



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

JUDICIAL REVIEW APPLICATION NUMBER 9 OF 2020

REPUBLIC.....APPLICANT

VERSUS

THE COUNTY ASSEMBLY OF TRANS-NZOIA.....1ST RESPONDENT

SPEAKER, COUNTY ASSEMBLY OF TRANSNZOIA.....2ND RESPONDENT

THE HON. ATTORNEY GENERAL.....3RD RESPONDENT

EX-PARTE:

EMMANUEL WASWA SIMIYU.....APPLICANT

AND

FORUM FOR THE RESTORATION OF

DEMOCRACY-KENYA.....1ST INTERESTED PARTY

BENARD MUGANDA ALIANG'ANA.....2ND INTERESTED PARTY

BEN WANJALA.....3RD INTERESTED PARTY

PAUL JEREMIAH.....4TH INTERESTED PARTY

MARGARET S. WANJALA.....5TH INTERESTED PARTY

CAROLINE MAKOKHA..... 6TH INTERESTED PARTY

MERCY TANUI.....7TH INTERESTED PARTY

RODGERS BARASA..... 8TH INTERESTED PARTY

PHILIP NYONGESA..... 9TH INTERESTED PARTY

BENINA KHISA.....10TH INTERESTED PARTY

JUDGMENT

Pursuant to leave granted on the 17th September,2020, the *ex-parte* applicant (the applicant) moved the court for the following orders;

1. That an order of certiorari to bring before this court and quash the letter dated 3rd August 2020 from one Moses M. Wetangula, Joel A. Ruhu and Millicent Abudho purporting to remove the *ex-parte* Applicant from the position of leader of minority party and member of the County Assembly Service Board, County Assembly of Trans Nzoia.

2. That an order of prohibition be issued to prohibit the 1st and 2nd Respondents from implementing the letter dated 3rd August 2020 from one Moses M. Wetangula, Joel A. Ruhu & Millicent Abudho.

3. THAT costs be provided for.

The application is supported by the verifying affidavit of the applicant sworn on the 4th day of September 2020 and the statement of facts dated on the same day. The application is opposed by the 1st Respondent who relies on the affidavit of Ainea Obare Indakwa the Clerk of the County Assembly of Trans Nzoia sworn on the 5th day of July 2021. The 1st interested party opposes the application through the deposition of Millicent Abudho the Deputy Secretary General of the FORD Kenya party sworn on the 12th day of March 2021. The 2nd to 10th Interested parties oppose the application through the affidavit sworn on their behalf by Bernard Muganda Aliangan'a.

The 2nd and 3rd Respondents did not file any response. The parties also relied on oral submissions by their Counsel supplemented by written submissions to support their respective positions.

The *ex-parte* Applicant, is the elected member of the County Assembly of Trans Nzoia ("the County Assembly") on the Forum for Restoration of Democracy-Kenya ("Ford-Kenya") party ticket for the Keiyo ward and the leader of the minority party. He is also a member of the County Assembly Service Board. At all times material to the cause, the applicant was the leader of minority having been so elected on a Ford Kenya ticket which is the minority coalition in the County Assembly.

The gravamen of the ex-parte applicant's case is the letter dated 3rd August 2020 addressed to the 2nd Respondent by one **Moses. M. Wetangula, Joel A. Ruhu and Millicent Abudho** purporting to remove the ex-parte applicant from the position of the leader of minority party and as a member of the County Assembly Service Board which letter it is averred was not legitimately sanctioned by the party. Conversely, a second letter from the Ford Kenya Party Secretary General dated the same day clarified that the party had not made any recommendation for his removal since there was a dispute in the party leadership pending at the High Court.

The *ex-parte* applicant took issue with the procedure adopted for his removal and is aggrieved that if the process is implemented, his legitimate expectation to serve in the position of member of the County Assembly Service Board for five years or until his term expires as a member of the County Assembly, shall be defeated. It is averred that the arbitrary procedure if implemented by the Respondents, shall be in violation of the Constitution and the tenets of the rule of law and this shall adversely affect his political rights. It is averred that the procedure for the removal of the Leader of Minority is spelt out under Standing Order 16(3) to (5) of the Standing Orders of the County Assembly of Trans Nzoia annexed to the ex-parte applicant's application.

The 1st Respondents opposed the Applicant's application vide a replying affidavit sworn by **Ainea Obare Indakwa** the Clerk of the County Assembly of Trans Nzoia where she deposes to have received the letter dated 3rd August 2020 from Millicent Abwodha revoking the appointment of the *ex-parte* Applicant as leader of minority.

It is also averred that on the same day, she received a letter from Dr. David Simiyu Eseli indicating that there had not been any resolution from the Ford Kenya Party to change the County Assembly minority leadership. It is averred that both letters were purportedly issued by the Ford Kenya Party on the same day and had conflicting information which could not be acted upon until clear communication was made from the party. That since then, no communication has been made with regard to the County Assembly minority leadership.

On behalf of the 1st Interested party, which is the Forum for Restoration of Democracy-Kenya ("**Ford Kenya**") the application was opposed vide a Replying affidavit sworn by Millicent Abudho, the Deputy Secretary General of the 1st Interested Party on 12th March, 2021.

It was contended that the *ex-parte* Applicant is an elected member of the County Assembly of Trans Nzoia, representing Keiyo ward having been so elected on a Ford Kenya ticket. The 1st Interested party's party is the minority in the County Assembly of Trans Nzoia courtesy of which the *ex-parte* applicant serves as the Minority Leader.

It is averred that the 1st Interested Party ("Ford Kenya") resolved to remove and replace the *ex-parte* applicant as the Minority Leader in the County Assembly of Trans Nzoia which communication was made via the letter dated 3rd August, 2020 to the Speaker of the County Assembly of Trans Nzoia. The Speaker of the County Assembly of Trans Nzoia did not act on the aforesaid communication dated 3rd August 2020 and therefore no action was taken against the *ex-parte* Applicant thus rendering the said communication inconsequential. It is further averred that the 2nd to 10th Interested Parties resolved to remove the *ex-parte* applicant as the Minority Leader.

The said resolution was made in the exercise of powers reserved to the members of the County Assembly under their Standing Orders which had nothing to do with Ford Kenya Party. It is further averred that the communication dated 3rd August, 2020 was legitimate and sanctioned by Ford Kenya's Party organ in charge of day-to-day operations. It is further averred that the letter purportedly authored by Dr. David Eseli Simiyu was a forgery and not sanctioned by Ford Kenya and further that Dr. David Eseli was no longer the Secretary General of Ford Kenya having been suspended and barred by a Court Order from transacting the business of Ford Kenya. Accordingly, the resolutions communicated vide the letter dated 3rd August 2020 was by Ford Kenya as an institution and not the individual persons who appear as signatories therein.

It is contended that the ex-parte applicant is serving in the positions of Minority Leader and as a Member of the County Assembly Services Board by virtue of having been so represented by Ford Kenya itself and or through the Ford Kenya party sponsored members of County Assembly. In the premises, the ex-parte Applicant cannot claim any vested rights in those positions as indeed none exists as the *ex-parte* applicant was appointed to the subject positions and it is the same way he stands to be removed by the very persons who appointed him.

It is further submitted that, if the *ex-parte* Applicant is aggrieved by the decision of the 1st Interested party, then recourse should be invoked through the internal dispute resolution mechanisms which are well provided in the Ford Kenya Constitution and where dissatisfied, appeal to the Political Parties Disputes Tribunal.

It is averred that the failure by the *ex-parte* applicant to invoke the internal dispute resolution mechanisms including any appeal to the Political Parties Tribunal renders the instant proceedings incurably incompetent and divests of this court's jurisdiction to preside over and or handle this matter.

That in the circumstances, the *ex-parte* applicant's case is misdirected, an afterthought and an abuse of the court process, devoid of any merit and hopelessly defective and this court has no jurisdiction to preside over and determine the same.

In brief rejoinder, the ex parte Applicant reiterated the contents of paragraph 14 of his verifying affidavit that the procedure adopted by the 1st Interested party for his removal is strange in law and does not exist. He further averred that the Deponent of the 1st Interested Party's replying affidavit has no authority to swear and speak on behalf of the 1st interested party as she was not authorized by the Secretary General of the 1st Interested Party to do so and neither is there a resolution by members authorizing her to swear the same.

It is averred that based on the advice of Dr. David Eseli Simiyu, the Secretary General of Ford Kenya Party to the Applicant, the party communicates all its decisions through the Secretary General who in this case denies having sanctioned the alleged letter purporting to revoke any appointment of the ex-parte applicant as the leader of minority in the County Assembly of Trans Nzoia.

It is averred that the letter-head used in the letter dated 3rd August, 2020 is authentic as the 1st interested party has not complained of any forgery of its letter head to the relevant authorities.

It is also contended that the averment by the said Milicent Abudho on suspension of Hon. Dr David Eseli Simiyu is an outright lie amounting to perjury as the order referred to merely barred the Registrar of parties and Interested Parties from acting on a Gazette Notice by which the Ford Kenya Party Leader one Moses Wetangula had been removed from office which had nothing to do with the alleged suspension of Hon. Dr. David Eseli Simiyu as the Secretary General of the 1st Interested Party.

It is averred that in its judgment in **Complaint No. 19 Of 2020**, the Political Parties' Disputes Tribunal declared the resolutions of the purported National Executive Council of the 1st Interested Party to remove from office among other interested persons Hon. David Eseli Simiyu as the Secretary General of the 1st Interested Party was null and void.

The position of leader of majority and minority in the County Assembly is created by **Section 10(1)** of the **County Government Act 2012** which provides that each Assembly shall have a leader of the majority party and one of minority party. The leader of the minority party is the leader of the second largest party or coalition of parties in the County Assembly. These leaders are elected by members of their parties in the assembly in accordance with the standing orders of the assembly. In the case of the *ex-parte* applicant, he was elected pursuant to Standing Order No. 16 of the assembly which provides as follows;

- 1. The Minority Party or coalition of parties in the County Assembly shall elect a member of the County Assembly belonging to the party or coalition of parties to be the Leader of the Minority Party.**
- 2. In electing member under paragraph (1), the Minority Party or coalition of parties in the County Assembly shall take into account an existing coalition agreement entered into pursuant to the Political Parties Act.**
- 3. A member elected under paragraph (2) may be removed by a Majority of votes of all members of the Minority Party or coalition of parties in the County Assembly.**
- 4. The removal of a member from office under paragraph (3) shall not take effect until a member is elected in the manner provided for under paragraph (1).**
- 5. The Whip of the Minority Party or coalition of parties in the County Assembly shall forthwith, upon a decision being made under this Standing Order, communicate to the Speaker, in writing the decision together with the minutes of the meeting at which the decision was made."**

The Applicant's case is hinged on the letter dated 3rd August 2020 issued to the 1st Respondents by one **Moses. M. Wetangula, Joel A. Ruhu and Millicent Abudho** purporting to remove him from the position of leader of minority party and also a member of the County Assembly Service Board.

According to the Applicant, the 1st Respondent cannot validly implement the said letter having not been sanctioned by the legitimate party organ. The applicant submits that the proposed removal of the applicant from the twin positions was not properly constituted by the FORD Kenya Party Organs.

The applicant relies on his notice of motion, statement of particulars dated 4th September 2020, the verifying affidavit sworn on 4th September 2020 and the supplementary affidavit of the applicant sworn on 13th May 2021 and the annexed affidavits of Hon. Dr. David Simiyu Eseli sworn on 5th May 2021 and the 2nd Interested Party herein Bernard Muganda Aliang' ana sworn on 4th May 2021.

The ex-parte applicant seeks judicial review orders of certiorari to quash the letter dated 3rd August 2020 by Hon. Moses Wetangula and two

others purporting to remove the ex-parte applicant from the position of the leader of minority. He further seeks an order of prohibition to prohibit 1st and 2nd Respondents from implementing the said decision. It's the *ex-parte* applicant's case that they are challenging the process and not the merit of the decision.

The applicant submits that the Standing Orders are the guiding principles of the County Assembly and **Rule 14(1)** empowers the **County Assembly** to make rules to guide the process.

It is submitted that, **Section 10(b)** of the **County Government Act** defines minority leader as the party with the second largest majority. Before election, there was a coalition agreement between Ford Kenya, Wiper and ODM giving rise to NASA. Under this coalition, they nominated one of them to serve in the position of minority leader and thus whoever appoints has the power to dismiss.

The letter sought to be quashed was initiated by Ford Kenya and not NASA. The Standing Orders further provide a mechanism in which a minority leader can be removed. **Rule 16 (5)** of the **County Assembly Rules** provides that it is the Whip of the minority that communicates the decision to the speaker. The process was not followed. The party leader is the one initiating the process and not the minority Whip. It is the *ex-parte* applicant's case that due process was not adhered to and the party leader wanted the *ex-parte* applicant removed from the County Assembly Service Board yet there were no minutes communicating how the decision was arrived at.

It was further submitted that, under **Section 12** of the **County Government Act**, the ex parte Applicant can only be removed from office when the term comes to an end or when such a person ceases to be a member of the County Assembly. In a letter dated 4th January, 2021 from NASA it is submitted that they declared confidence in the minority leader and did not endorse his removal. It is urged that the orders prayed for be granted and the letter in question be quashed.

On behalf of the 1st and 2nd Respondents, they relied on the Replying affidavit dated 5th July 2021 deposed to by the Clerk of the County Assembly on 3rd September, 2020. It is submitted that the Clerk received a letter dated 3rd August 2020 requesting the revocation of the appointment of the ex-parte applicant. He received another letter dated 3rd August, 2020 which had conflicting information. Both letters purported to have come from the Party. The County Assembly was not sure which letter to implement. They did not act on the letters and had not received any further communication on the same. It is further submitted that minutes attached to the application were never received in the County Assembly and the orders should not issue against them as this was an internal party dispute.

On behalf of the Interested parties, it was submitted that the ex-parte applicant is an elected MCA on a Ford Kenya ticket. Ford Kenya is a minority party. A resolution was passed on 3rd August, 2020 communicating to the Speaker of the County Assembly of the removal of the ex-parte applicant as the minority leader but it was not acted upon.

The MCAs resolved to remove the *ex-parte* applicant under the **Standing Orders 16 (b)** of the **County Assembly Rules**. The resolution was annexed to the replying affidavit. The resolution has not been given effect to pursuant to a Court Order by Dr. Simiyu Eseli's letter and is inconsequential since the order was issued on 15th June 2020. He was barred from conducting the affairs of Ford Kenya.

It was averred that Dr. Eseli cannot give directions to the parties and the application should have been presented to the Political Parties Dispute Tribunal. They should have invoked the internal dispute resolution mechanisms of the party and exhausted them before bringing the matter to court. The matter should have been referred to the Political Parties Dispute Tribunal. The supplementary affidavit should be expunged from the court record.

It is submitted that leave of the court was not sought and the annexure 'EWS 4' by one Dr. Eseli is erroneously entered as a pleading yet he is not a party to the application. It was also submitted that the affidavit of Mugenda should be expunged from the record for failing to comply with **Order 9 Rule 8** of the **Civil Procedure Rules** for failing to file a notice to act in person.

On behalf of the Attorney General, it was submitted that the dispute at hand is between members of a political party and they are bound by the political party's dispute resolution mechanisms as set out in the **Political Parties Act** under **Section 40(b)** of the **Act**.

It was further submitted that the *ex-parte* applicant failed to comply with the said requirements and the application is therefore moot and a non-starter. It was further asserted that, Courts are loath to interfere with structures where proper dispute resolution mechanism have been set but where a party has neglected to apply them. On the part of the AG, he did not understand why he was enjoined in the matter since this was a dispute between a political party and the County Assembly.

This court has considered the pleadings, annexures and the submissions made by the parties.

The jurisdiction of the High Court under **Article 165(3)** of the Constitution is to inquire into the legality of any act done or said to be done pursuant to the Constitution or under the law. In **Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR** it was held that;

“A court's jurisdiction 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 Constitution or legislation or both. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a court of beyond the scope defined by the constitution.”

Citing the case of **Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989]**, the Court in **Republic v Speaker, West Pokot County Assembly & 2 others Ex-parte David Pkeu Kapeliswa & another; Kenya African National Union (KANU) (Interested Party) [2020] eKLR** adopted the said decision thus:

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.....Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.”

The question for determination is whether this court ought to intervene in this case. In Commission for the Implementation of the Constitution V Parliament of Kenya and Others, Nairobi Petition No. 454 of 2012 [2013]eKLR, the court observed that,

“[38] Therefore, as regards the question as to whether the court has jurisdiction to entertain the petition, the answer can only be in the affirmative; as to what lengths the Court can actually go to in doing so is a second level inquiry based on the circumstances of each case.”

In the present application, after evaluating the affidavit evidence presented before the court, this court holds that it has jurisdiction to hear and determine the dispute involved in this case. Whereas the 1st interested party’s has a point when he argues that the dispute between the ex-parte applicant and itself is essentially an internal party dispute which should have been resolved by invoking the 1st Interested Party’s party internal dispute resolution mechanism as per the 1st interested party Constitution, it was clear that that the 1st Interested party ignored the principles of fair hearing before it wrote the letter dated 3rd August 2020 addressed to the Speaker of the County Assembly for Trans Nzoia. There was no evidence placed before the court to show that the exparte Applicant was summoned to attend a disciplinary meeting or otherwise before the 1st Interested party took the drastic decision that affected the ex-parte Applicant’s status in the County Government of Trans Nzoia. If this Court were to agree with position taken by the 1st Interested party to the effect that the Court did not have jurisdiction to entertain the dispute, this court would be in effect endorsing on illegal process whose outcome would have adversely affected the ex parte applicant without having a place to go to for appropriate recourse.

It is trite under **Article 47** of the **Constitution** and the **Fair Administrative Act** and specifically **Section 4(4)** thereof, before an adverse administrative decision was made by the 1st Interested Party against the ex-parte Applicant, he was required to be accorded the opportunity to be heard after sufficient notice had been given to him. For the 1st Interested Party to purport to make such drastic decision without affording fair hearing to the ex-parte applicant makes the decision that was arrived at as expressed in the said later dated 3rd August 2020 to be unlawful, null and void and of no legal effect.

Thirdly, from the evidence placed on record, it was evident that at the time the said letter was written to the Speaker of the County assembly, Trans Nzoia County, there were leadership wrangles in the 1st Interested party’s Political Party that spilled into the Courts. At the time the letter was written, it was not clear who was legitimately in the leadership of the 1st Interested Party’s party. The leadership dispute, according to the pleadings placed before the court, was still tied up in Court and the Political Parties Dispute Tribunal pending resolution. It is therefore clear that it cannot be said, without contradiction, that the persons who signed the impugned letter purporting to change the leadership of the Minority Party at the County Assembly were indeed the official officer bearers of the party at the time.

It was not a surprise therefore that another letter was written on 3rd September 2020 by Dr. David Eseli Simiyu, the Secretary general of the 1st Interested party Political party purporting to revoke the earlier decision contained in the letter dated 3rd August 2020. In the subsequent letter, it is stated that the 1st Interested Party’s leadership had not met or resolved for there to be changes at the County Assembly leadership for the letter dated 3rd August 2020 to have validity. It is evident to this court that as long as there was leadership dispute in respect of the 1st Interested party’s Political party, any decision that it made respecting the minority leadership’s position at the Trans Nzoia County Assembly at the time cannot have imprimatur to be implemented by the County Assembly of Trans Nzoia County.

Fourthly, it was submitted that the 1st Interested party Political party entered into a coalition agreement with other Political parties and formed a coalition called NASA. It was further argued that it is the NASA coalition which had the authority to indicate its preference in terms of leadership of the available positions at the County Assembly. It was submitted that the 1st Interested Party did not therefore have the requisite locus standi to purport to write to the Speaker of the County Assembly to change the leadership positions where its members of the County assembly (MCA) were affected. The 1st Interested Party had no persuasive answer to this submission. The standing Order No. 16 of the Trans Nzoia County Assembly (cited earlier in this ruling) provides that where a party enters into a coalition agreement with another or other Political parties, it is that Coalition that will make representations to the County Assembly concerning any matters involving the Coalition and not a Political party forming part of that coalition. This court therefore agrees with the ex-parte applicant that the 1st interested Party had no authority, while the Coalition agreement existed, to communicate to the County Assembly by itself and not through the Coalition, NASA, that it had entered into a Coalition agreement with. To that extent, the letter dated 3rd August 2020, has no legal effect.

Finally, the court agrees with the ex-party Applicant that a Political party cannot direct the Speaker of the County Assembly to recognize a particular leadership. Standing Order No. 16 of the County Assembly of Trans Nzoia spells out the procedure to be followed when the minority party elects its leadership. The letter dated 3rd August 2020 in so far as it purported to determine the minority leadership position of the County Assembly outside the Standing Orders of the Trans Nzoia County assembly was unlawful, null and void and of no legal effect.

In the premises therefore, this court holds that the ex-parte applicant made an appropriate case for this court’s intervention as a result of which the following orders are hereby issued;

1. An order of Certiorari is hereby issued to remove and bring to this court for the purpose of quashing the same the letter dated 3rd August 2020 from the Ford Kenya Political Party’s officials purporting to remove the exparte applicant from the position of leader of minority and member of the County Assembly of Trans Nzoia County Assembly Service Board.

2. An order of Prohibition prohibiting the County Assembly of Trans Nzoia and the Speaker, County Assembly of Trans Nzoia from implementing the said letter dated 3rd August 2020 from Ford Kenya Political Party

3. The Exparte Applicant shall have the costs of the suit.

It is so ordered.

DATED AT KITALE THIS 23RD DAY OF SEPTEMBER, 2021.

L. KIMARU

JUDGE