



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CONSTITUTIONAL PETITION NUMBER 3 OF 2020

IN THE MATTER OF ARTICLES 2(1), 3(1) & 2, 10 (1) & (2), 19, 20(1) & (3), 21, 23, 35, 174, 175, 176, 196, 200 (2) (D), 232 & 258 OF THE CONSTITUTION, 2010

AND

IN THE MATTER OF SECTION 3, 8, & 14 OF THE COUNTY GOVERNMENTS ACT

AND

IN THE MATTER OF STANDING ORDER NO. 24, 25, 26 & 36 OF THE COUNTY ASSEMBLY OF BUNGOMA STANDING ORDERS.

AND

IN THE MATTER OF CONTRAVENTION OF ARTICLES 2(1), 3(1) & 2, 10(1) & 2, 21, 35, 174, 175, 196(1) OF THE CONSTITUTION

AND

IN THE MATTER OF THE CONTRAVENTION OF STANDING ORDER NO. 24, 25, 26 & 36 OF THE COUNTRY ASSEMBLY OF BUNGOMA

AND

IN THE MATTER OF ILLEGAL SITTING BY THE COUNTRY ASSEMBLY OF BUNGOMA ON THE 14TH MAY, 2020.

BETWEEN

JOHN MAJOR MUKENYA.....PETITIONER/APPLICANT

VERSUS

THE CLERK-COUNTY ASSEMBLY OF BUNGOMA.....1ST RESPONDENT

THE HONOURABLE SPEAKER

COUNTRY ASSEMBLY OF BUNGOMA.....2ND RESPONDENT

THE COUNTY ASSEMBLY OF BUNGOMA.....3RD RESPONDENT

AND

FLORENCE FULANO WEKESA.....1ST INTERESTED PARTY

EVERYONE NABWELELEA MUTYEMBU.....2ND INTERESTED PARTY

LUKE OPWORA.....3RD INTERESTED PARTY

JOSEPH NYONGESA JUMA.....4TH INTERESTED PARTY

MESHACK SIMUYU WEKESA.....5TH INTERESTED PARTY

JOSEPH MAGUDA.....6TH INTERESTED PARTY

RULING

The petitioner **JOHN MAJOR MUKENYA** is a resident at Muchunu Vilage, Sagalo within Bungoma County. The 1st, 2nd, 3rd Respondents are institutions of the Country Assembly of Bungoma. The 1st – 6th Interested parties are members of the County Assembly. The petitioner filed the application dated 19th May, 2020 seeking the following orders.

a) Spent

b) Spent

c) Pending the hearing and determination of the substantive petition, the 1st, 2nd and 3rd Respondents be restrained from effecting changes of the leadership of the assembly emanating from the communication and ungazetted special sittings of the 14th day of May, 2020 and the enforcement of the resolution thereof emanating from the same sitting.

d) Cost of this application be provided for.

The grounds of the application are that: -

1) The 2nd Respondent herein on the 14th day of May, 2020 convened and chaired a special sitting of the 3rd Respondent which sitting was never gazetted in the Kenya Gazette as per the Constitution, the county governments Act and the county Assembly of Bungoma standing orders an action that made the sittings illegal and unofficial.

2) Despite the illegal and unofficial sittings of the 3rd Respondent on the 14th May, 2020 not being gazetted, the 2nd Respondent in the sitting of the 3rd respondent communicated changes on the leadership of the Assembly by removing the 1st, 2nd and 3rd Respondents from their positions and appointing the 4th, 5th and 6th Respondents as majority leader, majority whip and Deputy majority whip respectively among other resolutions which communications and resolution have no basis in law as they are an affront to the constitution, country Government Act and the Country Assembly of Bungoma Standing orders for want of gazettement and thus unconstitutional and void ab initio.

3) Despite the illegality, unlawfulness and unconstitutionality of the stings of 14th May, 2020 of the 3rd Respondent, the 4th, 5th and 6th interested parties herein are likely to assume the leadership of the house of the 3rd Respondent are starting today the 19th May, 2020 and are on the verge of running affairs of the 3rd Respondent from 20th May, 2020 when the sittings of the 3rd Respondent resumes an act that if left to occur will perpetuate further illegalities this, to the detriment of the general public.

4) Unless conservatory orders are issued stopping the illegal enforcement of the communication and resolution of the 2nd and 3rd Respondents resumes an act that if left to occur will perpetuate and continue with their illegal actions by flouting the constitution, county Governments act and the County Assembly of Bungoma standing Orders and the 4th and 6th Interested parties will be allowed to benefit from the illegalities and the unconstitutional acts of the respondents an act that will render subsequent settings of the 3rd respondent illegal and unconstitutional which action if left to occur will gravely impact on the sittings and business o the 3rd Respondent negatively and will render the instant application and petition an academic exercise.

The application is supported by the supporting affidavit of the petitioner sworn on 19th May, 2020 reiterating the grounds of the application.

Emmanuel Mukhebi Situma the Speaker of the County Assembly of Bungoma the 2nd Respondent filed a replying affidavit for the 1st, 2nd and 3rd Respondents sworn on 22nd May, 2020. He deponed that as speaker of the County Assembly he received a request for special sitting of the country Assembly from the Leader of Minority. He then did a letter calling for the special sitting; he did a notice and sent the same to the Government Printer for publication. Having completed all the requirements it was the duty of the Government Printer to publish the gazette for which he has no control. That he convened a special sitting and communicated the communication from the NASA Coalition to the House and he cannot rescind the same.

Due to Covid 19 Government Restrictions and Ministry of Health Guidelines and the Direction of the Hon. Chief Justice on management of court proceeding during he COVIC 19 Pandemic by consent this application was heard via SKYPE on 26th May, 2020. Mr. Wamalwa for the petitioner informed the court that he will rely on the filed petitions, affidavit and skeletal submissions. Mr. Bwochiri too relied on the filed documents on behalf of the Respondent and skeletal submissions filed.

Mr. Wamalwa Simiyu for the petitioner/applicant submitted this is an application for injunction that the applicant has a prima facie case with a probability of success; that the applicant will suffer irreparable injury which cannot be compensated by award of damages and the balance of convenience tilts towards the applicant.

Mr. Bwochiri for the Respondent submitted that the orders sought have been overtaken by events due to the fact that the 4th, 5th and 6th interested parties assumed office on 14th May, 2020 as can be confirmed by the Hazard, and that it will be a waste of time to grant the orders sought. He urged the court to follow the decision in **Kalyta Soi Farmers Co-operative Society Vs Paul Kurui & another (2013) eKLR**, the court was on the opinion that a court cannot restrain what has taken place.

From the petition, responses, affidavits and submissions filed, the only issue for determination is whether the applicant has satisfied the conditions for granting of a temporary injunction prayed for.

The principles of granting a temporary injunction are now well settled. In **Giella Vs Cassman Brown & Co. EA Ltd 1973 E.A. 285** where the court held: -

“The conditions for the grant of an interlocutory injunction are now I think were settled in East Africa First, an applicant must show a prima facie case with probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant will otherwise suffer irreparable injury which would not be adequately compensated by an award of damages. Thirdly, if the court is in doubt it will decide on application on the balance of convenience.”

These principles have also found expression in **American Cyanamid Co. Vs Ethiem Ltd (1975) AC** where the court also set the governing principles which are

a) Whether there is a serious question to be tried.

b) What should be the balance of convenience of each party should the order be granted (in other words where does the balance lie).

c) Whether there are any special factors.

d) Whether an award of damages would be an adequate remedy.

The issue for determination is whether the applicant has satisfied the governing principles above.

a) Whether there is a serious question to be tried in other words whether he has established a prima facie case.

From the application and response, this court can discern that the main question for trial is whether the changes made in the Country Assembly leadership were procedurally done. The petitioner submits that due procedure was not followed, in particular gazetting of the special sitting. The Respondent submits that due process was properly followed.

In **Mrao Vs First American Bank of Kenya & 2 others (2003) eKLR 125** the Court of appeal stated: -

“A Prima facie case in the Civil Application includes but is not confined to a “genuine and arguable case.” It is a case which on the material presented to the court or a tribunal properly directing itself will 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.”

b) Whether the applicant will suffer irreparable injury which cannot be compensated by an award of damages.

The counsel for the applicants submits that the application is aimed at protecting the established laws which are being violated by the Respondents' with impunity. He submits that if the application is not granted illegalities will continue to be perpetuated which will be to the detriment of the petitioner which cannot be compensated by damages.

The gist of the petition is the restraining of an act of illegality not monetary compensation. A challenge of legality or otherwise of an act goes to the root of rule of law. If not addressed the harm caused cannot be compensated by damages.

c) Where the balance of convenience lie. This will require the court to consider whether there are any special factors which will tilt the balance of convenience. In **Paul Gitonga Wanjau Vs Gathuthia Tea Factory Company Ltd & 2 others (2016) eKLR**, the court dealing with the issue on balance of convenience expressed itself thus: -

“Where any doubt exists as to the applicants' right, or if the right is not disputed, but its violation is denied, the court, in determining whether an interlocutory injunction should be granted, takes into consideration the balance of convenience to the parties and the nature of the injury which the Respondent on the other hand, would suffer if the injunction was granted and he should ultimately turn out to be right and that which injury the applicant, on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right.

Thus, the court makes a determination as to which party will suffer the greater harm with the outcome of the motion. If applicant has a strong case on the merits or there is significant irreparable harm, it may influence the balance in favour of granting an injunction. The court will seek to maintain the status quo in determining where the balance on convenience lies.”

In this application, Mr. Bwochiri for the Respondent's submits that the orders sought have been overtaken by events as now the 4th, 5th and

6th interested parties are the new leaders of Majority, Chief Whip and Deputy Chief whip respectively. Since the application is challenging the said appointment and whether they were properly and legally done, it cannot be said that the application has been overtaken by events. The legality or otherwise of the said process is what is being challenged, therefore cannot be said to have been overtaken by events.

Upon considering all the submissions and affidavits, I find that the petition has satisfied the condition for the grant of the orders sought. I, therefore direct: -

1) That pending the hearing and determination of this petition conservatory orders are issued restraining the 1st, 2nd and 3rd Respondents, their servants and or agents or any other person claiming through them from effecting the resolution and or communication of the special sitting of 14th May, 2020 on the change of leadership of the assembly as regards to the interested parties herein together with any other resolution made therefrom.

2) That the status quo obtaining before 14th May, 2020 in respect of the 1st, 2nd and 3rd interested parties:

a) 1st Interested Party – Florence Fulano Wekesa as Majority Leader

b) 2nd interested party – Everyone Nabwelelea Mutyembu As Deputy leader of Majority

c) 3rd interested Party – Luka Opwora as Deputy Majority Chief Whip be maintained

3) The orders granted will be valid for 30 days within which the substantive petition will be heard and determined.

Dated, signed and delivered at Bungoma this 18th day of June, 2020.

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S N RIECHI

JUDGE