



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANGA

CONSTITUTIONAL PETITION NO. 17 OF 2020

MWANGI WA IRIA.....1ST PETITIONER

MURANG'A COUNTY GOVERNMENT.....2ND PETITIONER

VERSUS

SPEAKER OF THE SENATE.....1ST RESPONDENT

THE SENATE, PARLIAMENT OF KENYA.....2ND RESPONDENT

THE INSPECTOR GENERAL OF POLICE & 47 OTHERS....INTERESTED PARTIES

RULING

1. The 1st petitioner, Mwangi Wa Iria, is the Governor of Murang'a County Government, the 2nd Petitioner.
2. The Senate Sessional Committee on County Public Accounts and Investments (hereafter the *Senate Committee*) invited him for a meeting on 11th August 2020 to consider the Reports of the Auditor General on Financial Statements for the years 2015/16, 2016/17 and 2017/18.
3. He was a no show. The committee then issued summons to him to attend its session on 28th August 2020. When the 1st petitioner failed to appear, the committee invoked Article 125 of the **Constitution** and section 8 of the **Parliamentary Powers and Privileges Act** and issued a warrant of arrest.
4. It further directed the Inspector General of Police (the 1st interested party) to enforce the warrant and produce the governor on 10th September 2020.
5. The governor has challenged the *constitutionality* of those decisions in the petition dated 3rd September 2020. Contemporaneously with the petition, he lodged a Notice of Motion praying for a *conservatory order* to stay or suspend the committee's decision contained in the letter dated 2nd September 2020 addressed to the 1st interested party.
6. The motion is supported by his affidavit of even date. There is also a supplementary affidavit lodged on 30th September in response to the reply by the 1st and 2nd respondents.
7. The 1st petitioner avers that the actions of the committee violate various provisions of the **Constitution** including Articles 6, 10, 43, 47, 50, 125 and 226 (2).
8. He avers that in view of the *Covid-19* pandemic, he requested the Senate Committee to appear virtually through a video link and made adequate arrangements. He deposes that his age falls within the bracket of persons who are most vulnerable to the disease.
9. He submitted that the conduct by the committee was not *bona fide* and may have been driven by chagrin over certain positions taken by the Council of Governors (on which he is vice chair) against the Senate.
10. He deposed that the County availed all the necessary documents required by the 1st and 2nd respondents as per the letter marked *MI1* dated 4th August 2020. He also referred to another letter from the County Secretary dated 25th August 2020 marked *MI4* but which was never acknowledged by the Senate.
11. He contends that it was unreasonable for the committee to insist on *in person* hearing contrary to the Senate Speaker's (1st respondent's)

directive to committees to hold virtual hearings. He argued that he and all the other 46 governors (the 2nd to 46th interested parties) had been excused by the Speaker from “physical attendance” at committee sessions during the pandemic.

12. He avers that he only learnt of the impugned warrants through the press. He contends that the actions are arbitrary, unreasonable, capricious, and driven by ill-motive. Furthermore, he argues, they violate his right to personal liberty and to a fair administrative action.

13. Lastly, he denies that the mere grant of the conservatory order will shield him from accountability to the Senate; or, that it will hamstring it because “there is no order stopping the County Public Accounts and Investment Committee from carrying out its mandate”.

14. The 2nd petitioner on the other hand claims that it had notified the Senate of closure of its county offices for two weeks due to a spike in the pandemic which made “attendance and participation before the committee meaningless”.

15. There are two letters marked *MI5 & 6* dated 11th August 2020 and 24th August 2020 annexed to the 1st petitioner’s deposition confirming the closure. In the earlier letter by David Waweru, the County CECM for Finance, he requested for a virtual sitting and to be provided with details of the video link. There seems to have been no response from the Senate.

16. The petition is supported by the 2nd to 47th interested parties. There is an affidavit sworn by Jaqueline Mogeni, the Chief Executive Officer of the Council of Governors, dated 29th September 2020. She deposed that owing to the pandemic, the Head of Public Service issued Circulars applying to all State and Public Officers to work from home or conduct meetings through *WebEx* or *Zoom* platforms. She states that the Circulars have not been revised.

17. She averred that the 47th interested party requested the 2nd respondent to allow governors to appear before the parliamentary committees via online platforms. The Senate agreed to suspend physical sittings for a period of thirty days from 30th July 2020.

18. She also deposed that on 7th August 2020, the Council of Governors embarked on mass testing and a number of its staff tested positive for *Covid-19*. As a result, it closed its offices for two weeks. She averred that all the governors were encouraged to work from home.

19. The petition is contested by the 1st and 2nd respondents. There is a replying affidavit sworn on 18th September 2020 by Jeremiah Nyegenye, the Clerk of the Senate.

20. The deponent has attached the letter of 22nd June 2020 marked *JN1* inviting the 1st petitioner to the sitting of the Senate Committee on 11th August 2020. In addition, there were press notices on 9th June 2020 (annextures *JN2-3*). He avers further that the Senate issued a witness summons (annexture *JN3*) to the 1st petitioner to appear on 28th August 2020.

21. At paragraphs 10 and 11, the deponent acknowledges receipt of the two letters from the county dated 11th and 25th August 2020. But in his view the county executive had sufficient notice and should have been ready for the meeting of 11th August 2020.

22. He deposed that under Articles 96, 117 and 125 of the **Constitution** the Senate had power to pass a resolution exercising its powers of a High Court and that this Court “has no jurisdiction to question what the Senate has resolved”.

23. The deponent then cites in paragraphs 17 to 22 a number of earlier decisions by the High Court on the subject. He was of the opinion that this Court should not revisit the matter; and, that the petitioners are in contempt of those decisions.

24. He also cited Article 229 of the **Constitution** which requires audit reports to be submitted to Parliament. He opined that Senate was exercising lawful authority in considering the report by the Auditor General.

25. He deposed that Senate has power to summon governors to answer to audit queries; and, that the petitioners are seeking to avoid accountability in violation of Articles 10, 73(2)(d) and 201 of the **Constitution**.

26. He stated further that the governor and deputy governor, as the executives of the county, are answerable and that there is no requirement that the Senate should first summon the County Accounting Officer.

27. At paragraph 36, he deposes as follows-

I confirm that the Senate has made sufficient arrangements for the sittings of the County Public Accounts and Investments Committee and governors of various counties have been appearing to respond to audit queries arising from the Auditor General’s report on their respective counties

28. The deponent raised doubts about the sincerity of the 1st petitioner or his vulnerability to *Covid-19* because “from the media, the 1st petitioner has been attending public meetings in large groups”. His conclusion is that the 1st petitioner has demonstrated open contempt to the Senate which can only be purged by appearing before the committee.

29. Learned counsel for the 1st and 2nd respondents, *Ms. Thanji*, argued that the *ex parte* orders obtained earlier were undeserved and have halted the operations of the committee. She submitted that public interest lies in allowing the Senate to carry out its oversight duties over counties. She implored the Court to dismiss the Notice of Motion.

30. The 1st interested party did not enter an appearance in the matter.

31. The petitioners filed skeleton submissions and a list of authorities on 26th October 2020. The 1st and 2nd respondent filed their submissions and a list of precedents on 21st October 2020. The 2nd to 47th interested parties filed submissions on 26th October 2020 together with a list of authorities.

32. On 26th October 2020 I heard further arguments by all learned counsel.

33. The main petition is *pending* for hearing. I thus decline the invitation to comment on the merits of the action at this stage. That will be the true province of the trial court.

34. To succeed in an application of this nature, the applicant must show that it has a *prima facie* case with a likelihood of success; that unless the *conservatory order* is granted the applicant will suffer *serious prejudice*; or, that the main petition will be rendered *nugatory*. See generally *Giella v Cassman Brown and Company Limited* [1973] E.A 358, *Suleiman v Amboseli Resort Limited* [2004] 2 KLR 589, *Mercy Wanjiku Kimwe & 2 others v Governor Murang'a County & 5 others*, High Court, Murang'a Pet. 55 of 2018 [2018] eKLR

35. In addition, it is essential to consider the *public interest*. Authorities abound including *Gatirau Peter Munya v Dickson Mwenda Githinji & 2 Others* Supreme Court of Kenya, Petition No 2 of 2013 [2014] eKLR, *Centre for Rights Education and Awareness & 7 others v Attorney General*, High Court, Nairobi, Constitutional Petition No. 16 of 2011 [2011] eKLR, *British American Tobacco Kenya Ltd v Cabinet Secretary for the Ministry of Health & 2 others* High Court, Nairobi, Constitutional Petition No. 143 of 2015 [2015] eKLR, *Flemish Investments Limited v Town Council of Mariakani*, Mombasa High Court Case 459 of 2010 [2012] eKLR, *Marius Wahome Gitonga v Kenya National Highways Authority*, Eldoret, High Court Petition 16 of 2015 [2015] eKLR.

36. The Supreme Court has explained the confluence of principles applicable in granting an ordinary *injunction* and a *conservatory order* in *Gatirau Peter Munya vs Dickson Mwenda Githinji & 2 others* [supra]. The distinguishing feature relates to *public interest*. The court must bear in mind the inherent *merit* of the case *versus* the *public interest*. The learned judges of the Supreme Court had this to say-

[86] '*Conservatory orders*' bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within the 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 applicant'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.*

37. Like I stated, it would be premature at this stage to determine a slew of legal and evidential issues raised in the main petition. For example, is the 1st petitioner deliberately obstructing the Senate or hiding behind the *Covid-19* pandemic to escape accountability for funds released to the county? Does the Senate or its committees have power to order the arrest of a defaulting witness? Can the Senate or its committee direct an independent constitutional office such as the Inspector General of Police to act in a certain manner? And so forth.

38. But at this juncture, I must delve a little deeper into the *rationality* or *constitutionality* of the impugned warrant of arrest. Paraphrased, have the rights of the governor to liberty or fair administrative action been infringed by the Senate?

39. The following remains a truism and will not change: Article 10 of the **Constitution** enumerates the guiding values and principles of governance including the rule of law; accountability; democracy; and, participation of the people. It binds all state organs, state officers and public officers and any person who applies, enacts or interprets the same. The principles of integrity, openness and accountability are buttressed further by Articles 73 (2)(d) and 201 (a).

40. Again, under the framework of our **Constitution**, and in particular Article 229 of the **Constitution**, Senate is imbued with power to superintend over financial probity in the counties. There is no contest that under sub-articles 7 and 8 thereof, Parliament must within *three months* debate, consider and take appropriate action on the relevant Reports of the Auditor General.

41. To effectively carry out its role, Parliament has power to summon witnesses including governors. See generally the Court of Appeal decision in *Council of Governors v & 5 others v The Senate & another*, Nairobi Civil Appeal 204 of 2015 [2019] eKLR.

42. Doubt is removed completely by Article 125 (2)(a) of the **Constitution** which states that:

A House of Parliament or any of its committees has the same powers as the High Court-

a) To enforce the attendance of witnesses and examine them on oath, affirmation or otherwise...

43. Article 117 (2) of the **Constitution** as read together with the **Parliamentary Powers and Privileges Act** grants parliamentary committees wide powers. For instance, under section 19 of the statute, it is an *offence* to fail to appear when summoned; and, the committee may impose a fine or *order arrest* of a witness. Some of the issues pertaining to the *exercise* of that power or its *constitutionality* will be determined after hearing the main petition.

44. The live issue now is whether the petitioners are entitled to a conservatory order. Paraphrased, did the Senate Committee, as a public body, properly exercise its power by ordering the arrest of the 1st petitioner?

45. There is no contest that the petitioners had adequate notice of the meeting first scheduled for 11th August 2020. This is clear from the letter of 22nd June 2020 and the earlier press notices of 9th June 2020.

46. However, the Republic was entering into the peak of the first wave of *Covid-19*. I am entitled to take judicial notice that that was the situation at the time the committee summoned the 1st respondent to attend its subsequent session *in person* on 28th August 2020.

47. That perhaps informed the requests by the petitioners in the two letters of 11th and 25th August 2020 to either adjourn the session or to allow them to appear virtually.

48. As I stated, Mr. Jeremiah Nyegenye, the Clerk of the House, at paragraphs 10 and 11 of his replying affidavit, admitted that he received the letters. He did not reply or accommodate the petitioners. He was content to depose that the chamber had taken adequate steps to stem infections; and, that other governors attended the in-person sessions.

49. True, the 1st petitioner may have overplayed the fact of his age or vulnerability. As a politician, he attended other public gatherings as deposed to by Mr. Nyegenye. The pictures exhibited as *JN6* and *JN7* leave no doubt about it. But the 1st petitioner's request and that of the county was not entirely unreasonable. And the Senate ought to have responded to the appeal. I say so very carefully and without making a final finding.

50. I agree with Mr. Nyegenye that the Senate may have made sufficient arrangements for the sittings of the County Public Accounts and Investments Committee; and, that some governors appeared in person to respond to audit queries. But that would be to trivialize the circular issued by the Head of Public Service dated 20th July 2020 annexed to the affidavit of the 1st petitioner marked *MI2* requiring all State and Public Officers to work from home. It is not lost on me either that one of the recipients of the circular was the Clerk of the Senate.

51. Furthermore, there is the letter from the Speaker of the Senate, Kenneth Lusaka, dated 30th July 2020 addressed to the Chair of Council of Governors confirming that the Senate Liaison Committee resolved-

That noting the escalation in the COVID-19 pandemic situation and the delicate phase into which the country may be entering, physical sittings of committees be suspended for a period of thirty (30) days, effective 30th July 2020, and that consequently, all sittings of Senate Committees be held on virtual platforms during this period and that the situation be reviewed at the expiry of that period

52. The 1st respondent was summoned to the committee meeting before the *expiry* of thirty days' notice by the Speaker suspending *in-person* meetings. As I stated, he had made a request in writing to appear via a video link. It has not been controverted that he made arrangements but no link was provided. The two letters by the petitioners to the Senate which I referred to were never answered.

53. There is *no* evidence *at this stage* demonstrating that the petitioners were accorded a hearing before the impugned decision was taken. The respondents have *not* explained in a satisfactory manner why they insisted on *in-person* appearance by the 1st petitioner at the height of the *Covid-19* pandemic; and, against the express resolution of the Senate conveyed by the Speaker to the Chair of Council of Governors on 30th July 2020.

54. From the materials before me *at this stage*, I readily find that the respondents' actions *may* have offended Articles 43, 47 and 50 of the **Constitution**. See generally *Alfred N Mutua & another v Speaker of the Senate & another; Inspector General of Police (Interested Party)*, High Court at Nairobi Pet. 398 of 2019 [2020] eKLR. Again, I say that very carefully as the main petition is pending for hearing.

55. I have also weighed the *merits* of this case against the *public interest*. The public interest in this case is to ensure that the Senate is not obstructed from carrying out, *in good faith*, its constitutional duties to oversight management of public resources in the counties. The private interest in this case is the personal *liberty* of the subject.

56. I have reached the *preliminary conclusion* that the committee's decision to issue the warrant of arrest without giving a hearing to the 1st petitioner; and, directing the Inspector General of Police to arrest him was unwarranted and arbitrary.

57. It must follow as a corollary that the petitioners have made out a robust case for grant of a conservatory order.

58. The upshot is that the petitioners' Notice of Motion dated 3rd September 2020 is allowed in the following terms-

a) That pending the hearing of the main petition, a conservatory order is hereby granted staying and suspending the decision of the 2nd respondent contained in the letter of the Clerk of the Senate dated 2nd September 2020 and referenced SEN/DCS/CPAIC/2020/086 which directed the 1st interested party to arrest the 1st petitioner or in any other manner whatsoever interfering with the liberty of the 1st petitioner over any summons to appear before the Senate Sessional Committee on County Public Accounts and Investments.

b) That the main petition shall be heard on priority.

c) That costs shall abide by the judgment in the main petition.

It is so ordered.

DATED, SIGNED and DELIVERED at MURANG'A this 19th day of November 2020.

KANYI KIMONDO

JUDGE

Ruling read in open court in the presence of:

Mr. J. Mbuthia holding brief for Mr. Ng'angá for the 1st and 2nd Petitioners instructed by Mbugua Ng'ang'a & Company Advocates.

No appearance by counsel for the 1st and 2nd Respondents.

No appearance by counsel for the 2nd to 47th Interested Parties.

No appearance by the 1st Interested Party.

Ms. Dorcas Waichuhi & Ms Susan Waiganjo, Court Assistants.