



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CONSTITUTIONAL PETITION NO. 1 OF 2019

IN THE MATTER OF ARTICLES 10, 19, 22, 23, 27, 28, 38, 47,174, 232,236, 258 (1) AND 259 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF THE FAIR ADIMINISTRATIVE ACTION ACT

AND

IN THE MATTER OF LEADERSHIP AND INTERGRITY ACT 2012

AND

IN THE MATTER OF THE ILLEGAL AND UNLAWFUL REMOVAL OF HON NURA DIBA AS CHAIR BUDGE, FINANCE & APPOINTMENTS COMMITTEE OF THE ISIOLO COUNTY ASSEMBLY

BETWEEN

HON NURA DIBA.....PETITIONER

AND

THE SPEAKER ISIOLO COUNTY ASSEMBLY.....1ST RESPONDENT

THE CLERK ISIOLO COUNTY ASSEMBLY.....2ND RESPONDENT

HON ISAAK ABDUB FAYO.....3RD RESPONDENT

HON ABDI DUBA WARIO.....4TH RESPONDENT

RULING

1. Before me is a Constitutional Petition brought pursuant to **Articles 10,19,22,23,27,28,35,38,47,174,232,236,258 (1), and 259 of the Constitution of Kenya (2010)** and filed in court on 25th January 2019, in which the Petitioner seeks the following reliefs;

a) A declaration be and is hereby issued that the purported replacement of the Petitioner as the Chair Budget, Finance & Appointments Committee by any and/or each and all the Respondents is unconstitutional, illegal, unreasonable, irrational and procedurally unfair.

b) A declaration that the purported election/replacement of the petitioner by the 4th respondent as the Chair Budget, Finance & Appointments Committee has resulted in the violation and infringement and threatens to violate and infringe the Petitioner fundamental rights and freedoms under Article 27 (1) (2) and (3), 28, 38 (3) (c) and 47 (1) of the Constitution.

c) A declaration that the actions and conduct of each and all the Respondents contravenes Article 2 (1) and (2), 10 (2), 35, 232 and 236 of the Constitution.

d) A conservatory order to stay the decision of the 1st, 2nd and 3rd Respondents herein, purporting to remove the Petitioner as the Chair Budget, Finance & Appointments Committee of the Isiolo County Assembly illegally replacing him with the 4th respondent.

e) Any other or further order the Honourable court deems fit to grant.

f) Costs be provided for.

2. Before the Petition could be heard on its merit or otherwise, the Respondents filed a Notice of Preliminary Objection on 4th February 2019, contending inter alia that the court lacked jurisdiction to entertain this matter and that further the Petition was fatally defective for non-joinder of the budget, finance and appropriation committee of the Isiolo County Assembly as well as the County Assembly of Isiolo.

3. In response to the Preliminary Objection, the Petitioner filed grounds of opposition on 11th February 2019, contending inter alia that the same was unmeritorious and untenable for the reasons inter alia that the same offends the authority stamped in Republic v Benjamin Washiali, Majority Chief Whip, National Assembly & 4 Others Ex-parte Alfred Kiptoo Keter & 3 Others [2018] eKLR where Odunga J held that in matters where violation or threatened violation of the Constitution was alleged, the court ought to be slow to summarily terminate such proceedings unless it was clear beyond par adventure that the matter is beyond resuscitation and that further the same offends the mandatory provisions of Article 159 of the Constitution 2010.

4. I have carefully considered the Notice of Preliminary Objection, the Grounds of Opposition thereof and the authorities relied upon by the parties. The law on Preliminary Objections is now well settled. See the opinion by **Law JA** on this point in the case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd (1969) EA 696* when he rendered himself thus:

“So far as I’m aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

Similarly **Sir Charles Newbold** in the same case stated that:

“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. This improper practice should stop.”

5. Save for the Respondents generally stating that this court did not have jurisdiction to entertain this matter, they did not lay a basis for this proposition and neither did they state why the court did not have jurisdiction. The Petitioner in the instant Petition is seeking inter alia **a declaration that the actions and conduct of each and all the Respondents contravenes Articles 2 (1) and (2) 10 (2), 35, 232 and 236 of the Constitution.** Article 165 of the Constitution of Kenya establishes the High Court. Sub Article (a) thereof provides that the High court has unlimited original jurisdiction in criminal and civil matters with sub Article (b) thereof further providing that the High Court has jurisdiction to determine the question whether a right or fundamental freedoms in the Bill of Rights has been denied, violated, infringed or threatened. The contention by the Respondent that the court lacked jurisdiction is therefore without basis since it was not stated in what ways that the court lacked jurisdiction. Similarly the authorities relied upon by the Respondents are not relevant to the instant case. For example in *PETER WARUTERE & ANOTHER V SPEAKER COUNTY ASSEMBLY OF NAIROBI & 3 OTHERS [2016] eKLR*, the Petitioner in that case who had been removed as the Chairman of the County Assembly Committee on trade, tourism and Cooperative Development had contended that his removal was contrary to the rules of natural justice as well as fair administrative action which is a complaint similar to the present case. The substance of the complaint was interrogated and a determination made through viva voce evidence. The reason for dismissal was not for lack of jurisdiction rather it was because there was no proof that the procedure used to impeach was unfair. This authority does not support the argument raised in the preliminary objection that this court does not have jurisdiction to entertain the complaint by the petitioner that his fundamental and freedoms under article 27(1) (2) and (3), Article 28, 38 (3) and 47(1) of the constitution have been violated by the Respondent.

6. Similarly, in paragraph 26 of the authority of *CAROLINE MUNANIE MUSEE V MAKUENI COUNTY ASSEMBLY & 2 OTHERS [2014] eKLR* relied upon by the Respondents the judge held :-

“ This court mandated by the law is not to enter by stealth into the mandate and role of the County Assembly. Its duty will be merely to observe that the procedure of doing business is followed and does not contravene the constitution in any manner. This court must only focus on the procedure adapted. Where the court finds that the Assembly breached the constitution the court must intervene to ensure the constitution is upheld”

7. The petition in the above authority was dismissed for lack of proof for breach of constitutional rights and not on account of lack of jurisdiction.

8. In *NATHANIEL NGANGA REUBEN V SPEAKER, MACHAKOS COUNTY ASSEMBLY & ANOTHER [2016]*, Justice Nyamweya held as follows :

“ it is the correct position that court should not ordinarily interfere with the exercise of legislative authority or executive functions of a constitutional body in line with the doctrine of separation of powers and ought to exercise judicial restraint. However, where a question arises whether an action is inconsistent with the constitution or is passed in contravention of the constitution the High court is empowered to determine such an issue.”

9. The petition was dismissed for reasons among others the lack of jurisdiction to interpret standing orders and application of standing orders in the assembly which is a preserve of the speaker.

10. With regard to the contention that the Petition was fatally defective for non- joinder of the Budget, Finance and Appropriation Committee of the Isiolo County Assembly as well as the County Assembly of Isiolo. It is my considered opinion that failure to enjoin the said parties in this Petition cannot be said to be pure point of law that can dispose off the Petition. In any event **Rule 5 (b) and (c) of the Constitution of Kenya (Protection of Rights and Fundamental freedoms) Practice and Procedure Rules 2013**, provide as follows;

(b) 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.

Rule (c) thereof further provides; 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.

11. In consideration of the analysis of the authorities relied upon in support of the preliminary objections this court finds that the preliminary objection filed in court on 4th February 2019 to be without merit and cannot stand and the same is overruled with costs to the petitioner.

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HON. A.ONG'INJO

JUDGE

RULING SIGNED, DELIVERED AND DATED THIS 27TH DAY OF FEBRUARY 2019.

In the presence of:

CA: Kinoti

Petitioner :-Mr Kiogora Mugambi for Petitioner

1ST Respondent:

2nd Respondent:

3rd Respondent:

4th Respondent:Mr Muriuki advocate

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HON. A.ONG'INJO

JUDGE

Mr Muriuki

I seek for leave to file further supplementary affidavit. I had been served with an affidavit raising several salient issues. I pray that application be canvassed by viva voce evidence. Mr Kiogora can have 21 days to file submissions.

Mr Kiogora

I can have 21 days.

Order:

The petition to be canvassed by way of written submissions. Petitioner has 21 days to file and serve written submissions. Upon service the Respondents will have 21 days to file and serve written submissions. M. 22.5.2019 to highlight submissions. Copies of ruling to be supplied to parties upon paying copying charges.

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HON. A.ONG'INJO

JUDGE