



REPUBLIC OF KENYA

THE HIGH COURT OF KENYA

AT NAKURU

JUDICIAL REVIEW APPLICATION NO. 17 OF 2020

IN THE MATTER OF: THE LAW REFORM ACT READ WITH ORDER 53 CIVIL PROCEDURE RULES, 2010

AND IN THE MATTER OF: SECTION 11 OF THE COUNTY GOVERNMENT ACT NO. 17 OF 2012

AND THE NYANDARUA COUNTY ASSEMBLY STANDING ORDERS NO. 63 AND

IN THE MATTER OF VIOLATION OF THE CONSTITUTION OF KENYA, 2010

AND IN THE MATTER OF: THE PURPORTED REMOVAL OF HON. JAMES NDEGWA

WAHOME FROM OFFICE OF THE SPEAKER NYANDARUA COUNTY ASSEMBLY.

AND IN THE MATTER OF: AN APPLICATION FOR LEAVE TO APPLY FOR THE

JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION

REPUBLIC *EX PARTE*

HON. JAMES WAHOME NDEGWA.....APPLICANT

AND

NYANDARUA COUNTY ASSEMBLY.....1ST INTERESTED PARTY

VERSUS

HON. ZACHARY MWANGI NJERU.....1ST RESPONDENT

HON. EDINALD WAMBUGU KINGORI.....2ND RESPONDENT

HON. GOVERNOR FRANCIS KIMEMIA.....3RD RESPONDENT

THE COUNTY GOVERNMENT OF NYANDARUA.....4TH RESPONDENT

THE GOVERNMENT PRINTER-GOVERNMENT PRESS.....5TH RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....6TH RESPONDENT

CONSOLIDATED WITH

CONSTITUTIONAL PETITION NO. 5 OF 2020 (NYAHURURU HIGH COURT)

IN THE MATTER OF CONSTITUTION OF KENYA 2010

IN THE MATTER OF ARTICLES 2, 3, 10, 20, 21, 47, 50, 165, 174,

AND

IN THE MATTER OF THE UNPROCEDURAL CLOSURE OF THE COUNTY ASSEMBLY OF
NYANDARUA OFFICES BY HON. JAMES NDEGWA WAHOME THE SPEAKER IN A BID
TO SCUTTLE HIS MOTION FOR REMOVAL FROM OFFICE VIA AN IMPEACHMENT
PROCESS AS PER SECTIONS II OF THE COUNTY GOVERNMENT ACT AND STANDING
ORDER NO. 63 OF THE NYANDARUA COUNTY ASSEMBLY STANDING ORDERS

AND

IN THE MATTER OF THE PRINCIPLES OF NATURAL JUSTICE

BETWEEN

HON. ZACHARY MWNGI NJERU.....PTITIONER/APPLICANT

VERSUS

HON. JAMES NDEGWA WAHOME.....RESPONDENT

AND

THE COUNTY ASSEMBLY OF NYANDARUA.....1ST INTERESTED PARTY

THE COUNTY GOVERNMENT OF NYANDARUA.....2ND INTERESTED PARTY

RULING

1. On 17/12/2020, Zachary Mwangi Njeru (Petitioner) approached the Nyahururu High Court in a Constitutional Petition intitled thereat as No. 5 of 2020 seeking certain orders and declarations against James Ndegwa Wahome (for reasons which will become clear below, hereinafter referred to as “*Ex Parte* Applicant”). The Petitioner is the Deputy Speaker of Nyandarua County Assembly while the *Ex Parte* Applicant is the Speaker of the Assembly.

2. The relief the Petitioner is seeking against the *Ex Parte* Applicant in the Petition are follows:

- a) *A declaration that the actions of the Respondents in illegally and unprocedurally closing the County Assembly Offices in a bid to bar his intended impeachment was not only illegal but unconstitutional.*
- b) *A declaration that failure to give the members of the public adequate notice of his intention to close the County Assembly of Nyandarua offices was not only illegal but also null and void.*
- c) *An order of certiorari to quash the directive by the Respondent herein to close the offices of the County Assembly of Nyandarua.*
- d) *An order to declare the Respondent’s interference with the functions of the Petitioner illegal and unconstitutional.*
- e) *Any other relief that this Honourable Court may deem appropriate to ensure law, order and constitutionalism.*
- f) *The Costs of the Petition.*

3. Contemporaneously with the Petition, the Petitioner filed a Notice of Motion under Certificate of Urgency seeking urgent reliefs *Ex Parte*. The Petitioner’s Counsel appeared before the Judge in Nyahururu High Court on 17/12/2020 and obtained orders certifying the matter urgent and the following consequential order:

That pending the hearing and final determination of the Petition herein, this Honourable Court be and is hereby pleased to issue interim orders directing the Respondent to immediately reopen the County Assembly of Nyandarua Offices and cease and/or desist from interfering with the activities of the Applicant being the Deputy Speaker in performing his functions and roles to oversee the processing of the impeachment motion dated the 15th day of December, 2020 and tabled against the Respondent for his intended removal from the office of the Speaker of the Nyandarua County Assembly.

4. It would seem that following the grant of these prayers the Petitioner moved to cause gazetting of a special sitting for the hearing of a motion to impeach the *Ex Parte* Applicant. He caused to be published in the Kenya Gazette notices numbers 10693, 10694 and 10695 in the Kenya Gazette Vol. CXXII- No. 225 of 17th December, 2020 giving notice to all staff members of the County Assembly of Nyandarua to be present at work on 24/12/2020; giving notice of removal proceedings of the *Ex Parte* Applicant; and giving notice of a special sitting of the County Assembly on 24/12/2020. All the three notices are indicated to have been issued by the Petitioner.

5. Meanwhile, on 18/12/2020, the *Ex Parte* Applicant, having learnt of the Notices in the Kenya Gazette, approached the Nyahuru High Court with a Chamber Summons Application dated 18/12/2020 seeking, in the main, for leave to bring substantive Judicial Review Application to quash the Gazette Notices as well as to prohibit the removal proceedings. The exact prayers in the Chamber Summons are as follows:

1) *That the Honourable Court be pleased to certify this matter as urgent and its service be dispensed with at the first instance.*

2) *That pending inter parties hearing and determination of this Application, the Honourable Court be pleased to grant the Applicant an order of CERTIORARI and PROHIBITION to remove into the High Court for the purpose of its being quashed the gazette notices No. 10693, No. 10694 and No. 10695 in the Kenya Gazette Vol. CXXII – No.225 of 17th December, 2020.*

3) *That the Honourable Court be pleased to grant the Applicant and order of CERTIORARI and PROHIBITION to remove into the High Court for the purpose of its being quashed the gazette notices No. 10693, No. 10694 and No. 10695 in the Kenya Gazette Vol. CXXII – No. 225 of 17th December, 2020.*

4) *That pending the hearing and determination of the hearing of this Application an order do issue prohibiting and restraining the 1st, 2nd 3rd and 4th Respondents either by themselves, their agents and/or anyone claiming under them from interfering with the Applicant's exercise of his duty, power, responsibility and/or his discharge of his duties and/or mandate as the Honourable Speaker, Nyandarua County Assembly through usurping of powers, respectively.*

5) *That the Honourable Court be pleased to grant leave to the Applicant to apply for an Order of CERTIORARI and PROHIBITION to remove into the Honourable Court for the purpose of its being quashed the decision to remove the Applicant from the office of the Speaker Nyandarua County Assembly, and prohibit the 1st, 2nd and 3rd Respondents either by themselves, their agents and/or anyone claiming under them from interfering with the Applicant's entry and/or access to any part of the County Assembly Nyandarua County, and/or his discharge of his duties and/or mandate as the Honourable Speaker, Nyandarua County Assembly respectively.*

6) *That the leave so granted does operate as a stay of execution and operation of the gazette notices No. 10693, No. 10694 and No. 10695 in the Kenya Gazette Vol. CXXII-No. 225 of 17th December pending the hearing and determination of this Application.*

7) *That the cost of this Application be provided for.*

6. Counsel for the *Ex Parte* Applicant appeared and addressed the Judge in Nyahuru. The Learned Judge granted prayers 1 and 2 – certifying the matter urgent and granting leave to bring Judicial Review application – but ordered the *Ex Parte* Applicant to serve the Respondents and return for directions *inter partes* on 21/12/2020. The Learned Judge also ordered that Petition No. 5 be mentioned contemporaneously with the Judicial Review matter.

7. Meanwhile, having been served with the orders in the Petition, the *Ex Parte* Applicant filed a Notice of Motion dated 21/12/2020 seeking, in the main, for the setting aside of the orders entered *Ex Parte* in the Petition on 17/12/2020.

8. Counsel for the Petitioner, the *Ex Parte* Applicant, the Interested Party (County Assembly) as well as for the Respondents (except the Honourable Attorney General) appeared before the Learned Judge in Nyahuru High Court on 21/12/2020 as directed. During that session, the Learned Justice Kariuki recused himself from both suits for personal reasons. He directed that the matter be mentioned before the Regional Duty Court today.

9. When the parties appeared before me, I noted that the issues are the same and the parties are the same so, with the concurrence of the parties, I consolidated the two matters. The matters that had been reserved for consideration before the Court today are as follows:

a. Prayers 2, 3 and 5 in the Chamber Summons by the *Ex Parte* Applicant dated 17/12/2020.

b. The Preliminary Objection dated 21/12/2020 by the 1st and 2nd Respondents.

c. The Notice of Motion Application dated 21/12/2020 by the *Ex Parte* Applicant filed in the Constitutional Petition.

d. Prayer 3 in the Notice of Motion Application by the Petitioner in the Constitutional Petition dated 17/12/2020.

10. It became clear that the interim orders sought in the Consolidated Suit are quite intensely contested. I directed that given the fact that there is a Special Sitting of the County Assembly planned for tomorrow, 23/12/2020, the parties do address the Court on the single question whether temporary conservatory orders should issue restraining the Special Sitting scheduled for 24/12/2020 until the hearing *inter partes* of the conservatory orders in the Consolidated Suit.

11. All the parties' counsels addressed me on the question. I am grateful for their input and arguments. As stated the most urgent issue for determination as I see it is whether the Court should grant temporary conservatory orders and if so, what directions to give regarding the

hearing *inter partes* of the substantive applications for temporary relief pending the hearing and disposal of the Consolidated Suit.

12. The *Ex Parte* Applicant urged the Court to grant temporary conservatory orders on four main grounds:

a. First, that if the Special Sitting proceeds the Judicial Review Application would have been rendered nugatory since the Respondents have failed to follow the statutory timelines. In particular, the *Ex Parte* Applicant's lawyers argued that the Clerk is to be given five days to serve the Speaker after which the Speaker is given seven days to respond in writing. In this case, the *Ex Parte* Applicant's lawyers argued, the purported Notice was issued on 17/12/2020 and the Special Sitting scheduled for 24/12/2020 while the Clerk was served on 16/12/2020. Any removal proceedings based on this service, the lawyers argued, would be clearly unlawful under section 11 of the County Government Act as amended.

b. Second, the *Ex Parte* Applicant argues that only a Speaker can call for a special sitting and that the notices issued by the Deputy Speaker are per se illegal. As such, any action based thereon will be an illegality.

c. Third, the *Ex Parte* Applicant insisted that the Deputy Speaker is in office illegally anyway and therefore any actions based on his actions are legally suspect.

d. Fourth, the *Ex Parte* Applicant argued that irreparable damage would be suffered by him if the orders are not granted while the Respondents would not suffer any prejudice at all as they await the finalization of the suit. The Applicant relied on the William Kasait Case.

13. The advocate for the 1st Respondent powerfully framed his submissions on the decision by the Supreme Court in the ***Justus Kariuki Mate & another v Martin Nyaga Wambora & another [2017] eKLR*** where the Supreme Court, addressing itself to matters of impeachment by the legislative body expressed itself thus:

From the facts of this case, it is clear to us that the integrity of Court Orders stands to be evaluated in terms of their inner restraint, where the express terms of the Constitution allocate specific mandates and functions to designated agencies of the State. Such restraint, in the context of express mandate-allocation under the Constitution, is essential, as a scheme for circumventing conflict and crisis, in the discharge of governmental responsibility. No governmental agency should encumber another to stall the constitutional motions of the other. The best practices from the comparative lesson, signal that the judicial organ must practice the greatest care, in determining the merits of each case.

14. The 1st Respondent urged the Court to exercise extreme caution in interfering with the operations of another constitutional body especially when that body is exercising authority directly conferred on it by the Constitution. The Court, argued the 1st Respondent, should only interfere where it is clear that the other constitutional body is acting in a manner not contemplated by the Constitution or is acting illegitimately and contrary to the statute. In other words, there must be a constitutional issue involved before a Court would act a priori to interfere with the operations of another constitutional body. The better course, urged Mr. Wanyama, Counsel for the 1st Respondent, is to await the process to run its course and then approach the Court.

15. Mr. Wanyama argued that the *Ex Parte* Applicant is only arguing that there were minor breaches of the law and that this can be argued in a suit to quash any decision by the *Ex Parte* Applicant if he is dissatisfied with the outcome. He argued that the Speaker has actual notice of the motion he is facing and that he will have an opportunity to do a written submission and then try to persuade the County Assembly members that they should not remove him.

16. Finally, Mr. Wanyama asked the Court not to grant any discretionary orders to the *Ex Parte* Applicant because he has not acted with clean hands. He was referring to the Orders dated 21/12/2020 given in Milimani Constitutional Petition No. E242 of 2020. In that case, the Court gave orders suspending Gazette Notice No. 10695 – which is one of the Gazette Notices under review in the present case. Mr. Wanyama pointed out that the *Ex Parte* Applicant obtained those orders after he had already filed this matter in Nyahururu and failed to obtain *Ex Parte* orders. He argued that this was an attempt to steal a march on the Respondents which disentitles him to discretionary orders. Due to brevity of time, I will not, in this ruling, explain the relationship of Petition E242 of 2020 with the present Consolidated Suit.

17. The other Respondents, in the main, agreed with Mr. Wanyama's submissions. They stressed that the law contemplated that there would be proceedings to remove a Speaker of a County Assembly if necessary and that a Speaker facing his own removal could not have been intended to superintend his own removal; that the law contemplated that another party – in this case the Deputy Speaker would do so. It is, therefore, proper that the notices were issued by the Deputy Speaker. They each pointed out that the Speaker has acted in collusion with the Acting Clerk to frustrate the process so as to ensure the Notice of Motion to remove the Speaker does not see the light of day. Each pointed out that the Speaker must be taken to have actual notice of the Notice of Motion to remove him and that he will get a chance to defend himself in the Assembly and/or challenge the decision in Court afterwards. They urged the Court to be very cautious in interfering with the operations of the Legislative arm of government.

18. Mr. Kipkoeh for the Interested Party, however, supported the grant of temporary interlocutory orders. He pointed out that the statutory timelines have not been followed in this case and that the statutory procedures for the Special Sitting have not been followed. He asked the Court not to reward the impunity displayed by the movers of the motion but to strike a blow for the Rule of Law.

19. As intimated above, the only question I propose to answer today is whether to grant temporary conservatory orders pending the full ventilation of the parties' arguments on whether conservatory orders should be issued pending the hearing and determination of the Consolidated Suit. This step is made necessary by the fact that the Special Sitting to consider the Notice of Motion to remove the Speaker is scheduled for tomorrow. Needless to say the parties differed wildly on the whether this is an appropriate case for grant of temporary relief. Though I am considering prayers for temporary relief pending consideration of prayers for interlocutory relief pending the hearing of the Consolidated Suit, the principles to be considered are the same. I would begin by agreeing with Mr. Wanyama Counsel for the 1st Respondent that the proper mindset to have in considering the question is that depicted by the Supreme Court in the ***Kariuki Mate Case***.

20. In *Freshco International Limited & Another v Kenya Plant Health Inspectorate & 2 Others* [2018] eKLR, I dealt with the question of when a Court would order that the grant of leave to bring Judicial Review Proceedings operate as stay and held as follows:

As I understand our applicable case law, for the Applicants to succeed in persuading the Court to grant the order that the leave to bring Judicial Review Application should serve as stay of the decisions and actions of the 1st Respondent, they need to demonstrate at least three things:

a. That the intended Judicial Review Application is arguable or that it raises a prima facie case;

b. There is a real risk that the Applicants will suffer irredeemable or serious prejudice as a result of the alleged illegal or unlawful action by the Respondents. See Centre for Rights, Education and Awareness (CREAW) & 7 others vs. The Hon. Attorney General, Nairobi HC Pet. No 16/2011, Muslims for Human Rights (MUHURI) & 2 others vs. The Attorney General & Judicial Service Commission, Mombasa HC Pet. No. 7 of 2011 and V/D Berg Roses Kenya Limited & Another vs. Attorney General & 2 Others [2012] eKLR. The prejudice to be suffered must be one which is preventable and one which, but for the action sought by the Court, would “render the Applicant helpless or hapless in the eyes of the wrong to be visited upon him.” See The Centre for Human Rights and Democracy & Others vs. The Judges and Magistrates Vetting Board & Others Eldoret Petition No. 11 of 2012.

c. Public interest concerns accord with the grant of the orders sought. See Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 Others, S.C. Application No. 5 of 2014.

21. The Court is ordinarily reluctant to scrutinize *ex ante* the internal operations of another arm of government where such an arm is acting with powers textually granted to it by the Constitution or written law except where it can be shown by clear and undisputed evidence that the organ is conducting itself illegally or beyond its powers. The better course is for the organ to conduct and complete its operations subject to the Court’s supervisory powers to ensure that all procedures – including the principles of fairness and natural justice are faithfully followed and that the outcome reached by the organ is legal, proportionate and within the law.

22. Differently put, the standard that the Court uses to restrain *ex ante* another organ to act within its purview and powers as textually granted to it by the Constitution or statute and the demonstration of alleged illegality, unfairness or un-procedural nature of the operations or conduct is way higher than when the Court is reviewing a decision of the organ *ex post* for procedural fairness, Wednesbury-unreasonableness or on a disproportionality analysis. This is because in the former case, the Court is being called upon to prohibit another government organ from doing that which it is by law permitted to do and the potential for mischief and serious peril to orderly government operations is quite high while in the latter case any relief can be properly structured and ordered to avoid disruptions in government operations. Additionally, a party alleging potential infringement of his or her rights still has an opportunity to un-do any decisions made through an *ex post* judicial review while a party who has succeeded in getting stay orders against proper government operations *ex ante* has no capacity to make good or unmake the disruption caused by those orders.

23. In the present case, the *Ex Parte* Applicant forcefully makes the claim that the intended removal proceedings are illegal, unprocedural and are being conducted in complete violation of the law and that they ought to be stopped forthwith. In particular, the *Ex Parte* Applicant makes three claims:

a. That the Petitioner had no legal authority to issue the Gazette Notices that he issued; and that, therefore, the planned special sitting for 24/12/2020 is unlawful.

b. That the Court orders issued on 17/12/2020 were issued as a result of material non-disclosure and fraud and should be set aside and that the Petitioner (Deputy Speaker) is in office illegally.

c. That, in any event the planned Special Sitting is illegal because it violates the statutory timelines and statutory procedures to be followed for a Motion to remove a Speaker.

24. I must be careful at this point not to prejudge the issues and not to come up with anything other than very provisional conclusions about the facts, circumstances and the law. Doing so, I find, provisionally, that the first two positions taken by the *Ex Parte* Applicant to be arguable but not overwhelmingly so to warrant the exceptional relief of constitutional conservatory orders (pending *inter partes* hearing for interim relief) to prevent a political arm of government from conducting its affairs *ex ante*.

25. However, it is the third set of arguments which I find troubling. Section 11 of the County Government Act as amended provides a clear procedure and provides timelines to be used in a Motion to remove a Speaker. For the County Assembly to enjoy the presumption of constitutionality of its operations and legality of its operations, it must demonstrate that it has strictly followed the procedures and timelines. The procedures and timelines provides that:

a. The Notice of Intention to remove the Speaker must be given in writing to the Clerk of the County Assembly and must be signed by a third of all members and state the grounds of removal.

b. The Clerk is then given five days within which to notify the Speaker and invite him to respond in writing to the Notice of Motion.

c. The Speaker is then given seven days within which to file his response in writing.

26. In the present case, even if we were to postpone determination of the question whether the Deputy Speaker has legal competence to call for a Special Sitting (which I hereby do pending full ventilation of the question), there is no demonstration that the County Assembly and or

the movers of the Motion have followed the letter or spirit of the law as strictly contemplated in the statute. The reason the Clerk is given five days to serve the Speaker is to obviate the questions present in the instant case whether the Speaker was already served and when exactly he was served. Similarly, the reason the Speaker is statutorily given seven days to respond in writing is obviate the question of when it can be said that the Speaker had adequate notice for purposes of determining the administrative fairness of the decision. The only way to eschew all these questions is for a County Assembly which is considering a Motion to remove a Speaker of the Assembly to impeccably follow the statutory timelines and demonstrate that it has done so.

27. As things stand now, I am not persuaded that the timelines have been followed. During arguments, Mr. Kipkoech, Counsel for the County Assembly, conceded that the Notice of Motion was served on the Clerk on 16/12/2020. The time for service on the Speaker started running on that day. It follows that the scheduled Special Sitting on 24/12/2020 will run afoul of the statutory timelines. This is not a technicality, a formal fetish or a minor breach; it is a substantive matter. The statutory scheme was established to ensure the fairness of the removal proceedings. On this score alone, I do consider it appropriate to issue conservatory orders restraining the County Assembly from convening tomorrow, 24/12/2020 to consider the Notice of Motion to remove the Speaker of the County Assembly.

28. I have been careful not to make any other conclusions of law or fact whether provisional or not. Those will have to await the *inter partes* hearing. Due to the nature of the issue and the public interest involved, I direct that the *inter partes* hearing be expedited. To accomplish this, I direct as follows:

- a. All the issues for consideration listed in paragraph 9 above will be heard contemporaneously by way of Written Submissions followed by oral highlighting.
- b. All the proponents for the different orders will have four days from the date today to file and serve their written submissions while the Respondents to the different orders will have four days from the date of service to respond to the written submissions.
- c. There will be oral highlighting on 31/01/2020. A ruling will be issued shortly thereafter.

29. In closing I must make one final remark. The existence of the Court Order in *Milimani Petition No. 242 of 2020* was brought to my attention during oral hearings. I got sight of it when I retired to write this short ruling as parties waited to rejoin the video-link.

Due to my disposition of the matter at hand, I did not base my determination on the existence of that Court order. Arguments about the import of that order may, however, be relevant during the *inter partes* hearing stage for substantive interim relief.

30. Orders accordingly.

Dated at Nairobi this 22nd day of December, 2020

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JOEL NGUGI

JUDGE