urged this court to restrain the 2<sup>nd</sup> respondent from accessing the precincts of the Assembly and bar him from performing the functions of the office of the Speaker. Such orders if granted would be in direct conflict with the orders issued by the court in Petition No. 10 of 2021.

47. To me, the application before this court appears to be a disguised attempt by the Petitioner to appeal or set aside the orders issued in Petition No. 10 of 2021. There are proper channels through which a party aggrieved by the orders of a court can have them varied. The approach taken by the petitioner has no backing in law as this court has no mandate to overturn orders issued by a court of concurrent jurisdiction.

48. As long as they have not been appealed against or reviewed, the orders of a court are binding. I wholly adopt the sentiments of Odunga J. in the case of **Alken Connections Limited v Safaricom Limited & 2 others [2013] eKLR** where the learned judge held;

*"... the law is well established that Court orders are not made in vain and are meant to be complied with and therefore a party should not take it upon himself to decide on the validity or otherwise of Court orders. Once a Court order is made in a suit the same is valid unless set aside on review or on appeal."*

49. Similarly, in the case of case of **Canadian Metal Co. Ltd v Canadian Broadcasting Corp (No. 2) [1975]48D.L.R. (30)** the court held;

*"To allow court orders to be disobeyed would be to tread the road toward anarchy. If orders of the court can be treated with disrespect, the whole administration of justice is brought into scorn ... if the remedies that the courts grant to correct ... wrongs can be ignored, then there will be nothing left for each person but to take the law into his own hands. Loss of respect for the courts will quickly result into the destruction of our society."*

50. It was also argued that if the orders sought were not granted, the Petitioner would not be adequately compensated by damages and the

petition would be rendered nugatory, as the Assembly was at a crucial stage of debating and passing the budget for the 2021/2022 financial year and an impasse in the Assembly would have a ripple effect on the service delivery to the people of Kisii County. However, if the 2<sup>nd</sup> respondent was allowed to execute his duty as the Speaker of the Assembly pursuant to the orders of the court in Petition No. 10 of 2021, the business of the 1<sup>st</sup> respondent would not stall. This court is not convinced by the petitioner's claim that the County Assembly of Kisii will grind to a halt and will not be able to conduct its budgetary mandate if the orders sought are not granted as the 2<sup>nd</sup> respondent still has the capacity to preside over the sittings of the Assembly.

51. The petitioner has not demonstrated the loss he or the public is likely to suffer if the orders he seeks in his application are not granted. He has also failed to demonstrate the existence of special circumstances in this case that would warrant the issuance of a mandatory injunctions against the 2<sup>nd</sup> and 3<sup>rd</sup> respondents from performing their duties.

52. The inevitable conclusion to be drawn from the above is that the application dated 11<sup>th</sup> June 2021 has no merit. It is hereby dismissed with costs to the 2<sup>nd</sup> and 3<sup>rd</sup> respondents.

**DATED, SIGNED AND DELIVERED AT KISII THIS 29TH DAY OF SEPTEMBER 2021.**

**R.E. OUGO**

**JUDGE**

**In the presence of;**

**Mr. Ondari            For the Petitioner/Applicant**

**Miss Gogi            For the 1<sup>st</sup> Respondent**

**Mr. Ochoki           For the 2<sup>nd</sup> Respondent**

**Ms Rael                Court Assistant**