



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CONSTITUTIONAL PETITION NO. 8 OF 2018

AMOS MUTHUI MUCHIRI.....PETITIONER

-VERSUS-

THE SPEAKER,COUNTY ASSEMBLY OF NYERI.....1ST RESPONDENT

THE COUNTY ASSEMBLY NYERI

COUNTY GOVERNMENT.....2ND RESPONDENT

THE CLERK

COUNTY ASSEMBLY OF NYERI.....3RD RESPONDENT

SAMUEL GICHUKI KARIUKI THE DEPUTY

SPEAKER COUNTY ASSEMBLY OF NYERI.....4TH RESPONDENT

JUDGMENT

Standing Order No. 14 of the Nyeri County Assembly's Standing Orders provides for the election of a deputy speaker, the manner in which that election shall be conducted and the replacement of the deputy speaker in the event his office falls vacant before the expiry of the County Assembly's term; it reads as follows:

14.(1) As soon as practicable after the election of a Speaker following a General Election, a Deputy Speaker shall be elected.

(2) The Speaker shall preside over the election of the Deputy Speaker under paragraph (1).

(3) If the office of the Deputy Speaker falls vacant at any time before the end of the term of the Assembly, the County Shall, as soon as practicable, elect a member to that office.

(4) The procedure for electing a Deputy Speaker shall, with necessary modifications, be the same as that prescribed for the election of the Speaker.

In its first sitting on 7th September, 2017, soon after the General Elections of August, 2017, the Nyeri County Assembly put this particular Order to test and elected the 4th Respondent as its Deputy speaker; his election was hot on the heels of the election of 1st Respondent as the County Assembly Speaker.

The Petitioner was aggrieved by not only the fact of the election of the 4th Respondent as the Deputy Speaker but also by this Standing Order through which he was elected and assumed office. His grievances have been articulated in the present petition dated 14th June, 2018 and filed in this Honourable Court on 18th June, 2018; he subsequently amended it on 26th June, 2018 and filed the amended version on 31st July, 2018. He has sought specific declarations from this Court to the effect that, first, the Standing Order No. 14 establishing the office of the Deputy Speaker is unconstitutional; secondly, the emoluments, payments, salaries, allowances, income and privileges accruing to the that office are unconstitutional; and, thirdly, the office of the Deputy Speaker itself is unconstitutional. The Petitioner also seeks for the costs of the petition and any other relief that this Court may deem fit to grant.

Amongst the provisions of the law the Petitioner has invoked in support of his petition are articles 2, 23, 175 and 178 of the Constitution; and, sections 7, 9, 13 and 14 of the County Governments Act, cap. 265.

He swore two affidavits the first which verified the contents of his petition while the second one exhibited the Hansard of the County Assembly's proceedings of 7th September, 2017 in which the 4th Respondent was elected as the Deputy Speaker.

The Petitioner's dispute is primarily centered on the proper interpretation of the law with particular reference to article 178 of the Constitution. The existence of the County Assembly's Standing Orders and the election of the Deputy Speaker in accordance with those Orders on the material date are facts basic to the petition but which are, by and large, uncontested; I suppose it is for this reason that the petitioners' affidavits are relatively terse.

If I can summarise his case, at least as much as I can discern from his petition, the Petitioner's major bone of contention is this: unlike in the National Assembly and Senate where the offices of the Deputy Speaker are expressly provided for in the Constitution, there is no such express provision for the Office of Deputy Speaker in County Assemblies and therefore it is unconstitutional for the County Assembly of Nyeri to create the position of the Deputy speaker when all that the Constitution provides for is the Office of the Speaker.

The respondents opposed the petition and to that end filed both grounds of objection and a replying affidavit; the latter document was sworn by the 3rd respondent on his own behalf and on behalf of the rest of the Respondents. A casual perusal of the affidavit suggests that the grounds of objection would have sufficed since, apart from denying that the petitioner has demonstrated how his constitutional rights have been infringed, the rest of the 'depositions' in the affidavit are largely matters of law which, in any event, both counsel for Petitioner and the Respondents covered in large measure in their rival submissions.

In his submissions, Mr Muhoho, the learned counsel for the Petitioner, cited two decisions by this Court in which the question of the constitutionality of the Office of the Deputy Speaker in the County Assemblies has been discussed. In **Nathanael Nganga Reuben Versus Speaker, Machakos County Assembly & Another (2016) eKLR**, Nyamweya, J held article 178 of the Constitution does not create a substantive position of the Deputy Speaker. Neither does section 9(4) and (5) of the County Governments Act, nor section 21(3) and (4) of the Elections Act, cap. 7 create such a position. Indeed, the learned judge went further to declare this latter provision in the Elections Act unconstitutional to the extent that it provides for election of a deputy speaker in a County Assembly.

This decision was followed by Gikonyo, J. in **Douglas Bundi Kirimi versus The Speaker of County Assembly of Meru and Another in Meru High Court Petition No. 26 of 2017**; in that case the learned judge opined further that only persons elected in accordance with article 178(1) and 178(2)(b) can exercise the functions of the Speaker. In his Lordship's words, "*any other person by whatever name called will only pretend to exercise power and duties of speaker; and of course, in violation of the Constitution*".

The learned judge opined that while article 106 of the Constitution expressly provides for the office of the Deputy Speakers in both Houses of Parliament; that is, the National Assembly and the Senate, no such express provision exists with regard to County Assemblies. Taken to its logical conclusion, the argument appears to be that in the absence of an express provision for the office of the Deputy Speaker in County Assemblies, it must have been the intention of the Constitution not to have this particular office in these assemblies.

Mr Muhoho asked me to follow these decisions and similarly declare the impugned Standing Order unconstitutional.

On his part, Mr Ngunjiri, the learned counsel for the respondents submitted that if the Constitution is read in its entirety, as it ought to, rather than consider its various provisions in isolation, it will be discovered that there are several other positions of deputies that have been created without any express provisions in the Constitution creating them. In other words, they are deemed to exist, if not for anything else, to give life to the Constitution; in support of this submission counsel referred me to the Supreme Court's advisory opinion **in re Speaker, County Assembly of Embu (2018) eKLR**. In that case, opinion was sought from the Supreme Court on the process of filling the position of Deputy Governor if he assumed the office of the Governor following the impeachment and removal from office of the incumbent Governor; neither the Constitution nor any other law catered for such an eventuality.

In its opinion, the Supreme Court stated that as the custodian of the integrity of the Constitution, it bears the obligation to interpret the Constitution holistically in order to achieve its declared principles and to ensure that other organs of the government are able to discharge their mandates in line with the Constitution itself.

The court explained '*holistic interpretation of the Constitution*' to mean "*interpreting the constitution in context*"; that is, "*it is the contextual analysis of a constitutional provision, reading it alongside other provisions, so as to maintain a rational explication of what the Constitution must be taken to mean in light of its history, of the issues in dispute and of the prevailing circumstances. Such scheme of interpretation does not mean unbridled extrapolation of discrete constitutional provisions into each other, so as to arrive at a desired result.*"

With that, the Supreme Court held that despite the Constitution being silent on the filling of the vacant position of the Deputy Governor once the incumbent one assumes the Governor's office, it is certainly not the intention of the Constitution that the office of the Deputy Governor should remain vacant until the next cycle of General Elections. Drawing an analogy from article 149. (1) which deals with the process of filling the position of the Deputy President if it falls vacant, the Court concluded that the office of the Deputy Governor would be filled in the same fashion. That article reads as follows:

149. (1) Within fourteen days after a vacancy in the office of Deputy President arises, the President shall nominate a person to fill the vacancy, and the National Assembly shall vote on the nomination within sixty days after receiving it.

Similarly, so the Court held, that in the absence of any law, where a vacancy occurs in office of the Deputy County Governor, the Governor shall within fourteen days of such a vacancy, nominate a person to fill it, irrespective of how the vacancy arose. Like the National Assembly,

the County Assembly is to vote on the nomination within sixty days of receiving it.

In coming to this conclusion, the Supreme Court effectively implied certain provisions in the Constitution relating to filling of a vacancy in the office of the Deputy Governor.

Counsel for the respondents urged this Court to adopt the reasoning behind the Supreme Court's opinion and find that it is not the intention of the Constitution that there shouldn't be a substantive office of the Deputy Speaker in the County Assemblies.

When I critically consider article 178. (2) (b) of the Constitution, I am convinced that I need not go that far because it is evident that the article contemplates someone who deputises the Speaker and who presides over the assembly sittings whenever the substantive holder of that office is away. For better understanding, it is necessary that I quote the entire article here; it reads as follows:

178. (1) Each county assembly shall have a speaker elected by the county assembly from among persons who are not members of the assembly.

(2) A sitting of the county assembly shall be presided over by—

(a) the speaker of the assembly; or

(b) in the absence of the speaker, another member of the assembly elected by the assembly.

(3) Parliament shall enact legislation providing for the election and removal from office of speakers of the county assemblies.

In my humble view, article 178. (2) (b) is self-explanatory; it expressly provides for someone to stand in for the Speaker and undertake the core responsibility of his office, which is presiding over assembly proceedings, whenever the Speaker is away, for one reason or another. That the person is elected rather than selected or arbitrarily appointed goes to show the importance the Constitution attaches to the role of a member so elected.

It is acknowledged, however, that apart from speaking of "an elected member of the assembly" to perform the functions of a Speaker, in the latter's absence, the Constitution does not give any particular description of the elected member. To me, nothing much should turn on this omission; the Constitution rather leaves it open to County Governments, or their assemblies for that matter, to give whatever description they deem fit to the member so elected. In the present case, the County Assembly of Nyeri may have found it opportune to refer to such person as the "Deputy Speaker" and it may be forgiven for falling for such description because, for all intents and purposes, he deputises the Speaker. On a more substantive note, the description has been adopted by the Elections Act, to which I will return in due course. This description, or any other description by which an 'elected member' may be christened, need not create any controversy; what matters, in my view, is the role he plays. If I have to take this argument to its logical conclusion, it follows that the description of the elected member as the "Deputy Speaker" by any provision in the Elections Act, or any other legislative Act does not, *ipso facto*, render the provision or the legislative Act unconstitutional merely because the Constitution does not expressly describe him in the same terms. For the same reason, I would not hold those provisions unconstitutional merely because there is another provision in the Constitution, in this regard article 106, that expressly provides for the Deputy Speaker in the Senate and in the National Assembly and therefore that the same description ought to have been adopted in article 178 if a deputy speaker was warranted. I say so because of a further reason that the core task for which the Deputy Speakers are elected to perform in Parliament is no different from that which 'the elected member' is elected to undertake in the County Assembly. His office does not necessarily become unconstitutional simply because the legislative instruments have chosen to describe him as a 'deputy speaker' when the Constitution itself has not given him such description.

If I am mistaken in my interpretation of article 178. (2) (b) I am convinced that I still have refuge in the opinion of the Supreme Court in **re Speaker, County Assembly of Embu (2018) eKLR (supra)**; by parity of reasoning, it certainly cannot have been the intention of the Constitution that the Speaker of a County Assembly cannot or shouldn't have a substantive deputy. To be precise, there is nothing in article 178 that suggests that the office of the Deputy Speaker is illegitimate; on the contrary, that provision of the law not only recognises the possibility of having such an office but it also prescribes who can hold and, how he can ascend to that office.

Talking of ascendancy to the office of the Deputy Speaker, the Constitution itself is clear; that it is by election. The Election Act, on the other hand, carries this theme forward in **section 21** thereof, which provides for, among other things, the election of the Assembly Speaker and, for our purposes, the Deputy Speaker; in its pertinent part, it says as follows:

21. Election of county assembly speaker

(1) The speaker of a county assembly shall be elected by each county assembly in accordance with the Standing Orders of the county assembly, from among persons who are qualified to be elected as members of a county assembly but are not such members.

(2) For the purpose of the election of the speaker of the county assembly after the first election under the Constitution, the procedure set out in the First Schedule shall apply.

(3) The deputy speaker of a county assembly shall be elected from among persons who are members of that county assembly.

(4) The First Schedule shall, with necessary modifications, apply to the election of the deputy speaker after the first election under the Constitution.

(5) ...

(a) ...

(b) ...

(c) ...

(d) ...

(e) ...

(f) ...

(g) ...

(h) ...

(i) ...

(j) ...

The effect of this provision, in my humble opinion, is to give effect to article 178. (2)(b) of the Constitution; it provides such details as to when and how the Speaker and his deputy are elected. Of particular relevance to the case at hand is section 21 (3) and (4) which provides in no uncertain terms the election of a deputy speaker. I do not, for a moment, find this provision to be inconsistent with article 178. (2) (b) of the Constitution; if anything, section 21(3) largely mirrors article 178. (2) (b) of the Constitution. In my humble opinion, this provision in the Elections Act does no more than provide the details of how to give effect to article 178. For instance, it prescribes who is eligible for election as the deputy speaker; it prescribes how the elections shall be conducted; and for the first time, it describes the person the Constitution calls “the elected member” as the “Deputy Speaker”.

I do not think it is necessary to give any justification why section 21 of the Election Act is more detailed on the election of the Speaker and his deputy than the Constitution save to say that, in very basic terms, the Constitution is the primary legal framework in which all other legislative instruments, both primary and subsidiary, fit; the finer details, in those instances where details are necessary for the practical application of the Constitution, are to be found in the legislative instruments themselves. These instruments amplify, so to speak, what the Constitution itself says and like any other good amplifier they can only echo that which the Constitution sounds out and nothing more.

There is another angle to this provision of the election of the deputy speaker. The reason for any election is because there are bound to be several competitors one of whom must emerge a victor at the completion of the exercise. I suppose it is for this reason that there are stringent rules or regulations that govern this exercise. Being such an elaborate event, it cannot be that every time the substantive speaker leaves the chair and an ‘elected member’ has to step in, elections have to be conducted to find a suitable member amongst members of the Assembly to hold the Speaker’s brief. Assuming the Speaker has to excuse himself from the chair for two or three or even more times a day and, the speaker being only human, such possibility is not that remote, it will obviously be cumbersome and time wasting to conduct elections for a stand-in speaker for as many times; this certainly cannot have been the intention of the Constitution. It is for this reason, I find section 9. (4) of the County Governments Act to be more restrictive than the Constitution itself might have intended if at all it suggests that an acting speaker has to be elected every time the substantive Speaker is way. That section reads as follows:

9. (4) At any time in the absence of the speaker of the county assembly or in matters that directly affect the speaker, the county assembly shall elect a member to act as speaker as contemplated under Article 178. (2)(b) of the Constitution.

One may interpret this section to restrict election of what it, in its own words, is ‘an acting speaker’ to as many times as the substantive speaker may be absent unless, of course, the ‘acting speaker’ is to act for the rest of the term of the assembly. For reasons I have stated, I doubt this could have been the intention of the Constitution. However, I would hesitate to fault this section summarily because it is also capable of being interpreted to mean that the County Assembly shall always have, amongst its composition, an elected member who would always be called upon to stand in for the speaker in circumstances contemplated under this section. I would endorse this latter interpretation precisely for the reason that it is not only consistent with article 178. (2)(b) but also because any other interpretation would lead to absurd results.

I am of the humble view that, the election of the person who will be called upon to perform the functions of the speaker in the absence of the speaker himself can only be done once, at the beginning of the new term of the County Assembly. As far as I understand article 178. (2)(b), the Constitution presupposes the existence of an “elected member” ready to step in the shoes of the Speaker any time the latter is absent as soon as the assembly is inaugurated. I cannot read any other meaning from the words, “***in the absence of the speaker, another member of the assembly elected by the assembly***”. (underlining mine). I do not read this provision to imply that the election is a future event, so that the “acting speaker”, can only be elected after the departure of the substantive speaker or after his absence has been brought to the attention of the Assembly. *A fortiori*, being the business of the assembly, it is only logical that the Speaker himself will preside over the election of his deputy, or a person to preside over the sittings while he is away.

I have to conclude by going back to where I began from and note that Standing Order No. 14 of the Nyeri County Assembly only gives practical effect to article 178. (2)(b) of the Constitution and section 21. (3) of the Elections Act to the extent that it prescribes how the person contemplated under that article assumes office; it is not true that, in that regard, it creates an office which does not, otherwise, exist. In a

nutshell, I find the Oder to be in tandem with the Constitution and the Elections Act.

Inevitably, I have to hold that the office of the deputy speaker in the County Assembly is constitutional and that the 4th respondent was validly elected into it. His remuneration and any other fringe benefits attached to that office are catered for by the Salaries and Remuneration Commission in the Gazette Notice No. 6518 of 7th July, 2017 pursuant to the powers conferred upon it by article 230. (4) of the Constitution and therefore, there is nothing unconstitutional about them.

In the ultimate, I do not find any merit in the petitioner's petition and it is hereby dismissed. Parties will bear their respective costs. It is so ordered.

Dated, signed and delivered in open court this 22nd February, 2019

Ngaah Jairus

JUDGE