



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CONSTITUTIONAL PETITION NO. 16 OF 2018

RUTH WAMBUI NDIRANGU.....1ST PETITIONER/APPLICANT

GRACE WANJA MURIITHI.....2ND PETITIONER/APPLICANT

SAMUEL WACHIRA NJUE.....3RD PETITIONER/APPLICANT

VERSUS

CLERK - COUNTY ASSEMBLY OF EMBU.....1ST RESPONDENT

SPEAKER - COUNTY ASSEMBLY OF EMBU.....2ND RESPONDENT

COUNTY ASSEMBLY OF EMBU.....3RD RESPONDENT

PUBLIC SERVICE BOARD EMBU COUNTY.....4TH RESPONDENT

JUDGMENT

1. The applicants herein moved this court by way of a notice of motion dated 21.01.2019 and filed in court the same day and the same is brought under certificate of urgency. Prayers 1, 2 and 3 are spent and as thus the only remaining prayers are:-

1) That pending the hearing and determination of the petition, a preservative/ conservatory order be issued in the first instance, restraining the respondents by themselves, or their servants, agents or otherwise howsoever from implementing or enforcing the purported recommendations contained in the report of the 3rd respondent's Ad hoc Committee submitted for approval by the 3rd respondent on 17th January 2019 in their entirety and in particular removal of the petitioners/ applicants from office within 24 hours and/or terminating, withdrawing or ceding the petitioner/ applicant's appointment (prayer 4).

2) That pending the hearing and determination of the petition, a preservative/ conservatory order be issued in the first instance, restraining the respondents by themselves, or their servants, agents or otherwise howsoever from interfering with, stopping, blocking and/or hindering the petitioners/ applicants from carrying out their functions in furtherance of the purported recommendations contained in the report of the 3rd respondent's Ad hoc Committee submitted for approval on 17th January 2019 (prayer 5).

3) That this Honourable Court be pleased to grant an order barring the respondent by themselves, servants or agents howsoever from victimizing and subjecting to vendetta, witch-hunt, terror, psychological torture, intimidation, impunity, indignity, torment, ridicule, professional dishonor, stereotyping, profiling, vilifying the petitioners/applicants the devious scheme to hound them out of employment (prayer 6).

2. The applicants further prayed for orders that this Honorable court be pleased to grant any such further or other orders as it may deem fit and just to safeguard the petitioners/applicants' constitutional fundamental right to fair labour practices (prayer 7) and for the costs of the application to be borne by the respondents (prayer 8).

3. The said application is premised on the grounds on its face and further supported by the affidavit sworn by the 1st applicant. The applicants' case is that they filed a petition in this cause challenging the resolution by the Assembly on 29.11.2018 requiring them to step aside from their positions and despite being aware of the instant ongoing petition, the 3rd respondent proceeded to constitute an Ad hoc committee to investigate the petitioners/applicants. That the 1st respondent proceeded to serve the petitioners/applicants with summons requiring them to file documents and further appear before the committee but which summons they did not honour as the same were similar to the summons subject of the pending petition herein and thus *sub judice*. That the Ad hoc committee proceeded to sit and made

recommendations in its report submitted for approval to the 3rd respondent on 17.01.2017 and seeking removal of the petitioners/applicants from office within 24 hours.

4. Further that, as such, the petitioners/applicants had been condemned unheard and their rights to fair administrative action as enshrined under Article 45 of the Constitution had been violated and that they are at the verge of losing employment through an unlawful process as the recommendations have been approved and are in the process of being implemented. As such, the orders herein ought to be granted in the circumstances.

5. The 1st – 3rd respondents opposed the application by way of two replying affidavits sworn by one Hon. Josiah Murithi Thiriku the 2nd respondent and on behalf of the 1st and 3rd respondents. The respondents' case is basically that the County Assembly has an oversight role which includes considering matters of accountability and transparency of County governments. That the Ad hoc committee was formed to investigate the petitioners/ applicants herein and the same was in exercise of the said oversight powers and which committee's sittings the applicants failed to attend despite having been served with summons in that respect. As such, the application herein has no merits as the applicants failed to attend the said meetings and therefore they cannot allege that they were denied right to a fair hearing. Further that the reports of the committee have been adopted by the Assembly and as such this court has no jurisdiction to sit in review or appeal on the findings and decisions of the County Assembly.

6. The 4th respondent also opposed the said application by way of grounds of opposition dated 21.01.2019 and wherein it was stated that the application herein is merely speculative and premature as no actions had been taken against the applicants to warrant the instant application. Further that the application is based on unfounded and baseless fears by the applicants meant to hoodwink the court in granting them unwarranted orders.

7. The application was canvassed by way of written submissions. The applicants relied on the principles for grant of injunctive orders as were laid down in the case of **Geilla –vs- Cassman Brown Limited 1973 EA 358** and submitted that they have met the said conditions in that they have demonstrated a prima facie case against the respondent with likelihood of success, that the grant of the injunction will act as a safeguard and maintain status quo for the greater ends of justice pending hearing and determination of the main case and that the balance of convenience tilts in the applicants' favour.

8. Further that despite the 2nd respondent having powers to oversight various county government executives, the exercise of the said power is subject to judicial interference in event of apparent breach of law and procedure consistent with the doctrine of separation of powers and it is the exercise of the said judicial interference that they invite the court to exercise and in so doing determine the constitutionality of the decision made by the ad hoc committee of the Embu County Assembly. Reliance was made on the case of **Njenga Mwangi & another –vs- The Truth, Justice and Reconciliation Commission & 4 others** and **Martin Nyaga Wambora and the County Government of Embu – vs- Speaker County Assembly of Embu & others (2014) eKLR** amongst other authorities.

9. The 4th respondent filed submissions and wherein it was essentially submitted that the applicants did not satisfy the conditions for grant of orders of injunction as were laid down in **Geilla –vs- Cassman case (supra)**.

10. The 1st – 3rd respondents did not file submissions despite the matter having been mentioned severally to confirm filing of submissions.

11. I have considered the application herein, the response thereto and the submissions filed in relation to the same. As it has been acknowledged by the parties herein, the said application basically seeks interim preservative/conservatory orders against the respondent. The issue for determination is therefore whether the applicant has satisfied the conditions for the grant of the said orders.

12. The application is premised on the provisions of Article 22 and 165 of the Constitution of Kenya 2010 and Rules 19, 23 and 24 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013. Article 22 provides for the jurisdiction of this court to grant conservatory orders. Article 165 also bestows this court with enforcement jurisdiction. Rule 23 of Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013 further grants this court with jurisdiction to grant conservatory or interim orders where a petition under rule 4 is presented before the court. As such, there being a pending petition alleging infringement of the applicants' rights, it is my considered view that this court has jurisdiction to determine the application herein. (See **Nubian Rights Forum & 2 others –vs- Attorney General & 6 others; Child Welfare Society & 8 others (Interested Parties); Centre for Intellectual Property & Information Technology (Proposed Amicus Curiae) Petition Nos. 56, 58 & 59 of 2019 [2019] eKLR**). In fact the issue of jurisdiction was determined in a ruling delivered by Hon. F. Muchemi J in the ruling delivered on 17.01.2019 in this cause. As such the objection by the 1st -3rd respondents on the jurisdiction of this court is unmerited and further res judicata.

13. Having determined the issue *in limine* as the law requires, I will then proceed to determine the main issue. The threshold for grant of conservatory orders was established by the Supreme Court in the case of **Gatirau Peter Munya –vs- Dickson Mwenda Kithinji & 2 others [2014] eKLR** where the apex court held that:-

“ [86] “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 the 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 supplicant’s case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.” (Emphasis added).

14. It is therefore clear that the principles on grant of temporary orders of injunctions as were laid down in **Geilla –vs- Cassman case**

(supra) and other cases cited by the parties herein are not applicable when it comes to determining an application for grant of interim conservatory orders.

15. The principles in regard to grant of interim conservatory orders are quite different. The first principle is that the applicant ought to demonstrate an arguable prima facie case with a likelihood of success and that in the absence of the conservatory orders he is likely to suffer prejudice. The second principle is that the Court should decide whether a grant or a denial of the conservatory relief will enhance the constitutional values and objects of a specific right or freedom in the Bill of Rights. The third principle is whether if an interim conservatory order is not granted, the petition or its substratum will be rendered nugatory. Lastly, that the Court should consider the public interest and relevant material facts in exercising its discretion whether, to grant or deny a conservatory order. {See Nubian Rights Forum & 2 others – vs- Attorney General & 6 others (supra).

16. The question therefore is whether the applicants have satisfied the above conditions.

17. As to the establishment of a prima facie case with a likelihood of success and likelihood on the part of the applicants to suffer prejudice unless the orders are granted, the applicants' case is that the 3rd respondent despite them being aware of the court proceedings constituted ad hoc committee and the applicants were invited to submit documents and to appear before the said committee. That however they did not honour the said summons as there was a case ongoing in court. The committee proceeded to sit and made a recommendation in its report that they be removed from office and which report was tabled in the Assembly for adoption and which report has adverse recommendations. The respondents on the other hand stated that the committee was legally constituted and the applicants notified to attend but they elected not to attend.

18. When a court is called upon to determine whether a *prima facie* case has been established, it should not delve into a detailed analysis of the facts and law but should focus on determining whether the applicant has put forward a case that is arguable and not frivolous. In Board of Management of Uhuru Secondary School –vs- City County Director of Education & 2 others [2015] eKLR the Court posited that:

“26. It is in my view not enough to merely establish a prima facie case and show that it is potentially arguable. Potential arguability is not enough to justify a conservatory order but rather there must also be evident a likelihood of success. The prima facie case ought to be beyond a speculative basis...”

Ringera, J in the case of Trust Bank Limited v Amin Company Ltd & another [2000] KLR 164 defined the term frivolous as follows:-

“A pleading or an action is frivolous when it is without substance or groundless or fanciful and is vexatious when it lacks bona fides and is hopeless or offensive and tends to cause the opposite party unnecessary anxiety, trouble or expenses. A pleading which tends to embarrass or delay fair trial is a pleading which is ambiguous or unintelligible or which states immaterial matters and raises irrelevant issues which may involve expenses which will prejudice the fair trial of the action.”

19. In my view, the petition before this court has a likelihood of success. The questions raised in the petition cannot be said to be frivolous. I would not wish to pre-empt on the outcome of the petition but from perusal of the application herein, the reply thereto and the petition pending before this court, serious issues arise and which should be answered so as to provide better clarity. For instance, were the applicants notified before a motion was tabled to have them suspended pending investigations? At what point does the right to be heard before a decision is made materialize? Is the County Assembly required to summon members of the executive before debating on their suitability or otherwise of office in exercise of the oversight mandate? In my view, this issue alone is not frivolous. The petition cannot therefore be said to be groundless or without substance. Without saying more, I find that the Applicant has a *prima facie* case with a likelihood of success.

20. Further, the petitioners' case is that if the committee's report is implemented, they stand to lose their employment. I have perused the said reports annexed to the respondent's replying affidavit and the recommendations therein. The petition pending before this court is premised on the fact that the applicants were never offered an opportunity to be heard when the County Assembly debated on their suspension pending investigations and subsequent adoption of the resolution in that respect. The contents of the recommendations of the report are not denied and further its adoption by the Assembly. It is my view that if the report is implemented the applicants are at risk of losing their jobs whereas the process leading to the same is under challenge. As such, it is my finding that the applicants have proved that they stand to suffer prejudice if the conservatory orders are not made.

21. I take note of the 4th respondent's response in the grounds of opposition filed herein to the effect that the application is merely speculative and premature as no action has been taken against the applicants to warrant the instant application. However, as I have said, the recommendations in the report are prejudicial to the applicants. There is nothing preventing the implementation of the said report. As such, I find that the respondents are capable of implementing the same and the statement by the respondents cannot be taken as a guarantee.

22. I further take note of the respondents' submissions to the effect that the irreparable loss which the applicants stand to suffer is the summary dismissal from employment and which can be remedied by way of damages and that if the court finds (after hearing the petition) that there was irregular exercise of power in the investigation process, the same can be remedied by way of damages. It is my view that this is the wrong position. This court should not be invited to foresee a process under challenge being implemented just for the reasons that those affected can be compensated by way of damages. Further, what is before the court being an allegation of violation of a right, it is not clear as to whether there can be any adequate damages to remedy the loss. I therefore refuse to buy that argument.

23. As to whether the grant or a denial of the conservatory relief will enhance the constitutional values and objects of a specific right or freedom in the Bill of Rights, I note that the petition basically revolves around the right to fair administrative action as provided for under Article 47 of the constitution. The constitutional values provided for under Article 10 binds every state officer and state organs and all persons. Article 2 of the Constitution provides that the constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government.

24. As such, every member of the public whether individually or collectively is enjoined to respect, uphold and defend the constitution. As Justice J.A Makau stated in **Law Society of Kenya v Officer of the Attorney General & another: Judicial Service Commission (Interested Party) [2020] eKLR** which statement I am persuaded with, any alleged violation of the Constitution by any individual is a very serious matter and an affront to the Constitutionalism, and sets a dangerous precedent in the violation of the constitution. The same can, if not checked, result in serious harm to the country and every citizen.

25. In my view, denial of the conservatory orders will not enhance said constitutional values and neither will it enhance the objects of the right to fair administrative action. The contrary is true.

26. As to whether the petition or its substratum will be rendered nugatory if the interim conservatory orders are not granted I note that the petition is premised on the alleged violation of the petitioners' rights under the constitution. Amongst the reliefs sought is a declaration that the said motion was unconstitutional, null and void *ab initio*, an order of certiorari to remove to this court and quash the said resolution and an order of prohibition to prohibit the 4th respondent from implementing the notice dated 30.11.2018 to the 4th respondent.

27. I am alive to the fact that at this stage, this court is not supposed to examine the merits of the petition but has to consider whether the petitioners have established a prima facie case to warrant interim orders so as to secure the substratum of the petition and not to render the petition nugatory and become a mere academic exercise. However, from the lens of the fact that the recommendations of the report are not denied and further it's adoption by the Assembly, it is clear that in absence of interim conservatory orders, the said report will definitely be implemented and thus rendering the pending petition nugatory.

28. As to consideration of the public interest and relevant material facts in exercising the discretion on whether or not to grant interim conservatory orders, the Supreme Court in the election petition case of **Gatirau Peter Munya –vs- Dickson Mwenda Githinji & 2 Others SCK Petition No 2 of 2013** held that the court in deciding on whether to grant interim conservatory orders ought to have in mind that conservatory orders ought to be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values and the proportionate magnitudes, and priority levels attributable to the relevant cause.

29. In **Martin Nyaga Wambora –vs- Speaker Of The County Of Assembly Of Embu & 3 Others [2014] eKLR** the Learned Judge observed that where a conservancy order is sought against a public agency like a legislative assembly that is mandated to carry out certain functions in the normal course of its business, it is only to be granted with due caution. The interruption of the lawful functions of the legislative body should take into account the need to allow for their orderly functioning in the public interest. Further that the court will only issue conservatory orders in exceptional circumstances and will be minded of the mandate of other constitutional organs in exercise of their constitutional mandate.

30. I note that the petition revolves around the violation of Articles 10, 47, 185(3) and 235(c) of the Constitution by the respondents herein and key provision being Article 47. As I have already stated, Article 2 of the Constitution provides that the constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government and thus every member of the public whether individually or collectively is enjoined to respect, uphold and defend the constitution.

31. According to **Black's Law Dictionary**, "public interest" is defined as:

"The general welfare of the public that warrants recognition and protection; or something in which the public as a whole has a stake especially an interest that justifies governmental regulation."

32. In the instant case, it is my view that it is in the public interest that the interim orders are granted. I say so having noted the assertions by the respondent that the applicants can be compensated by way of damages if the court faults the procedure. I think the public resources can be spent in a better way other than paying damages to people as a result of violation of rights of other people. Further public interest in this case lies in favour of preserving and protecting values and interest as enshrined in the constitution and further ensuring that public funds are well utilized.

33. I find that public interest would thus be greatly jeopardized and compromised should the court decline to grant the interim conservatory orders. If the respondents feel that the applicants herein violated the law as was alleged, there will be no harm in restarting the process afresh and employ the right procedure as it will be within their mandate. This will be easier as opposed to implementing the report which is under challenge and speculating on the outcome of the petition herein and wait to pay damages in the event the same does not favour them.

34. It is my considered view that the applicants herein have satisfied the aforesaid principles in regard to the granting of interim or conservatory orders. The applicants have demonstrated an arguable prima facie case with likelihood of success and shown that in absence of the conservatory orders they are likely to suffer prejudice. They have further met the second principle that grant of conservatory relief will enhance the constitutional values and objectives of the right to a fair administrative action as provided under Article 47 of the Act and further demonstrated that if interim orders or conservatory orders are not granted, the petition or its substratum will be rendered nugatory. They have also demonstrated that public interest will be prejudiced by a decision not to grant conservatory orders. As such, prayers 4 and 5 of the application ought to be allowed.

35. The applicants prayed for orders barring the respondent by themselves, servants or agents howsoever from victimizing and subjecting to vendetta, witch-hunt, terror, psychological torture, intimidation, impunity, indignity, torment, ridicule, professional dishonour, stereotyping, profiling, vilifying the petitioners/applicants the devious scheme to hound them out of employment (prayer 6). However, no evidence was tendered in support of the said prayer. There were no submissions made in that respect either. As such, the said prayer cannot be granted and it therefore fails.

36. The application as such succeeds in terms of prayers (4) and (5).

37. The court makes the following orders;-

1) *A preservatory/conservatory order restraining the respondents by themselves, or their servants, agents or otherwise howsoever from implementing or enforcing the purported recommendations contained in the report of the 3rd respondent's Ad hoc Committee submitted for approval by the 3rd respondent on 17th January 2019 in their entirety and in particular removal of the petitioners/applicants from office within 24 hours and/or terminating, withdrawing or ceding the petitioner/applicant's appointment BE AND IS HEREBY granted pending the hearing and determination and final disposal of the Petition herein.*

2) *A preservatory/conservatory order be issued in the first instance, restraining the respondents by themselves, or their servants, agents or otherwise howsoever from interfering with, stopping, blocking an/or hindering the petitioners/applicants from carrying out their functions in furtherance of the purported recommendations contained in the report of the 3rd respondent's Ad hoc Committee submitted for approval on 17th January 2019 BE AND IS HEREBY granted pending the hearing and determination and final disposal of the Petition herein*

3) *Costs of the application be in cause.*

38. The petitioner to prosecute their petition within period of 90 days failing which the orders issued in prayer (4) and (5) shall lapse.

39. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 21ST DAY OF OCTOBER, 2021.

L. NJUGUNA

JUDGE

.....for the Applicant

.....for the Respondents

.....for the Exparte Applicant