



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

CONSTITUTIONAL PETITION NO. 2 OF 2019

IN THE MATTER OF THE CONSTITUTION OF KENYA 2010 IN SO FAR AS THE CONSTITUTION HAS BEEN AND STANDS TO BE VIOLATED

AND

IN THE MATTER OF AN APPLICATION UNDER ARTICLE 22(1) OF THE CONSTITUTION OF KENYA (2010)

AND

IN THE MATTER OF THE CONTRAVENTION OF RIGHTS AND FUNDAMENTAL FREEDOMS ENshrined IN THE CONSTITUTION OF KENYA, 2010

AND IN THE MATTER OF FUNDAMENTAL RIGHTS AND FREEDOMS

AND

IN THE MATTER OF AN ALELGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLE (2, 3, 10, 23, 28, 35, 47, 48, 294, 235, AND 259) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF ARTICLE 159 OF THE CONSTITUTION OF KENYA, 2010 AND

IN HTE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS (PRACTICE AND PROCEDURE RULES, 2013)

BETWEEN

NDUYO SUSAN NGUGI.....PETITIONER

VERSUS

THE SPEAKER, COUNTY ASSEMBLY OF

THARAKA NITHI COUNTY.....1ST RESPONDENT

THE CLERK, COUNTY ASSEMBLY OF

THARAKA NITHI COUNTY2ND RESPONDENT

THE COUNTY ASSEMBLY OF

THARAKA NITHI COUNTY.....3RD RESPONDENT

JUDGEMENT

1. **NDUYO SUSAN NGUGI**, the Petitioner herein states in this petition that she is working for gain as a Deputy Speaker for the County Assembly of Tharaka Nithi in Tharaka Nithi County.

2. She has sued the Speaker County Assembly of Tharaka Nithi (the 1st Respondent) in his capacity as the one charged with the responsibility of presiding over sittings of Tharaka Nithi County Assembly.

3. The 2nd Respondent (Clerk, County Assembly of Tharaka Nithi) is sued in his capacity as the Secretary of County Service Board and Chief Administrative Officer of the County Assembly charged with day to day management and functioning of the County Assembly.

4. The 3rd Respondent (County Assembly Tharaka Nithi) charged with major responsibility of legislation oversight and vetting is sued in that capacity.

Relief Sought:

5. The Petitioner seeks the following reliefs in this petition namely:-

1) A declaration that the motion dated 4th February 2019 aimed at removing the Petitioner from office is unfounded, malicious illegal and an abuse of the Constitution.

2) Spent

3) An order restraining the 3rd Respondent from re-introducing a motion of impeachment and/or removal of the Petitioner as Deputy Speaker Tharaka Nithi County Assembly.

Petitioner's Case

6. The petitioner has pleaded that on 7th February 2019 she was served with a motion of her impeachment on the following allegations namely:-

a) That the Petitioner on 12th December 2018 during the tabling of nominees to the Assembly Business Committee and committee on selection, allegedly walked out of the Assembly in protest whereas consultations had been made by the parties and she was expected to show leadership in the house.

b) That on 5th December 2018 the Petitioner made allegations against a fellow Hon. Member without substantiating and used unparliamentary language which is contrary to her duty to ensure dignity of the Assembly is upheld and rights and privileges are not abused.

7. The petitioner avers that the Respondents' action violated the law on the following grounds:-

i) That the looming motion of impeachment will deny her an opportunity to carry out her duties pursuant to Article 73, 178 and 232 of Constitution of Kenya 2010.

ii) That the impeachment motion contravenes standing order number 63(1).

iii) That the Petitioner refutes the false accusations that she walked out of the house and that if she walked out it was because she had a running stomach which situation would be embarrassing if it was to be known as the same could be used as a political tool.

iv) The Petitioner denies using un-parliamentary language.

v) The Petitioner contends that the impeachment motion is discriminatory to her on grounds of gender because she is female and the intended replacement is a male. In her view her rights under Article 27 of Constitution of Kenya will be violated.

vi) That the impending impeachment is unfair, unreasonable and unconstitutional.

8. This court on 12th February 2019 following the Petitioner's motion dated 4th February, 2019 temporarily suspended the impeachment process pending the determination of the said application. However that notwithstanding, the County Assembly of Tharaka Nithi went ahead and removed the Petitioner as Deputy Speaker. The Petitioner filed another application dated 13th February 2019 asking this court to *inter alia* commit members of County Assembly for contempt of court and reinstating her to her former position. This court dealt with the prayer on contempt but the issue of reinstatement was suspended owing to the fact that the issue substantially touched on the reliefs, sought in this petition and therefore rendering myself at that interlocutory stage would have had undesired effect of premature decision on the petition itself. This court directed the parties to canvass or make representations in respect to that prayer at the hearing of this petition for final determination by this court.

The Petitioners submissions:

9. The Petitioner's submissions were filed on 5/2/2020. The petitioner submits that she is a Member of the County Assembly of Tharaka Nithi County elected in 2017 to represent Marimanti Ward and is also the Deputy Speaker of the said County Assembly. She then reiterates the facts leading up to the petition herein. She submits that the issues for determination are whether the grounds for impeachment offended

the Constitution, whether the motion for impeachment was untenable for reason of being malicious, whether the grounds therein were sufficient to warrant her removal as Deputy Speaker, whether the County Assembly has mandate/responsibility/authority over removal of the holder of the seat of deputy Speaker and whether the Petitioner ought to be granted the reliefs sought.

The petitioner submits that the position of Deputy Speaker is provided under Part III section 16 of the Assembly Standing Orders as adopted by the Assembly in April 2016 and section 16(5) of the said standing orders provide that the procedure to remove a Deputy Speaker shall be similar to that for removal of the Speaker, which procedure is provided under section 21 of the same standing orders. She also submits that the Constitution of Kenya 2010 also safeguards against arbitrary exercise of authority and abuse of power by authorities and also provides for equality, freedom of expression and freedom from discrimination. She also cites the Fair Administrative Actions Act 2015 as providing a framework to regulate administrative actions.

The petitioner submits that the motion to impeach her contravenes the spirit and fundamental provisions of the Constitution of Kenya and the ground of walking out of a meeting does not in her view constitute serious reason to remove her as Deputy Speaker. She states that she was never given an opportunity to say that she was heading to the washrooms which was a distance away. She also submits that she was never cited for misconduct for using foul language against a colleague and there is no record to that effect. Therefore, it is her view that her removal from office was malicious and intended to coerce her to submit to unlawful whims as she has been vocal against corrupt practices in the County Government. She states that the grounds used were not credible and that the court has jurisdiction to decide this issue impartially and to grant her the reliefs that are sought submitting that they are most appropriate and in the interest of justice.

Respondent's case

10. The Respondents have opposed this petition through a Replying Affidavit sworn on 11th February 2019 by one Eric Nthumbi, the clerk of the Tharaka Nithi County Assembly. The respondents submits that the Petition is brought in bad faith to stall the procedures and smooth running of the Assembly. They also contend that this Petition is premature as the petitioner should have awaited a ruling by the County Assembly before going to court. They contend that Article 177 of the Constitution of Kenya only recognizes the office of the Speaker and does not create a post such as Deputy Speaker and further to that, Article 178(2)(b) provides that the Speaker shall preside over sittings of the Assembly and in absence of the Speaker, another member elected by the Assembly shall do so. It is their case that the substantive office of Deputy Speaker does not exist in law and that it is the mandate of the MCAs to remove the Petitioner as they are the ones vested with power to elect an acting Speaker. The Respondent aver that no Constitutional rights were infringed and the Petitioner has no locus to institute this Petition. The respondent also states that a conservatory order to restrain reintroduction of a motion would have adverse effects on the day to day running of the Assembly and would open the flood gates to frivolous litigation. The respondents insists that Section 9(4) of the County Government Act complements Article 178(2)(b) of the Constitution of Kenya and that the full understanding of the instruments of law renders the status of the office of the Deputy Speaker untenable.

Respondents written submissions

11. The Respondents submits that the petition was based on a decision that had not been made and was therefore speculative. They reiterate the contents of their replying affidavit and aver that there is no constitutional or statutory position of a Deputy Speaker of a County Assembly, which is the basis of the entire petition. They further submit that the procedure as per the standing order was followed. They also state that the deputy speaker, being elected by the Assembly, can also be impeached by the Assembly. They submit that the petitioner was informed of the impeachment, was afforded an opportunity to defend herself, the vote was presided over by the Speaker and the petitioner was ousted with the required 75% vote. They contend that right to fair hearing was adhered to and have relied on the case of **County Assembly and 2 others v Kisumu County Assembly Service Board and 7 others (Kisumu High Court CA No. 17& 18 of 2015 - Consolidated)**.

12. The respondent also submits that the petitioner seeks to have the removal process declared a nullity and yet she has not adduced any evidence to challenge the process itself or show any impropriety. They have faulted the petitioner on grounds that she has even failed to attach the motion of impeachment itself. The respondents also submit that going by the decision of **Anarita Karimi Njeru -vs- Republic (1976-1980) 1KLR**, the petitioner should have set out her case with a reasonable degree of precision on the provisions infringed. In their view this petition falls short of the threshold required. The respondents further submit that the issues in the petition are overtaken by events as she has already been impeached and her application for reinstatement is misplaced as she has not even provided an annexed decision showing that her impeachment has taken place. They also cite that affirmative action for gender is not a matter of law and does not form any subject in this petition. The respondent urges the court to exercise judicial restraint and refrain from interfering with the workings of the Assembly's legislative and deliberative mandate.

Analysis and Determination:

13. This court has considered this petition and the response made. The main issues in this petition are basically two. These are:-

- (i) Whether the impeachment process initiated by and through the Respondents against the Petitioner infringed or violated the constitution or her constitutional rights.
- (ii) Whether the Petitioner should be reinstated.

Whether the impeachment process violated the Constitution of Kenya or Petitioner's rights.

14. The motion against the Petitioner at the County Assembly was dated 4th February 2019 and this court notes that the said motion indeed gave two grounds for the removal of the Petitioner from her position as Deputy Speaker. The grounds given are firstly leaving the Assembly in protest during committee selection meeting and secondly making unsubstantiated allegations against a fellow member of the Assembly using un-parliamentary language thus compromising the dignity of the assembly. The Petitioner's only evidence tendered in this

petition is the said motion.

15. The Petitioner could have done herself good by availing the copy of the standing order number 63(1) County Assembly Standing Orders for this court to determine whether the procedure to impeach her pursuant to the said order was followed. She also failed to avail a copy of the Assembly Hansard in order to impugn the reasons for her impeachment.

16. This court has considered this petition in totality and finds the petitioner has not clearly established the cause of action in her petition. This court's findings are based on the following grounds:-

(i) The petitioner has faulted the County Assembly for moving to impeach on grounds that, in her view, do not warrant her removal. However this court finds that because of the doctrine separation of powers, the body mandated to determine the merits and demerits of grounds of removal of a person from a County Assembly is the County Assembly itself. This court cannot arrogate itself the power of the County Assembly. The Petitioner has cited some grounds of defence to the allegations of her removal including the innocuous reasons as to why she walked out when the selection committee was in session but the power to entertain and determine the Petitioner's defence certainly vests in the County Assembly of Tharaka Nithi not this court since under the provisions of Article 185(3) the County Assembly is empowered to exercise oversight role in all organs/bodies and County Government. This court finds that the Petitioner's claim that the grounds for her impeachment did not meet the threshold is incompetent as it has been improperly placed before this court instead of the County Assembly of Tharaka Nithi. This court is only minded about the process and not the merits of the decision itself.

(ii) The Petitioner has not faulted the process of her impeachment or alleged that the County Assembly or the mover of the motion to impeach her over-stepped his mandate or breached the cardinal principles of natural justice to wit her rights to be heard or accorded an opportunity to defend herself. In the absence of questioning the process of her impeachment, it is hard for this court to intervene to save her, because the power of removal just like the power to appoint vest in the County Assembly. She has claimed that the County Assembly discriminated against on grounds of gender but she has not given the particulars of the discrimination. Her intended replacement in my view may just be political and this court cannot jump into that arena for obvious reasons. In the absence of any hint of procedural impropriety in the impeachment proceedings on the part of the Respondents, this court cannot be called to intervene in the impeachment proceedings because it is within the mandate of County Assembly to initiate impeachment of proceedings of officers falling under their oversight roles. I agree with the Respondent that a person's seeking a constitutional or Judicial Review relief against an administrative action taken against him/her by a statutory body must set out with a reasonable degree of precision what the complainant is all about, the provision said to be infringed and the manner of the alleged infringement.

17. In this matter, the Petitioner has failed to pinpoint the exactly the violation or infringement and how the infringement occurred. In my view mentioning in passing that action was just taken against her only on account of gender is insufficient and does not meet the threshold set in the case of *Anarita Karimi Njeru (supra)* cited by the Respondent.

(ii) Whether the Petitioner should be reinstated:

18. The Petitioner has asked this court to reinstate her because she was removed when there was a stay order from this court against her removal. It is true that this court on 12th February 2019 stayed the impending impeachment motion against the petitioner. The issue of service of the said order was hotly contested and in the end this court found no evidence of proof of service of the said order prior to proceedings of the impeachment motion at County Assembly on 12th February 2019. The Respondents, therefore, escaped court's sanction because the petitioner failed to establish that they had deliberately and knowingly breached a court order.

19. Having made a finding that the Respondents were not culpable for violation of the said order, this court directed the Respondents not to install a replacement until this petition was determined and both counsel in this petition agreed to that arrangement. The Respondent's have not been faulted for going against that undertaking.

20. The next question posed is whether this court should order that the Petitioner be reinstated to her provisions position. Before I delve into that aspect perhaps it would suffice to have a clear perspective of the legal position of a Deputy Speaker of a County Assembly. It is not disputed that the unlike the office of County Assembly Speaker, the position of Deputy Speaker County Assembly is precarious owing to the fact that the position is not a Constitutional office. Article 177 & 178 of the Constitution 2010 only provides for the position of a County Assembly Speaker. The County Government Act, 2012 also provide for the officer of Speaker County Assembly and other offices like party leaders County Assembly (Section 10) and County Assembly Service Board (Section 12).

21. It is apparent that most County Assemblies rely on Section 14 of County Government Act 2012, to provide in their standing orders establishment of the seat of Deputy Speaker just like other various committees in the house. The office of Deputy Speaker is not a constitutional office or substantive office with statutory procedures provided to fill or remove whoever serves in that office. That is why I find the position precarious in nature because mostly the occupant occupies that office at the whims of political exigencies of the day.

22. In the case of *Nathanel Nganga Reuben - vs- Speaker Machakos County Assembly & Another [2016] eKLR*, the court made a similar findings by *inter alia* holdings that the position of Acting Speaker or Chair of Committee is created for procedural purposes only. **Hon. Nyamweya J** observed as follows:-

“In addition, the provisions of the Standing Orders relied on by the Petitioner as indicated in the foregoing do not create any substantive office, and indeed may vary from County Assembly to County Assembly as regards the procedures that will be followed as the Assembly undertakes its legislative functions.

It is noteworthy in this regard that the chairperson of committees is the member of the County Assembly that the Machakos County Assembly has provided will deputize for the Speaker in proceedings in the County Assembly as envisaged in Article

178 and section 9(4) and (5) of the County Governments Act. The County Assemblies are in this regard at liberty and have the powers under section 14 of the County Governments Act to designate any member of the Assembly to deputize for the Speaker in their Standing Orders and name the member as they prefer, including naming that member a deputy speaker or chairperson of Commissions. Likewise they can provide for the appointment and removal of such member in the Standing Orders. What is important is to note that the provisions do not create a constitutionally recognized position of Deputy Speaker, and are only limited to the specific procedures of a county assembly. As noted earlier, such procedures can indeed differ amongst the different county assemblies.”

23. It is quite apparent going by the above observations that owing to the fact that creation of that office is purely a discretionary matter for County Assemblies according to their respective Standing Orders, the issue of appointment and replacements of persons to occupy that office is best left to each County Assembly as it falls within their purview. Courts should normally exercise judicial restraint in interfering with such affairs as held in the Supreme Court of Canada in the case of Canada (House of Commons -vs- Valid [2005], SCR 667 where in explaining the *"doctrine of necessity"* observed as follows:-

"Courts should exercise restraint as regards parliamentary and County assembly proceedings which are closely and directly connected with the fulfilment by the assembly or its members of their functions as a legislative and deliberative body, including the assembly's work in holding the government to account."

24. The restraint by the Courts to interfere with the workings of Parliament and County Assemblies on account of their mandate and privilege has been a subject of various decisions in Kenya including the decision by the Court of Appeal in Martin Nyaga Wambora -vs- County Assembly of Embu & 37 Others [2015 eKLR].

25. The Petitioner despite her last ditch effort to persuade me to save her in the spirit of affirmative action since *"she is the only female Deputy Speaker"* in this Country, has failed to impugn the procedure of her removal as I have already observed and has also failed to establish basis for this court's intervention in the impeachment that was carried out by the County Assembly of Tharaka Nithi. This court finds that the County Assembly were within their powers and mandate to appoint or remove any person occupying that office. This court cannot be called to interfere with the processes of a statutory body unless the same violates the constitution or a specific statute. The court's sole focus is the procedures followed and the law.

In the end this court finds no merit in this petition. The same is disallowed but I shall not make any order as to costs.

Dated, signed and delivered at Chuka this 30th day of June 2020.

R.K. LIMO

JUDGE

30/6/2020

Judgement dated, signed and delivered in the open court in presence of Kirimi for Petitioner and Muthomi holding brief for Kibara for Respondent.

R.K. LIMO

JUDGE

30/6/2020