



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 191 OF 2020

HON. ABDI HASSAN GUYO.....PETITIONER

VERSUS

THE SPEAKER NAIROBI CITY

COUNTY ASSEMBLY.....1ST RESPONDENT

THE COUNTY ASSEMBLY NAIROBI

CITY COUNTY.....2ND RESPONDENT

THE NAIROBI CITY COUNTY SELECT

COMMITTEE ON POWERS & PRIVILEGES.....3RD RESPONDENT

THE CLERK NAIROBI CITY COUNTY

ASSEMBLY.....4TH RESPONDENT

RULING

1. The Petitioner, Hon. Abdi Hassan Guyo, has presented two applications for determination by this Court. The first application is the notice of motion dated 8th June, 2020 in which he seeks orders as follows:-

“a) That this Application be certified urgent and be heard *ex parte* in the first instance.

b) That an interim order be and is hereby issued barring the 3rd Respondent from holding any sitting to investigate the conduct of the Petitioner for conduct which constitutes breach of privilege as set out in the letter from the 3rd Respondent dated 5th June, 2020 pending hearing of this application inter partes.

c) That in the alternative an interim order do issue barring the 2nd Respondent from adopting the Report of the Nairobi City Assembly Select Committee on Powers and Privileges touching on the Petitioner pending hearing of this application inter partes.

d) That in the alternative an interim order do issue staying the implementation of the Report of the Nairobi City County Select Committee of Powers and Privileges relating to its investigations against the Petitioner pending hearing and determination of this application inter partes.

e) That a temporary conservatory order do and is hereby issued barring the 3rd Respondent from holding any sitting to investigate the conduct of the Petitioner for conduct which constitutes breach of privilege as set out in the letter from the 3rd Respondent dated 5th June, 2020 pending hearing and determination of this Petition.

f) That a temporary order do issue barring the 2nd Respondent from adopting the Report of the Nairobi City Assembly Select Committee on Powers and Privileges touching on the Petitioner pending hearing and determination of this Petition.

g) That there be a stay of implementation of the resolution of the Nairobi City County Assembly Committee on Powers and Privileges arising from its investigations of the Petitioner following its letter dated the 5th June, 2020 pending hearing and determination of the Petition.

h) That any other or further order this Honourable Court deems fit, proper and just to grant.

i) That costs of this Application be borne by the Respondent in any event”.

The application is supported by the grounds on its face and an affidavit sworn on the date of the application by the Applicant/Petitioner.

2. The second application is dated 12th June, 2020 and in that application the Applicant seek orders as follows:-

“a) That this Application be certified as urgent and the same proceeds ex parte and be heard immediately.

b) That an order be issued suspending the implementation of the decision of the Nairobi County Assembly Select Committee on Powers and Privileges dated 9th June, 2020 pending the hearing and determination of the Petitioner’s application dated the 8th June, 2020.

c) That an order be issued ordering the 1st Respondent and the Sergeant-at-Arms of the Nairobi County Assembly to allow the Applicant/Petitioner back into the Assembly and within the precincts of the Assembly pending the hearing and determination of the Petitioner’s application dated the 8th June, 2020.

d) That the Petitioner be granted leave to amend the Petition in terms proposed in the annexed draft amended Petition and the same be deemed as duly filed upon payment of the requisite fees.

e) That the 1st Respondent be held and found to be in contempt of Court and be condemned to pay a fine and/or to imprisonment.

f) That Costs of this Application be borne by the Respondents.”

The application is supported by the grounds on its face and an affidavit sworn by the Applicant on the date of the application.

3. The Speaker, Nairobi City County Assembly (“the Speaker”), the Nairobi City County Assembly (“the Assembly”), the Nairobi City County Assembly Select Committee on Powers and Privileges (“the Committee”) being the respective 1st, 2nd and 3rd respondents opposed the applications. The 4th Respondent being the Clerk Nairobi City County Assembly (“the Clerk”) has a split personality on the applications with one side opposing the applications and another side supporting the applications. I shall come back to the 4th Respondent’s dual personality in due course.

4. In summary, the Applicant’s case is that he is a Member of the County Assembly (MCA) of Nairobi City County elected on 8th August, 2017 to represent Matopeni Ward. He is also the Leader of Majority duly nominated by Jubilee Party. The Applicant’s averment is that on 5th June, 2020 he received an invitation from the Acting Clerk of the Assembly to attend a meeting on 8th June, 2020 of the Committee that was investigating a complaint, pursuant to Article 194(1) of the Constitution and Order 242 of Nairobi City County Assembly Standing Orders (“Standing Orders”), of his failure to attend eight plenary sittings.

5. According to the Applicant, the said summons which was signed by Pauline Akuku who designated herself as the Acting Clerk was in contempt of a valid and existing Court Order issued in Nairobi Employment and Labour Relations Court Petition No. 194 of 2019 suspending the appointment of Ms Monica Muthami or any other person acting as the Clerk of the Assembly. His averment is that the Clerk of the Assembly is one Mr. Jacob Ngwele and that any communication from any person other than the clerk recognised by law is void *ab initio* and of no effect.

6. It is further the Applicant’s averment that the Committee which is established under Section 15 of the County Assembly Powers and Privileges Act, 2017 (“the Act”) is mandated to inquire into the conduct of a member whose conduct is alleged to constitute a breach of privilege in terms of Section 16 of the Act. It is the Applicant’s case that the power to investigate a member for failing to attend eight sittings in the Assembly has not been donated by Section 16 of the Act and therefore any act by the Committee in furtherance of the said objective is *ultra vires* its powers.

7. The Applicant asserts that the actions of the Committee also violates Section 15(5) of the Act which empowers it, to within fourteen days of receipt of the complaint, inquire into the conduct of a member whose conduct is alleged to constitute breach of privilege in terms of Section 16. According to the Applicant, the complaint against him is alleged to have been raised on the floor of the House on 16th March, 2020 and that is when the Speaker directed the Committee to investigate the matter. His averment is that the fourteen days for investigating the complaint lapsed on 30th March, 2020 and the decision by the Committee to inquire into the matter sixty six days is contrary to Section 15(5) of the Act and is therefore illegal.

8. The Applicant further avers that the respondents’ action violates Order 242(1) & (2) of the Standing Orders of the Assembly which provides for investigation and determination of a complaint relating to the absence of a member from eight sittings within fourteen days from the date the matter is referred to the Committee. Additionally, that in any event the Standing Orders being subsidiary legislation cannot

donate any power to a statutory committee, such as the Committee, which is established under Section 15 of the Act and therefore Standing Order 242 is *ultra vires* the Act and hence unconstitutional.

9. The Applicant also deposes that the notice issued to him to attend the Committee violated Article 47 of the Constitution and Section 4 of the Fair Administrative Action Act, 2015 in that the notice for the meeting was grossly inadequate; that a virtual meeting would deny him proper audience; that the notice did not inform him of his right to legal counsel thus denying him representation by an advocate; that he was not informed whether witnesses will be presented and if he has the right to cross-examine them; and that he had been denied access to information, materials and evidence to be used by the Committee.

10. The Applicant accuses the Speaker of the Assembly of being driven by malice with a view to frustrating his discharge of his mandate as the Leader of Majority of Jubilee Party. In support of this statement he avers that on 28th May, 2020 he was confirmed as the Leader of Majority of the Jubilee Party in the Assembly but the Speaker had on 2nd June, 2020, contrary to parliamentary norms and procedures, failed to acknowledge the changes claiming that she would have to review the letter appointing him.

11. The Applicant avers that no complaint could have been made against him on 16th March, 2020 as alleged in the report of the Committee since the last sitting of the Assembly was on 12th March, 2020 when the House formally adjourned to 17th March, 2020. His case is that there was therefore no valid complaint before the Committee and the sole intention of the fabrication was to frustrate his appointment as Leader of the Majority.

12. In the affidavit sworn in support of his application of 12th June, 2020, the Applicant averred that he is widely known as Mr Guyo which is his communal name and the name is well known and even used in the Assembly. He exhibited the Hansard of proceedings in the Assembly to validate the averment. He states that his name as it appears in his national identity card is Abdi Ibrahim Hassan. According to the Applicant, the 1st Respondent despite acknowledging service of the orders of this Court, mischievously indicated that the orders related to a person who is not a member of the Assembly and the Assembly could therefore adopt the report of the Committee dated 9th June, 2020. The Applicant avers that the 1st Respondent acted intentionally and mischievously as she had referred to him as Mr. Guyo on 2nd June, 2020 when presiding over the proceedings of the Assembly.

13. The Petitioner urged the Court to assert the authority of its orders and compel the 1st Respondent and the Sergeant-at-Arms to allow him into the Assembly to discharge his constitutional mandate.

14. The 1st Respondent opposed the notice of motion dated 8th June, 2020 through a notice of preliminary objection dated 15th June, 2020 on the grounds that:-

“a) The Petitioner is not a *bona fide* member of the County Assembly of Nairobi and has or did not have the requisite *locus standi* to institute this suit and should therefore be struck out with costs.....

b) The suit is defective for contravening Section 8 of the County Assembly Powers and Privileges Act 2017 for having been instituted against the 1st Respondent in her capacity as the chair of the Committee of Powers and Privileges.

c) The suit is further fatally defective for contravening Section 10 of the County Assemblies Powers and Privileges Act 2017 which *inter alia* expressly insulates proceedings of the Committee of Powers and Privileges acting in accordance with the Act from being challenged in courts.

d) The Petition contravenes a fundamental principle of law that maintains that all three arms of government remain separate and should not encroach upon each other.

e) The Application and Petition are totally misconceived, bad in law and an abuse of the court process.”

15. The Speaker, Hon Beatrice Kadeveresia Elachi, also swore an affidavit in opposition to the Applicant’s two applications.

16. Ms Elachi avers that the rights this Court sought to preserve by its order of 8th June, 2020 were sought in *persona* as opposed to being in *rem* for the benefit of one Abdi Hassan Guyo and could not therefore be conferred on Hassan Abdi Ibrahim or anyone else. She exhibited a Gazette Notice of the members elected to the Assembly in support of her averment that the person by the name Hon. Abdi Hassan Guyo who moved this Court on 8th June, 2020 is not a member of the Assembly. She stresses that the known member representing Matopeni Spring Valley Ward in the Assembly is one Hassan Abdi Ibrahim and not Abdi Hassan Guyo.

17. The Speaker relies on her above averments to rebuff the Applicant’s prayer to have her cited for contempt. She avers that whereas Article 159(2)(d) of the Constitution calls on this Court to administer justice without undue regard to procedural technicalities, the question as whether the proper party is before the Court cannot be classified as a procedural technicality.

18. As for the Applicant’s prayer to amend the petition, the Speaker avers that despite the provisions of Order 1 Rule 10 as read with Order 8 Rule 3 of the Civil Procedure Rules, 2010 (CPR), the amendment can only be allowed if the mistake sought to be corrected was genuine and was not misleading. Further, that the intended amendments warrant being struck out for offending Order 8 Rule 7 CPR and thus incurably defective, and devoid of form and substance.

19. As regard the substance of the petition, the 1st Respondent reiterates her averment that the Applicant is unknown to the Assembly.

20. Turning specifically to Nairobi Employment and Labour Relations Court Constitutional Petition No. 194 of 2019, the 1st Respondent avers that the matter “**is still alive in a different court and such cannot be litigated herein for it will offend the sub judice rule.**”

21. On the allegation by the Applicant that Article 47 of the Constitution and the Fair Administrative Action Act, 2015 were violated, the 1st Respondent avers that Hon. Abdi Ibrahim Hassan was timeously served and he never appeared before the Committee.

22. Ms Elachi points to Standing Order 242(1) as bringing the issue of failure to attend sittings within the purview and ambit of the Committee. Further, that Section 15(4) and 16(e) of the Act gives an expansive mandate to the Committee.

23. On the Applicant’s averment that the Act envisages that investigations should be conducted within fourteen days, the 1st Respondent avers that Section 15(3) of the Act “**gives the committee latitude to regulate its procedures.**”

24. On the Applicant’s assertion that the complaint against him had no foundational basis since the Assembly did not sit on the alleged date of the complaint being 16th March, 2020, the 1st Respondent avers that the question in relation of the failure by Hon. Abdi Ibrahim Hassan of Matopeni/Spring Valley Ward to attend eleven consecutive sittings of the Assembly’s Fourth Session between the period of 9th June, 2020 and 10th March, 2020 was raised on the floor of the House on 12th March, 2020 and referred to the Committee on the same date.

25. On the failure by the Committee to adjudicate the matter within the statutory time frame of fourteen days, the Speaker deposes that the delay was caused by the Covid-19 pandemic and the Court should take judicial notice of the disease. Further, that Standing Order No. 1 empowers her to, *inter alia*, make decision on any procedural question based on the Constitution; statute law; and the usages, precedents, customs, procedures and traditions of Parliament and of county assemblies of Kenya and other jurisdictions to the extent applicable to Kenya.

26. Initially, the 2nd and 3rd respondents were both represented by the firm of Ashioya Mogire & Nkatha Advocates. Through the said firm of advocates, the 2nd and 3rd respondents filed grounds of opposition dated 15th June, 2020 through which they opposed the application and petition dated 8th June, 2020 as follows:-

a) That both the Application and the Petition are *ex-facie* bad in law, misconceived, fatally defective, incompetent, and prejudicial to the 2nd and 3rd Respondents hence an abuse of the Court process.

b) That both the Application and the Petition are misconceived, fatally defective and incompetent to the extent that the Applicant/Petitioner is not a *bona fide* Member of the Nairobi City County Assembly and/or is a person known to the 2nd and 3rd Respondents.

c) That the pleadings as drawn and filed are incapable of invoking the jurisdiction of this Honourable Court on account that the Applicant/Petitioner does not or did not have the requisite *locus standi* to institute the current Motion/Petition and therefore the same should be struck out *in limine* with costs.

d) That the Motion/Petition is fatally defective for contravening Section 10 of the County Assemblies Powers and Privileges Act 2017 which provides that ‘*No proceedings or decision of a county assembly or the Committee of Powers and Privileges acting in accordance with this Act shall be questioned in any court.*’

e) That the Motion/Petition offends the principle of institutional comity between the three arms of government which must not be endangered by the unwarranted intrusions into the workings of one arm by another. The Court cannot supervise the workings of Parliament.

27. When the 3rd Respondent appointed its own counsel, it filed its own grounds of opposition dated 24th June, 2020 and specifically opposed the application and petition dated 8th June, 2020 on the grounds that:-

a) That the Application and the Petition filed thereto is bad in law, misconceived, incompetent and incurably defective and as such an abuse of the Court process and precious judicial time.

b) That the Petitioner is not a *bona fide* Member of the County Assembly of Nairobi and has or did not have the requisite *locus standi* to institute this suit and should therefore be struck out with costs.

c) That the suit is further fatally defective for contravening Section 10 of the County Assemblies Powers and Privileges Act 2017 which *inter alia* expressly encases proceedings of the Committee of Powers and Privileges acting in accordance with the Act from being challenged in courts.

d) That there is no explanation justiciable, plausible or otherwise discernible from the Motion and Petition dated 8th June 2020 to compel this Honourable Court to grant the orders sought.

e) That this Honourable Court ought to apply the Doctrines of Ripeness and avoidance and decline to entertain the Petition and Motion filed thereto.

f) That in any event, the application is frivolous, groundless and an abuse of court process.

g) That on the aforementioned grounds, the 3rd Respondent shall seek for dismissal *limine* of the Petitioner's Motion and Petition dated 8th June 2020 with costs.

28. The first personality of the 4th Respondent opposed the application through a replying affidavit sworn on 24th June, 2020 by Pauline S. Akuku. She commences her averment on the issue of the representation of the 4th Respondent. It is her testimony that the 4th Respondent instructed the firm of Osiemo Wanyonyi & Company Advocates vide a letter dated 12th June, 2020. As for the purported representation of the 4th Respondent by Victor Odhiambo from Muthomi & Karanja Advocates, she avers that the firm of Muthomi & Karanja Advocates was from 18th November, 2019 no longer in the panel of registered suppliers for the Assembly to offer services of litigation, drafting and conveyance. Further, that the firm of Osiemo Wanyonyi & Company Advocates was enlisted in the panel of registered suppliers for the Assembly to offer services of litigation and conveyancing from 19th February, 2020. Ms Akuku closes her deposition on the issue by stating that the letterhead used to instruct the firm of Muthomi & Karanja Advocates had been discarded by the 4th Respondent following introduction of serialized letterheads which were published in the local dailies and the public warned against accepting transactions premised on the phased out letterheads.

29. Turning to the substance of the application, Ms Akuku reiterates the 4th Respondent's grounds of opposition dated 8th June, 2020 to the effect that this Court is divested of requisite jurisdiction under the doctrine of absolute parliamentary privilege espoused under Section 10 of the County Assemblies Powers and Privileges Act, 2017; that the Petitioner has no *locus standi* to file the petition or the application; and that the petition and the application is an abuse of the court process as the same has been overtaken by events and should be struck out forthwith.

30. On the issue of the name of the Petitioner, Ms Akuku avers that the 4th Respondent does not have records of a member sworn in and gazetted by the name Abdi Hassan Guyo and the Petitioner is therefore a stranger to the 4th Respondent and the orders he seeks from this Court cannot be enforced against the 4th Respondent.

31. In regard to the orders issued in Employment and Labour Relations Court Petition No. 194 of 2019, she avers that those are live issues in the said petition and the same cannot be re-litigated herein as it will offend the *sub judice* rule.

32. Ms Akuku avers that acting on instructions from the Committee she issued a letter to Abdi I. Hassan to attend a meeting of the Committee to shed light on matters that were being investigated by the Committee. It is her position that by so doing she did not breach any court order. She accuses the Applicant of personalising the office of the 4th Respondent and avers that the office of the 4th Respondent has other staff working under it as defined in PART IV of the County Assembly Services Act and one member of the office cannot therefore personalise the office of the 4th Respondent to the exclusion of the other staff.

33. On the substance of the complaint against the Applicant, Ms Akuku avers that the Committee was seized of the matter pursuant to Standing Order No. 242 and that the matter was referred to the Committee pursuant to a question raised on 12th March, 2020 in the House in respect of the failure by Hon. Abdi Ibrahim Hassan of Matopeni Ward to attend eleven consecutive sittings of the Assembly's Fourth Session.

34. It is additionally the averment of Ms Akuku that the Assembly had at the beginning of the session passed a calendar allowing for a short recess from 20th March, 2020 to 6th April, 2020 and a long recess from 1st May, 2020 to 1st June, 2020. She deposes that parliamentary practice and procedure stipulates that all pending bills, motions and committee work at the time of recess are carried forward to the next session of the House. She signs off by stating that **"it was therefore practically impossible for the Committee to prosecute and/or investigate the complaint within the set time frame as is required."**

35. The alter ego of the 4th Respondent supports the application through the affidavit of Jacob Muvengi Ngwele sworn on 18th June, 2020. Mr Ngwele introduces himself as the Clerk of the Assembly.

36. On the question of the representation of the 4th Respondent, Mr Ngwele avers that upon being served with Applicant's pleadings he instructed the firm of Muthomi & Karanja Advocates to represent the 4th Respondent. He was later informed by his advocate that one Mr Osiemo had also entered appearance on behalf of the 4th Respondent and proceeded to address the Court under instructions of one Ms Pauline Akuku.

37. It is Mr Ngwele's deposition that there are several orders issued by the Employment and Labour Relations Court in Petition No. 194 of 2019, *The Clerk, Nairobi City County Assembly v The Speaker, Nairobi City County Assembly & others* precluding the 1st and 2nd respondents from removing him from office as the Clerk of the Assembly pending the determination of the substantive suit. Further, that the 1st and 2nd respondents were precluded from designating another person to exercise the functions of the clerk of the Assembly. It is also Mr Ngwele's averment that the Court stopped any person, apart from himself, from exercising the functions of the Clerk of the Assembly. According to Mr Ngwele, the 1st and 2nd respondents have disobeyed the court orders on multiple occasions and are currently facing contempt of court proceedings in the Employment and Labour Relations Court. He urges the Court to find that the representation of the 4th Respondent by Mr Osiemo is a violation of the stated court orders and exclude the said counsel from the proceedings.

38. Returning to the core issues raised in the petition, Mr Ngwele after citing various provisions of the Standing Orders concludes that **"the issue of whether a particular Member missed the mandatory minimum eight sittings in a previous session can only be established after the expiry of a given session"** which runs from the second Tuesday of February to first Thursday of December in a calendar year.

39. Mr Ngwele also avers that a reading of sections 15(4) and 16 of the Act discloses that the Committee does not have the statutory mandate to investigate, inquire into or recommend any penalties, against any member for missing eight sittings in a session and any action by the Committee along those lines is *ultra vires* the Act.

40. On the letter dated 5th June, 2020 inviting the Applicant to appear before the Committee, Mr Ngwele deposes that Section 18(2) of the Act provides that any summons or invitations to appear before the Assembly shall be issued by the Clerk of the Assembly. His averment is that since he did not issue any such notice then the same is incurably defective. It is his case that the same argument applies to the letter dated 12th June, 2020 written by Ms Pauline Akuku purporting to communicate the resolution of the Assembly made on 9th June, 2020 suspending the Applicant from the precincts of the Assembly for four months.

41. It is Mr Ngwele's further deposition that the records in his custody shows that the Applicant "**exceeded the legal threshold of attending mandatory eight sittings of a County Assembly in a session**" for the 2019 session.

42. The advocates filed written submissions in support of their positions and also made oral highlights of those submissions at the hearing. I will consider their arguments in the course of determining this application.

43. In my view, there are five issues for the determination of this Court in this ruling. They are:-

- a) Which firm of advocates should represent the 4th Respondent?
- b) Whether the 1st Respondent's preliminary objection should succeed;
- c) Whether the Applicant should be allowed to amend his pleadings;
- d) Whether the respondents acted in contempt of the orders issued by this Court on 8th June, 2020; and
- e) Whether the Applicant is deserving of conservatory orders.

44. The question as to who should represent the 4th Respondent does not require much mental exertion. Mr Odhiambo submitted that there are subsisting orders in Environment and Labour Relations Court Petition No. 194 of 2019 recognising Mr Jacob Ngwele as the Clerk of the Assembly. The muted response by the 1st Respondent and Ms Pauline Akukuis that the issue is alive issue before another Court and should not be litigated before this Court. Therein lies the answer to the question as to who is supposed to represent the 4th Respondent. There is a valid court order stating that Mr Jacob Ngwele is the Clerk of the Assembly and nobody else should be appointed a clerk of the Assembly pending the hearing and determination of the petition before the Employment and Labour Relations Court. Mr Jacob Ngwele is therefore the person authorised to appoint an advocate to act for the 4th Respondent. In the circumstances the firm of Muthoni & Karanja Advocates is the proper representative of the 4th Respondent. For this matter therefore the firm of Osiemo Wanyonyi & Company Advocates is wrongly on record and shall be excluded from these proceedings. The pleadings so far filed by the said firm of advocates are expunged from the court record and only the pleadings filed by the firm of Muthomi & Karanja Advocates will be considered in this matter.

45. This decision does not in any way address the procurement of the services of the firm of Muthomi & Karanja Advocates. It simply acknowledges the fact that Mr Jacob Ngwele being the person recognised as the Clerk of the Assembly is the only person who can instruct an advocate for the 4th Respondent. In case there is change of the holder of the office of the clerk of the Assembly in the course of the hearing of this matter, the new office holder will be at liberty to instruct new advocates to represent the 4th Respondent in the matter. That is all I will say on the issue.

46. The question whether the 1st Respondent's preliminary objection should succeed goes hand in hand with the question as to whether the Applicant should be granted leave to amend his pleadings. A determination of the two issues will provide an answer as to whether the respondents acted in contempt of the order issued by this Court on 8th June, 2020.

47. The 1st Respondent's notice of preliminary objection dated 15th June, 2020 is premised on the assertion that the Applicant had no *locus standi* to institute the petition and the same should be struck out with costs. Reliance is placed on the decision in **Patrick Kiseki Mutisya (Suung as the Personal Representative of Estate of Nzomo Mutisya (Deceased)) v KB Shangani & Sons Limited & others [2012] eKLR** for the proposition that a suit filed by an incompetent party can be dismissed on a preliminary objection. It is urged that the Applicant, Abdi Hassan Guyo, is unknown to the Assembly and the orders he obtained from this Court could not be enforced by the 1st Respondent.

48. On the Applicant's application for amendment of his petition, the 1st Respondent submits that whereas Order 1 Rule 10 as read with Order 8 Rule 3 CPR permits amendments, the intended amendment can only suffice if the mistake sought to be corrected was a genuine mistake and was not misleading.

49. The 1st Respondent's position is that the Applicant has not met the conditions for grant of leave to amend the petition. It is submitted that Article 159(2)(d) of the Constitution is not a panacea for all procedural shortfalls nor is it a magic wand for sloppy drafting. The decision of the Court of Appeal in **Apungu Arthur Kibira v Independent Electoral and Boundaries Commission & 2 others [2018] eKLR** is cited as holding that Article 159(2)(d) of the Constitution is not a panacea for all procedural shortfalls and that all what the courts are obliged to do is to be guided by the principle that justice shall be administered without undue regard to technicalities.

50. The 1st Respondent identifies the factors to be considered in an application for amendment as follows: that a party cannot, through an amendment, substitute one distinct cause of action for another; that a party cannot change the subject matter of the suit or substantially change the character of the suit; that a party will not be permitted to amend where such an amendment will prejudice the existing rights of the other party at the time of the proposed amendment; and that a party will not be permitted to amend where such amendments are being made late in the day, misleading and made in bad faith.

51. It is the 1st Respondent's further position that the suit, both in its initial state or with the intended amendments, is defective for contravening sections 8 and 11 of the Act which gives her immunity from civil and criminal proceedings. The 1st Respondent submits that the suit having been preferred against her in her capacity as the chair of the Committee and as the Speaker of the Assembly falls flat on its face.

52. The 2nd and 3rd respondents adopted a similar position to that of the 1st Respondent. On their assertion that the Applicant does not have or did not have the *locus standi* to institute the matter, the 2nd and 3rd respondents submit that the Applicant is not a juristic person and is unknown to the 2nd and 3rd respondents and is therefore non-existent and deficient of any legal capacity to enjoy or lay claim on any constitutional rights envisaged under Article 22(1) of the Constitution. According to them, the issue of juristic personality is a fundamental issue of law which touches on jurisdiction.

53. The 2nd and 3rd respondents urge that a court is competent when it is properly constituted as regards members and qualifications of members of the bench; the subject matter of the action is within its jurisdiction and there is no feature in the case which prevents the court from exercising its jurisdiction; proper parties are before the court; and the action is initiated by due process of law and upon fulfilment of any condition precedent to the exercise of jurisdiction.

54. Based on the above exposition of the law, the 2nd and 3rd respondents contend that this Court has no jurisdiction to entertain the matter on two grounds. Firstly, that only a juristic person that is an entity endowed with legal personality can have *locus standi* before a court and can be subject of rights and obligations as may be declared by the court. The 2nd and 3rd respondents assert that Hon. Abdi Hassan Guyo is a person unknown to the 2nd and 3rd respondents and is therefore a person unknown to the law and not capable of commencing a suit.

55. In support of the submission that the Court lacks jurisdiction to adjudicate a matter in which proper parties are not before it, the 2nd and 3rd respondents rely on the decisions in the cases of **SIETCO (Kenya) Ltd v Fortune Commodities Ltd and the Cooperative Bank of Kenya Ltd [2005] eKLR**; **Apex Finance International Limited & another v Kenya Anti-Corruption [2012] eKLR**; and **Housing Finance Company of Kenya Ltd v Embakasi Youth Development Project [2004] eKLR**.

56. Secondly, that Section 10 of the Act bars this Court from entertaining any litigation that questions proceedings or decisions of the Assembly or Committee. It is submitted that this Court has no jurisdiction to determine the issues raised by the Applicant as those issues flow from the proceedings or decision of the Committee. The Court is reminded that Section 10 of the Act has not been repealed and is still actively in force.

57. The 2nd and 3rd respondents introduces the argument that the applications and the petition offends the principle of institutional comity between the three arms of government which principle was enunciated by the Supreme Court in the advisory opinion of **In the Matter of the Speaker of the Senate & another [2013] eKLR**. It is urged that the Court cannot supervise the workings of Parliament and the institutional comity between the three arms of government must not be endangered by the unwarranted intrusions into the workings of one arm by another.

58. It is therefore the 2nd and 3rd respondents' submission that the applications and petition are *ex-facie* bad in law, misconceived, fatally defective, incompetent, and prejudicial to them hence an abuse of the court process and they should be dismissed.

59. The 3rd Respondent also filed separate submissions dated 24th June, 2020 and reiterates the submissions filed jointly with the 2nd Respondent. The 3rd Respondent additionally submits that the Applicant has not established any justiciable issue to warrant the invocation of the jurisdiction of this Court. The decisions in the cases of **Ashwander v Tennessee Valley Authority [1936] 297 U.S. 288**; **John Harun Mwau & 3 others v A.G. & 2 others, HCCP No. 65 of 2011**; and **Hon. Martin Nyaga Wambora v Speaker of County Assembly of Embu & 5 others, HCCP No. 3 of 2014** are cited as enunciating the principle that courts can only exercise jurisdiction in the context of a dispute or controversy.

60. The Applicant filed three sets of submissions. At this stage I will only highlight the submissions in response to the 1st Respondent's preliminary objection and the submissions in respect of the notice of motion dated 12th June, 2020. The starting point of the Applicant's argument is that the 1st Respondent's notice of preliminary objection does not meet the test set in **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696** as it does not raise a pure point of law and requires ascertainment of facts. Reliance is placed on the case of **Orarov Mbaja [2005] 1 KLR 141** for the holding that a preliminary objection that bears factual aspects calling for proof is not a true preliminary objection which the court should allow to proceed. According to the Applicant, the issue of whether he is a *bona fide* member of the Assembly can only be determined after hearing of the facts of the case. It is therefore urged that there is no proper notice of preliminary objection for the determination of the Court.

61. The Applicant points out that the other pillar upon which the notice of preliminary objection is hoisted is that the suit is defective for contravening Section 8 of the Act as it has been instituted against the 1st Respondent in her capacity as the chair of the Committee. Further, that this case violates Section 10 of Act which bars this Court from questioning the proceedings or decision of a county assembly or the Committee acting in accordance with the Act.

62. On the alleged breach of Section 8 of the Act, the Applicant asserts that the provision seeks to give immunity to members of county assemblies in respect of debates. His case is that the applications and the petition do not seek to challenge the powers under Section 8 of the Act and the 1st Respondent's objection on this aspect has no merit and should fall.

63. Turning to Section 10 of the Act, the Applicant submits that the said provision seeks to oust the jurisdiction of the courts in a manner that contravenes Article 48 on access to justice and therefore goes against the concept of the supremacy of the Constitution as stated in Article 2. The submission is supported by reference to the case of **Law Society of Kenya v Attorney General & 2 others [2013] eKLR** for the

statement that courts are required by the Constitution to ensure that all branches of government act within the law and fulfil their constitutional obligations.

64. The Court is also urged not to extensively pronounce itself on the issue at this stage as the Applicant challenges the constitutionality of Section 10 of the Act in his petition. However, the Applicant urges the Court to uphold its jurisdiction notwithstanding the provisions of Section 10 of the Act as has been done by other judges in the cases of **Ruth WambuiNdirangu & 2 others v The Clerk of Embu & 3 others [2019] eKLR**; **Hon.Protus Aramba Moindi & another v Speaker County Assembly of Kisii & 2 others [2016 eKLR]**; and **Apollo Mboya v AttorneyGeneral& 2 others [2018] eKLR**.

65. On the application dated 12th June, 2020, the Applicant submits that the order issued by this Court on 8th June, 2020 was served through email on the same date and served physically on the morning of 9th June, 2020. It is the Applicant's contention that although the 1st Respondent acknowledged receipt of the order, she acted in utter contempt and disrespect to the authority of the Court by stating that the order was defective and that the Court had no authority over the Assembly and the Assembly could therefore proceed and adopt the report of the Committee dated 9th June, 2020. The report was subsequently adopted and the Applicant suspended from the Assembly for a period of four months. The Court is urged to find that the substratum of this suit will be lost unless this Court stays the implementation of the report and compels the 1st Respondent together with the Sergeant-at-Arms of the Assembly to allow him within the Assembly and its precincts.

66. The Applicant makes lengthy submissions on the power of the Court to punish those who act in contempt of its orders. It is the Applicant's position that the 1st Respondent knew him by the name Guyo and had even referred to him by that name on 2nd June, 2020 during debate in the Assembly. He submits that the 1st Respondent was therefore aware who Mr. Abdi Hassan Guyo was and that he was one and the same person as Abdi Ibrahim Hassan. According to the Applicant, there was no ambiguity about his identity and the orders were clear and capable of compliance. It is pointed out that the 1st Respondent acted intentionally and ruled quite deliberately that the Court had no authority to stop the Assembly from adopting the report of the Committee.

67. The Applicant concludes by submitting that his application to amend the petition so as to capture his official name as well as his cultural name has not been opposed. He states that his application will help erase any mischief by the respondents and allow the Court to deal with the real issues in contention. Further, that no person will be prejudiced if the application for amendment of the petition is allowed.

68. The 1st Respondent's notice of preliminary objection challenges the jurisdiction of this Court to handle the Applicant's applications and petition on two grounds. Firstly, that the Applicant, Hon. Abdi Hassan Guyo is not a person known to the respondents. Indeed one of the respondents refer to him as a ghost not meriting the attention of this Court. The drafters of Legal Notice No. 117 of 2013, the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 popularly known as the Mutunga Rules, foresaw objections to petitions such as the one before this Court and legislated at Rule 5(b) thus:-

“A petition shall not be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every proceeding deal with the matter in dispute.”

69. Rule 5(c) specifically provides the remedy, for a situation like the one before this Court, as follows:-

“Where proceedings have been instituted in the name of the wrong person as petitioner, or where it is doubtful whether it has been instituted in the name of the right petitioner, the Court may at any stage of the proceedings, if satisfied that the proceedings have been instituted through a mistake made in good faith, and that it is necessary for the determination of the matter in dispute, order any other person to be substituted or added as petitioner upon such terms as it thinks fit.”

70. Indeed Rule 3(8) commands and empowers the Court as follows:-

“Nothing in these rules shall limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.”

71. The Applicant has placed evidence before this Court showing that he has previously been addressed by the Speaker herself and other members in the Assembly by the name Guyo. He says the name Guyo is a cultural name which is well known in the Assembly. His averments have not been disputed.

72. On the other hand, the 1st to 3rd respondents contend that the member of the Matopeni Spring Valley Ward in the Assembly is Abdi Ibrahim Hassan and not Abdi Hassan Guyo in whose favour orders were issued by this Court on 8th June, 2020. I do not wish to delve into the unhelpful arguments save to state that a constitutional petition should not be defeated by sideshows. Alleged violation of rights is such a weighty issue that calls for concrete responses from those accused of violating rights and any attempt to sidestep the core issues cannot be accepted by the Court. From the pleadings and annexures placed before this Court, it is clear that the member of Matopeni Spring Valley Ward is one Abdi Ibrahim Hassan who is also known as Abdi Hassan Guyo. That fact was well-known to the 1st Respondent. It cannot therefore be said that the Applicant is a ghost or a non-juristic person as alleged by the 1st to 3rd respondents.

73. It is also further observed that there is no plausible objection to the Applicant's prayer to amend his petition so that his name reads Hon. Abdi Ibrahim Hassan alias Abdi Hassan Guyo. The word alias means 'also known as' and there is no merit in the argument by the 3rd Respondent that a petitioner cannot be known by an alias. The Applicant has indeed established that he is Abdi Ibrahim Hassan and is also known as Abdi Hassan Guyo.

74. It is therefore my decision that the petition was proper from the time of inception as the person who approached this Court was well-

known to the 1st to 3rd respondents even though the name Guyo which he used in his pleadings is not captured as part of his official name in the Assembly. In order to avoid the uncalled for objections by the respondents, I will allow the Applicant's request to amend his petition so that his cultural name Abdi Ibrahim Guyo appears as an alias to the name Abdi Ibrahim Hassan which is the official name he uses in the Assembly.

75. The other issue is whether this Court has jurisdiction to entertain the application and petition in light of Section 10 of the Act which provides that:-

“No proceedings or decision of a county assembly or the Committee of Powers and Privileges acting in accordance with this Act shall be questioned in any court.”

76. One of the prayers sought in the petition is a declaration that Section 10 of the Act is inconsistent with and contravenes the Constitution hence invalid, null and void and should be declared unconstitutional. I should therefore leave this particular issue for determination in the judgment. However, the 1st to 3rd respondents have made the issue a jurisdictional hurdle which requires to be surmounted before I can have authority to deal with the application for conservatory orders.

77. My understanding of the law is that where a court is confronted with a statutory enactment which contradicts a constitutional provision, the court is required to embrace the constitutional provision. This is in line with the proclamation in Article 2(4) of the Constitution that any law, including customary law, which is inconsistent with the Constitution is void to the extent of the inconsistency, and any act or omission in contravention of the Constitution is invalid.

78. A court has no obligation to rely on a statutory provision that expressly violates the Constitution notwithstanding the fact that the provision has not been declared unconstitutional through a judgment of the High Court. A court's first and foremost duty is fidelity to the Constitution. Section 10 of the Act appears to oust the constitutional mandate bestowed upon the High Court by Article 165(3)(d)(i) & (ii) and (6) of the Constitution. It is therefore a provision that should automatically be overlooked as the Court focuses its vision on the higher law being the Constitution. It is therefore my finding that Section 10 of the Act cannot oust this Court's constitutional mandate to inquire into the issues raised by the Applicant.

79. On the submission by the respondents that this Court should defer to the constitutional mandates of the other arms of government, I will only quote the holding of the Supreme Court in the **Advisory Opinion Reference No. 2 of 2013, In the Matter of the Speaker of the Senate & another (2013) eKLR** that:-

“However, where a question arises as to the interpretation of the Constitution, this Court, being the apex judicial organ in the land, cannot invoke institutional comity to avoid its constitutional duty. We are persuaded by the reasoning in the cases we have referred to from other jurisdictions to the effect that Parliament must operate under the Constitution which is the supreme law of the land.....If Parliament violates the procedural requirements of the supreme law of the land, it is for the courts of law, not least the Supreme Court to assert the authority and supremacy of the Constitution.”

I think I have said enough to point to the inevitable conclusion that this Court has jurisdiction to look into the issues raised by the Applicant in his applications and petition.

80. Before I proceed to consider whether the Applicant is deserving of conservatory orders, I need to address the question as to whether the 1st Respondent is guilty of acting in contempt of the orders issued by this Court on 8th June, 2020. All the parties are agreed that the Applicant's official name is Abdi Ibrahim Hassan. The orders were issued in the name of Abdi Hassan Guyo. The orders were therefore not issued in the names of the person in the records of the Assembly. For that reason alone, it is difficult to pin down the 1st Respondent on the ground that she disobeyed the Court order. I therefore find no merit in the prayer seeking that the 1st Respondent be found guilty for violating the Court's order dated 8th June, 2020.

81. I now turn to the question as to whether the Applicant should be granted conservatory orders. In an application for conservatory orders, the court is not required to make definitive findings of either fact or law as those are issues to be addressed once the petition is heard. What the court is required to do at this stage is to determine, on the material placed before it, whether the applicant has established a *prima facie* case to merit grant of orders. In doing so, the court is called upon to consider whether denial of orders will be prejudicial to the applicant's constitutional rights and fundamental freedoms.

82. In the **Board of Management of Uhuru Secondary School v City County Director of Education & 2 others (2015) eKLR; Nairobi High Court Petition No. 359 of 2015**, Onguto, J outlined the factors to be taken into consideration in determining an application for conservatory orders as follows:-

“25. Foremost, the applicant ought to demonstrate a prima facie case with a likelihood of success and that in the absence of the conservatory orders he is likely to suffer prejudice....

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....

28. Once the applicant has established to the court's satisfaction a prima facie case with a likelihood of success the court is then to decide whether a grant or a denial of the conservatory relief will enhance the Constitutional values and objects of the specific right or freedom in the Bill of rights....

29. Thirdly, flowing from the first two principles, is whether if an interim Conservatory order is not granted, the petition or its substratum will be rendered nugatory. It is indeed the business of the court to ensure and secure so far as possible that any transitional motions before the court do not render nugatory the ultimate end of justice....

30. The fourth principle which emerges from the various cases and is well captured by the Supreme Court of Kenya in the case of *Gatirau Peter Munya –v- Dickson Mwenda Githinji & 2 Others* [2014] eKLR is that the court must consider conservatory orders also in the face of the public interest dogma.

31. Finally, the court is to exercise its discretion in deciding whether to grant or deny a conservatory order. The court must consequently consider all relevant material facts and avoid immaterial matters. The court will consider the applicants credentials, the prima facie correctness of the availed information, whether the grievances are genuine legitimate and deserving and finally whether the grievances and allegations are grave and serious or merely vague and reckless.”

83. Applying the stated legal principles to the Applicant’s case, it emerges that he has established a *prima facie* case. He has shown that the Committee dealt with his case outside the maximum fourteen days fixed by both the Act and Standing Order No. 242. This is a matter that calls for interrogation during the hearing of the petition. There is also the claim by the Applicant that there was no formal complaint regarding his alleged no-attendance of more than eight Assembly sittings.

84. Has the Applicant demonstrated the prejudice to be suffered? He has indeed already suffered prejudice following his expulsion from the Assembly as a result of what he alleges is a flawed process.

85. It is also in the public interest to allow the application on the ground that the residents of the ward represented by the Applicant in the Assembly will have no representation during the four months the Applicant will be out of the Assembly.

86. All the facts therefore converge in favour of the prayer for grant of conservatory orders and the application therefore succeeds.

87. Considering the stage at which things are at the time of the delivery of this ruling, I allow the Applicant’s applications dated 8th June, 2020 and 12th June, 2020 in the following terms:-

a) There shall be stay of the implementation of the decision of the Nairobi City County Assembly Committee on Powers and Privileges arising from its investigations of the Applicant/Petitioner following its letter dated 5th June, 2020 pending the hearing and determination of the petition;

b) An order is hereby issued suspending the implementation of the decision of the Nairobi City County Assembly Select Committee on Powers and Privileges dated 9th June, 2020 as adopted by the Nairobi City County Assembly pending the hearing and determination of the petition;

c) For avoidance of doubt, the Applicant/Petitioner shall have unrestrained access to the Assembly and its precincts and shall enjoy all privileges and benefits pertaining to the office of a member of the Nairobi City County Assembly pending the hearing and determination of his petition;

d) The Applicant/Petitioner is granted leave to amend his petition in the terms of the annexed draft amended petition; and

e) The costs for the applications dated 8th June, 2020 and 12th June, 2020 shall abide the outcome of the petition.

Dated, signed and delivered through video conferencing/email at Nairobi this 30th day of July, 2020.

W. KORIR,

JUDGE OF THE HIGH COURT