



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**(CORAM: A.K. NDUNG’U)**

**JUDICIAL REVIEW APPLICATION NO. 3 OF 2020(JR)**

**IN THE MATTER OF ARTICLES 1(1), (2) & (3) (a),**

**10, 20, 21(1), 22, 23, 27, 47, 48, 50, 185, 232(1), 232(2) OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF SECTIONS 5, 15, 16, 17, 19, 20, 27 OF THE COUNTY ASSEMBLIES POWERS & PRIVILEGES ACT NO. 6 OF 2017**

**AND**

**IN THE MATTER OF SECTION 4 OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015**

**AND**

**IN THE MATTER OF STANDING ORDERS NO 44, 47, 49 & 50 OF THE STANDING ORDERS OF COUNTY ASSEMBLY OF KISII**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

**THE COUNTY ASSEMBLY OF KISII**

**COMMITTEE OF POWERS AND PRIVILEG.....1<sup>ST</sup> RESPONDENT**

**THE COUNTY ASSEMBLY SERVICE**

**BOARD KISII COUNTY ASSEMBLY.....2<sup>ND</sup> RESPONDENT**

**THE COUNTY ASSEMBLY OF KISII.....3<sup>RD</sup> RESPONDENT**

**THE HON. SPEAKER KISII COUNTY ASSEMBLY.....4<sup>TH</sup> RESPONDENT**

**THE CLERK OF COUNTY ASSEMBLY KISII.....5<sup>TH</sup> RESPONDENT**

**KAREN NYAMOITA MAGARA.....EXPARTE APPLICANT**

**RULING**

**1. Before me is a Notice of Preliminary Objection dated 11<sup>th</sup> September 2020 which challenges the jurisdiction of this court to hear and determine the substantive application for judicial review orders for reasons that;**

a. The court has no jurisdiction to impede with the internal operations of the County Assembly in accordance with the County Assemblies Powers and Privileges Act.

b. The application infracts the provisions of Section 10 of the County Assemblies Powers and Privileges Act No. 6 of 2017

c. The application is premature before this Honourable Court as it offends the Kisii County Assembly Standing Orders No. 46 (2) (a) as the applicant has not fully exhausted all the laid down internal mechanisms of dispute resolution.

2. Subsequent to obtaining leave to file a substantive application for judicial review orders, the *ex parte* applicant filed a Notice of Motion seeking orders to quash and prohibit the implementation of a recommendation made by the 1<sup>st</sup> respondent on 22<sup>nd</sup> July 2020 and tabled, debated and adopted as a resolution of the 3<sup>rd</sup> respondent on 28<sup>th</sup> July 2020. The resolution ordered the suspension of the *ex parte* applicant from the service of the Assembly and barred her from the precincts for a period of three (3) Assembly Calendar Sitting Months from the date of adoption of the report of the 1<sup>st</sup> respondent.

3. The preliminary objection was canvassed by way of written submissions which I have duly considered.

4. The respondents contend that this court lacks jurisdiction to adjudicate over the matter on account of **section 10 of the County Assemblies Powers & Privileges Act No. 6 of 2017** which provides;

*“10. 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.”*

5. It is urged for the respondent that the importance of the foregoing provision is to safeguard the principle of separation of powers. Learned Counsel argues that intrusion into the workings of the respondents will impede the respondents’ performance of their duties and the court must decline jurisdiction. To buttress this position, counsel relied on the cases of **Peter O. Ngoge v Francis Ole Kaparo & 4 Others Misc Appli 22 of 2004 [2007] eKLR** and **Justus Kariuki Mate & another v Martin Nyaga Wambora & another Petition 32 of 2014 [2017]eKLR**.

6. He also cited the case of **In the matter of the Speaker of the Senate & Another v Attorney General & 4 Others Reference No. 2 of 2013 [2013]eKLR** where the Supreme Court held:

*“This court will not question each and every procedural infraction that may occur in either of the Houses of Parliament. The Court cannot supervise the workings of Parliament. 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.”*

7. The respondent also relies on the doctrine of exhaustion which espouses that a party must first exhaust all available dispute resolution mechanisms provided by the law before filing a dispute in court. It is argued that the *ex parte* applicant has not challenged the impugned resolution in the manner provided in **Standing Order Number 46 (2) (a) of the Kisii Standing Orders** which provides that;

*“A motion to rescind the decision on such a question may be moved with the permission of the Speaker.”*

8. The *ex parte* applicant is said to have ignored the avenue provided above and instead opted to rush to court without seeking an exemption order as provided in the case of **Mayson Services Ltd vs Parklands Baptist Church Registered Trustees and Another** thus;

*“A party seeking judicial review remedy must exhaust the review and appeal remedies available under the applicable law and where in the interest of justice, exhaustion of those remedies is not a viable route the applicant is obligated to move the court for an exemption order.”*

9. Conversely, it is submitted for the *ex parte* applicant that the actions, proceedings and decisions she seeks to quash were in violation of her constitutional rights and since the violations were done by the respondents in exercise of their quasi judicial functions, the provisions of the Powers and Privileges Act do not oust the supervisory jurisdiction of this court. The cases of **Ruth Wambui Ndirangu & 2 others vs Clerk County Assembly of Embu & 3 Others [2019]eKLR**, **National Gender & Equality Commission vs Majority Leader, County Assembly of Nakuru & 4 Others, Jubilee Party & Another (Interested Parties) eKLR**, **Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 Others [2013]eKLR**, **County Assembly of Kisumu & 2 Others vs Kisumu County Assembly Service Board & 6 Others [2015]eKLR**, **Judicial Service Commission vs Speaker of the National Assembly & 8 Others [2014]eKLR**, **the Council of Governors & Others vs The Senate Petition No. 413 of 2014** and **James Opiyo Wandayi vs Kenya National Assembly & 2 Others Nairobi HCC JR 258 of 2016** were relied upon in support of this position.

10. On the doctrine of exhaustion, the *ex parte* applicant submitted that a motion to rescind the decision as provided under Standing Order 46 (2) would not be approved by the Speaker and even where such a motion was approved, the *ex parte* applicant would not have the quality of audience before the House. It was also her position that the Standing Orders do not, by their nature, oust the jurisdiction of the courts and the court ought to dismiss the preliminary objection.

11. The *locus classicus* on jurisdiction is the celebrated case of the Court of Appeal, **Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] KLR 1** where Nyarangi J. held thus:

*“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction,*

*there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”*

12. The *ex parte* applicant seeks to quash and prohibit the implementation of the decision of the respondents by her application for judicial review orders. The respondents’ position is that this court lacks jurisdiction to hear and determine the matter as it is expressly barred from doing so by **section 10** of the **County Assemblies Powers and Privileges Act No. 6 of 2017**.

13. Various courts have interrogated the scope of the High Court’s authority to adjudicate over proceedings or decisions of the county assembly in light of the privileges and immunities conferred upon the county assemblies, their committees and members.

14. In declaring **section 11** of the **Parliamentary Powers and Privileges Act (No. 29 of 2017)**, which was in *pari materia* with section 10 of the County Assemblies Powers & Privileges Act, unconstitutional the court in ***Apollo Mboya v Attorney General & 2 others PETITION NO. 472 OF 2017 [2018] eKLR*** held;

*“53. Section 11 of the act provides that ‘No proceedings or decision of Parliament or the Committee of Powers and Privileges acting in accordance with this Act shall be questioned in any court’....*

*75. The foregoing paragraphs summarize the nature and purpose of Parliamentary immunity. A reading of section 11 leaves no doubt that it covers more than the immunity discussed in the above paragraphs. It bars any person from challenging in Court decisions made by Parliament or its committees. The provision does not specify the nature of the decisions. It does not refer to immunity in the performance of their Parliamentary duties. It seeks to shield their decisions from court scrutiny. It is an ouster or finality clause which restricts or eliminates Judicial Review. In our constitutional dispensation, it is not Parliament, or the executive or the Judiciary that are Supreme, but the Constitution.”*

15. Similarly, in the case of ***Protus Aramba Moindi & another v Speaker of the County Assembly – Kisii County & 2 others Petition No. 13 of 2016 [2016] eKLR*** J.R. Karanja J. held;

*13. ... On the face of it, S.12 of the Act purports to exclude interference of the courts in matters of the National Assembly or for that matter County Assemblies. However, Article 2 of the Constitution proclaims the supremacy of the Constitution to the effect that it is Supreme Law of the Republic and binds all persons and all state organs at both levels of Government. So that, no person may claim or exercise State authority except as authorized under the Constitution and any law that 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.*

...

*15. Jurisdiction being the authority which a court has to decide matters that are litigated before it or to make cognizance of matters presented in a formal way for its decision, and taking into account that Article 165(3) of the Constitution grants the High Court the power to determine any question as to the interpretation of the Constitution and that the High Court is recognized as the custodian of the Bill of Rights which is the framework of social, economic and cultural policies in a democratic state such as Kenya it would follow that S.12 of the National Assembly (Power & Privileges) Act cannot restrict or oust the Constitutional mandate of this court.”*

16. The above decision of the court was cited with approval by the court in the case of ***Ruth Wambui Ndirangu & 2 others v Clerk County Assembly of Embu & 3 others Constitutional Petition No. 16 of 2018 [2019] eKLR***. In that matter the court held that Sections 10 and 11 of the County Assemblies Powers & Privileges Act 2017 did not oust the supervisory jurisdiction of the court as provided in the Constitution.

17. In the case of ***Peter O. Ngoge v Francis Ole Kaparo & 4 Others Misc Appli 22 of 2004 [2007] eKLR*** which was relied upon by the respondent, the court cited the decision of the court in the case of ***Kenya Bus Service Ltd And Others v Attorney General & Others (2005) I EALR III at page 15(1)(J) and 116(a)*** where it was held that a court would only be entitled to intervene in the internal matters of Parliament in order to uphold the provisions of the Constitution.

18. The Supreme Court in ***Justus Kariuki Mate & Another v Martin Nyaga Wambora & Another Petition No. 32 of 2014 [2017]eKLR*** referred to its decision in ***In the matter of the Speaker of the Senate & Another v Attorney General & 4 Others*** where it had called for caution against undue interference with running processes in other arms of Government. On the extent of the doctrine of separation of powers, the Supreme Court in ***Justus Kariuki Mate (supra)*** held;

*“[62] A clear inference to be drawn is that, it was the Supreme Court’s stand that no arm of Government is above the law. This being a constitutional democracy, the Constitution is the guiding light for the operations of all State Organs. The Court’s mandate, where it applies, is for the purpose of averting any real danger of constitutional violation.”*

19. In the present case, the *ex parte* applicant is challenging the resolution adopted by the 3<sup>rd</sup> respondent on 28<sup>th</sup> July 2020 to suspend her from the service of the Assembly and bar her from the precincts for a period of three (3) Assembly Calendar Sitting Months for being inconsistent with the provisions of the law including the Constitution, the County Assemblies Powers & Privileges Act, the County Assembly of Kisii Standing Orders and established practices, customs and traditions of the County Assembly of Kisii and Kenya.

20. As a court of review, this court is empowered to look into the lawfulness of a process by which a decision of a judicial or quasi-judicial body was arrived at and can set it aside if the process was flawed. This power is bestowed upon the court by **Article 165 (6)** of the **Constitution** which provides that the High Court has supervisory jurisdiction over any person, body or authority other than a superior court exercising a judicial or quasi-judicial function. Under **Article 165 (3) (d) (ii) of the Constitution** the court is also empowered to hear any question on whether anything said to be done under the authority of the Constitution or any law is inconsistent with the Constitution.

21. The common thread in the preceding authorities is that the court's jurisdiction to interrogate the constitutionality of any act including that of the county assembly cannot be ousted. The court is mandated to safeguard the sanctity of the Constitution and where it is called upon to determine whether there has been a violation of the Constitution it must not shy away from its duty. I am in agreement with the decisions of the courts in the foregoing authorities that the powers and privileges of the county assembly does not restrict or oust the Constitutional mandate of this court to look into the constitutionality of the decisions of the county assemblies.

22. As to the doctrine of exhaustion, I find that a resolution of this issue must await a plenary hearing of the substantive application as the determination of whether the *ex parte* applicant had exhausted the dispute resolution mechanism will require an enquiry into the facts to ascertain the truth. A preliminary objection is to be restricted to pure points of law. It cannot be raised where any facts have to be ascertained. (See *Mukhisa Biscuit Manufacturers Ltd. vs. West End Distributors Ltd. [1969] E.A. 69*).

23. For the reasons given above, I find the preliminary objection to be lacking in merit and I hereby dismiss it.

24. Costs shall be in the cause.

**Dated and Delivered at Kisii this 18<sup>th</sup> day of November, 2020.**

.....

**A. K. NDUNG'U**

**JUDGE**