



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERICHO

CONSTITUTIONAL PETITION NO 6 OF 2018

EDITH CHEPKOECH KAPTICH.....1ST PETITIONER

ANN CHEPKORIR TUMM.....2ND PETITIONER

ERICK KIPSIGEI KOSKEY.....3RD PETITIONER

VERSUS

THE COUNTY ASSEMBLY OF KERICHO.....RESPONDENT

JUDGMENT

1. The Petitioners are nominated members of the county assembly of Kericho and also members of the Justice and Legal Affairs Committee, Information Technology and E-Government Committees of the county assembly respectively. As members of the above committees, they were invited to London to attend a status conference on a case, the Kipsigis Talai v FCO at the Temple Gardens Chambers pursuant to a letter addressed to the Speaker of the County assembly by J.K. Bosek and Co. Advocates. The petitioners had thereafter held several formal and informal meetings at the county assembly on reasons why they ought not to attend the status conference. It appears, however, that despite these meetings, they did travel to London for the status conference.

2. Consequent upon their travel to London for the status conference, the respondent removed them from their positions as members of the committees above stated. The petitioners have therefore filed the present petition in which they allege that the procedure used by the respondent to remove them from the said committees affects their positions as nominated members of the county assembly.

3. The petitioners have filed the petition against the respondent, a public organ established under Article 177 of the Constitution and whose functions are provided for under Article 185 of the Constitution.

4. The facts forming the basis of the petition are that in a letter dated 27th June 2018, the firm of J.K. Bosek and Company Advocates wrote to the Clerk of the county assembly requesting that members of the Justice and Legal Affairs Committee and two staff members from the legal team be cleared and released from the county assembly to enable them attend a status conference on the case of Kipsigis Talai v FCO at the Temple Garden, London in the United Kingdom. The conference was scheduled to take place between 30th July to 3rd August 2018.

5. On 10th July 2018, the Clerk of the county assembly wrote to the Principal Secretary at the Ministry of Devolution requesting that the petitioners and other members of the Justice and Legal Affairs Committee, including the two staff members of the legal team, be given travel clearance to enable them travel to attend the conference. The team travelled to the United Kingdom as scheduled. It is not clear from the pleadings what interest the petitioners had in the case.

6. On 2nd August 2018, the respondent tabled a motion to discuss and remove the petitioners from the committees and proceeded to remove them. The petitioners contend that the tabling and discussion of the motion to remove them did not accord them fair administrative action as it was not done in a procedural manner in line with the standing orders of the Kericho county assembly, the Fair Administrative Action Act and the Constitution of Kenya. They therefore pray for the following orders:

1. A declaration that within the intendment of Article 10 of the Constitution, the Respondents are bound by the key national values and principles, to have regard to human dignity, equity, social justice, inclusiveness, equality and human rights.

2. A declaration that within the intendment of Article 28 of the Constitution the Respondents are bound to respect and protect the inherent dignity of the Petitioners.

3. A declaration that within the intendment of Article 35(1) of the Constitution te Respondents are bound to release all

documents pertaining to the reasons and justification of the tabling of the motion for removal on 2nd August 2018.

4. A declaration that within the intendment of Articles 47(1) of the Constitution, the Respondents are bound to provide administrative action that is lawful, reasonable and procedurally fair.

5. A declaration that within the intendment of Articles 47(2) of the Constituion, the Respondents are bound to provide reasons for failure to provide reasons for failure to provide written reasons for the tabling of the Motion for removal of the Petitioners from their various positions mentioned above.

6. A declaration that the removal of the Petitioners from their various positions in the Justice and Legal Affairs Committee and the Information Technology and E-Government Committee and County Public Service Board is inconsistent with the provisions of Articles 10,27(4), 28, 35(1), 47, and of the Constitution and is illegal null and void.

7. An order of permanent injunction be issued to restrain the Respondents, their agents and persons acting under the authority of the Respondents, from interfering wit the administrative rights of the Petitioners and their right to hold political office in the various committee of the County assembly.

8. An order of prohibition against the Respondents, their agents or persons acting under their authority and command, from tabling any motion for removal of the Petitioners from their positions , on the basis of the factual background stated in this Petition, in the Justice and Legal Affairs Committee and the Information Technology and e Government Committee and County Public Service Board, or in any manner whatsoever interfering with Petitioner's rights to occupy those positions.

9. An order do issue from this court for the reinstatement of the Petitioners to their positions in the Justice and Legal Affairs Committee, the Information Communications Technology and e- government committee and the County assembly Service Board.

10. An order of compensation for:-

A) General damages for Infringement of rights of the Petitioner under Article 10,28,35,47 of the Constitution.

B) Special damages for the occasioning of anguish, ridicule and apprehension on the Petitioners.

C) Interests on (a) and (b) above at court rates.

D) There be an order as to costs.

7. The respondent opposed the petition and filed a replying affidavit sworn on 2nd October 2018 by Hezreon Ngetich. It is averred on behalf of the respondent that by a letter dated 26th June 2018 addressed to the Speaker of the county assembly of Kericho and copied to the Clerk of the county assembly, J.K Bosek & Company Advocates required the petitioners and other members to be cleared and released to attend the status conference from 30th July to 3rd August 2018 on Kipsigis Talai v FCO at the Temple Gardens Chambers London by virtue of being members of the Justice and Legal Affairs Committee of the county assembly.

8. The petitioners were, however, informed at a meeting held by the county assembly members at the county assembly that a resolution had been reached that nobody would travel to attend the alleged status conference. This decision was arrived at, according to the respondent, in order to safeguard the public interest and prevent misuse of public funds on the purported travel which emanated from an intended court case that the county assembly had opposed and declined to approve funding for.

9. The respondent states that despite the petituoners attending the meetings and being part of the resolutions passed, they decided to ignore the resolution and travelled to the status conference. They did not obtain written authorization to travel from the Speaker as required by the county assembly standing order number 229.

10. The respondent avers that the petitioners did write a notice to the Clerk of the county assembly to inform him of their plan to travel. They did not write to the Speaker as required, an act which directly disregarded the provisions of standing order number 229. Despite not obtaining official authorization, the petitioners opted to travel at their own risk against the standing orders, the joint resolutions of the county assembly and practice governing the members of the county assembly.

11. The respondent avers that on 2nd August 2018, a motion was tabled by Hon, Paul Chirchir to the effect that the petitioners had not complied with the standing orders of the house and should therefore be removed from their leadership positions in the select committees. According to the respondent, it is only the petitioners, out of all the members of the Justice and Legal Affairs Committee of the county assembly, who defied the resolution and travelled to attend the status conference. The rest of the members honoured the resolutions passed by the county assembly.

12. The respondent avers that as a result of their actions, the petitioners were removed from the leadership position of the committees. They were not removed from their positions as nominated members of the county assembly.

13. The respondent avers that this matter should not be subjected to the courts and the court processes so as to honour the principle of separation of powers and honour the decision of the county assembly. It is its argument that it has not infringed on the rights of the petitioners in any way given the blatant disregard of the resolutions, rules and procedures by the petitioners exhibited in their decision to travel without approval of the Speaker as required in law and against the resolutions of the assembly. It is its contention that it did not

contravene the provisions of the Constitution, the Elections Act or of any other statutes. It urged the court to dismiss the petitioners' claims as they are devoid of any merit and dismiss the petition with costs to them.

14. The parties were directed to file written submissions on their respective cases. This they duly did but elected not to highlight.

15. In their submissions on behalf of the petitioners, the firm of Manyonge Wanyama & Associates argued that the respondent was in breach of their right to fair administrative action under Article 47 of the Constitution, which right is further enumerated under section 4(3) of the Fair Administrative Action Act. This Act requires, *inter alia*, that where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the person shall be given prior and adequate notice of the nature and reasons for the proposed administrative action; an opportunity to be heard and to make representations in that regard, and notice of a right to a review or internal appeal against an administrative decision, where applicable. The person was also entitled to the reasons for the decision.

16. It was their submission that the import of Article 47 is that every person is entitled to fair administrative action. In this regard, the petitioner were entitled to be heard and to be given administrative action that is reasonable and procedurally fair. The case of **Ridge v. Baldwin [1964] AC 40**, in which the House of Lords clarified that the rules of natural justice, in particular the right to fair hearing, applied not only to bodies having a duty to act judicially but also to the bodies exercising administrative duties, was cited.

17. They also relied on the case of **David Onyango Oloo v The Attorney General [1987] KLR 711**. It was the petitioners' submission on the basis of the holding in the above case that the county assembly of Kericho had tabled and discussed the motion for the removal of the petitioners from their respective positions in a non-procedural manner as the Clerk and mover of the motion did not subject the petitioners to fair administrative action procedures over their actions.

18. It was further submitted on behalf of the petitioners that the actions of the respondent were tainted with unreasonableness. They again cited Article 47 and relied on the case of **Associated Provincial Picture Houses v Wednesbury Corporation [1948] 1 KB 223** in which the court set out what would be considered unreasonableness in respect of the making of administrative decisions or the carrying out of an administrative action.

19. The petitioners submit that it is to breach the rules of fair administrative action for the members of the county assembly to turn around and state that the petitioners did not seek the permission of the Speaker and the House before proceeding to the status conference. They further submit that it is only the nominated members of the county assembly that were singled out by the movers and seconders of the motion, which in their view meant that the motion was intended to remove nominated members of the assembly from their positions in the county assembly committees.

20. The petitioners further contend that the insistence of the members of the county assembly that the petitioners ought to have furnished the Speaker with a travel itinerary is not only unreasonable but also laden with malice.

21. The petitioners further allege that their legitimate expectations were not met. They cite the case of **Council of Civil Service Unions v Minister for the Civil Service [1983] UKHL 6** for the definition of what amounts to legitimate expectations. It was submitted on their behalf that their legitimate expectation was violated by the decision of the county assembly through the motion for their removal from the offices they held in the county assembly as there is a dispensation in place with regard to how a person travels and how the information on travelling abroad is communicated, which is through the Clerk to the assembly.

22. The petitioners further submitted that the acts of the respondent were *ultra vires*. They relied on the case of **Republic v Attorney General & 3 others Ex-Parte Tom Odoyo Oloo [2015] eKLR** to submit that the essence of the doctrine of *ultra vires* is that administrative bodies must act within the powers granted them by statutes and they must act within the requirements of common law. They further cited **David Onyango Oloo v The Attorney General (supra)** in which it was held that the Commissioner of Prisons acted *ultra vires* by failing to carry out an inquiry as provided for under section 52 and 53 of the Prisons Act.

23. It was their submission that where an administrative officer makes a decision contrary to what is provided for under any given law, then such decision or action is *ultra vires*. They argued that the respondent's standing orders do not state that a member of the county assembly must personally seek the permission to travel abroad from the Speaker of the county assembly.

24. The petitioners submitted that the actions of the respondent violated their right to human dignity guaranteed under Article 28 of the Constitution. They cited **Paulus Kaufmann, Hannes Kuch, Christian Neuhäuser, and Elaine Webster** in Part I of the book **Humiliation, Degradation, Dehumanization: Human Dignity Violated** which lists the cases and context in which the violation of the right to human dignity takes place. They also relied on **Kirsteen Shields** in Chapter 13 of the same book titled **"Crossing the Threshold Between Acceptable and Unacceptable Labor Conditions"** which states that the violation of the right to human dignity can also occur in cases where there is restriction to movement and confinement to the workplace or a limited area.

25. The petitioners further cited the case of **Republic vs. Kenya National Examinations Council & Another ex parte Audrey Mbugua Ithibu [2014] eKLR** with respect to what human dignity entails and urged the court to grant the orders that they were seeking.

26. The submissions on behalf of the respondent were filed by their advocates on record, M/s Singoei Murkomen & Sigei Advocates. It was submitted on its behalf that the court had no jurisdiction to interfere with its actions. It was its case that it is a body established under Article 176 of the Constitution and is tasked with ensuring that laws are formulated to enable the smooth operation of the Kericho county government. It also has oversight responsibilities on the county's operational activities. According to the respondent, each county assembly under the law is required to have standing orders as stated in section 149(1) of the County Government Act.

27. In its view, by the petitioners sending a notice to the Clerk instead of the Speaker, they were in contravention of the provisions of the standing orders of the county assembly, which is a contravention of the procedures of the house. The respondent cited in support standing

order number 229 which required members travelling outside Kenya to give written notice to the Speaker of the county assembly indicating the destination and date of travel, among other things. It was its submission that it had declined to approve the budget for funding the petitioners' trip to prevent abuse and misuse of public funds, and that in doing so, it was acting within the confines of Article 10(2)(c) and (d) of the Constitution on the national values and principles of governance.

28. It had also, in its view, upheld the provisions of Article 73(1) (a), (i), (ii), (iii) & (iv) that provide the principles of leadership. Its actions were therefore protected by section 10 of the County Powers and Privileges Act, 2017 which ousted the jurisdiction of the court with respect to the proceedings or decision of a county assembly or the Committee of Powers and Privileges acting in accordance with the Act. It cited in support the decision in **County assembly of Kisumu & 2 Others v Kisumu County assembly Service Board & 6 Others [2015]**. The respondent further cited the case of **Njenga Mwangi & Another v Truth, Justice & Reconciliation Commission & 4 Others [2013]eKLR** for a similar proposition.

29. To the petitioners' contention that it had infringed on their rights, the respondent denied that any violations had occurred. It was, in its view, the duty of the petitioners to demonstrate that such violations had occurred, reliance being placed on the decision in **A.K.M.M v E.M.K.K & 2 others [2014]eKLR**.

30. The respondent further submitted that the petitioners ought to show how the respondent, in trying to enforce Chapter Six of the Constitution, had violated their rights. In its view, the Constitution must be interpreted as a whole and not only when it is relevant to an aggrieved party. Reliance was placed in this regard on **Law Society of Kenya v Kenya Revenue Authority & another [2017] eKLR**.

Analysis and Determination

31. I have read and considered the petition and the respective averments and submissions of the parties with regard thereto. The principles with regard to the burden imposed on a party seeking to enforce alleged violation of fundamental rights are clear. The petitioner must set before the court, with a reasonable degree of precision, the constitutional provisions said to have been violated or infringed and the manner of infringement to enable the court address itself to the issues, and the respondent to answer the alleged violations. -see **Anarita Karimi Njeru v Republic (No.1)-[1979] KLR 154** and **Meme v Republic & another [2004] 1 KLR 637**.

32. In its decision in **Mumo Matemo v Trusted Society of Human Rights Alliance [2014] eKLR**, the Court of Appeal stated:

"...the principle in Anarita Karimi Njeru (supra) underscores the importance of defining the dispute to be decided by the court... Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in Anarita Karimi Njeru (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle."

33. The petitioners in this case are all nominated members of the county assembly of Kericho. They were members of various committees of the county assembly. Their case is that they were invited to attend a status conference on a case in London, which they attended after giving notice to the Clerk of the county assembly, but were thereafter removed from the respective committees on which they served pursuant to a resolution of the county assembly. They allege violation of Articles 28 and 47 of the Constitution, violation of their right to legitimate expectations, and accuse the respondent of unreasonableness and of acting *ultra vires* in ousting them from the committees.

34. The respondents case is that it was entitled to act as it did in this matter. The petitioners, as nominated members of the respondent, are obligated to act in accordance with the standing orders of the assembly. They had failed to do so, had attended the status conference in direct defiance of a resolution of the county assembly that prohibited any member of the county assembly from travelling for the status conference, and the respondent was therefore within its rights and properly exercised its powers in removing them from the committees.

35. Contrary to the assertions by the respondent, this court has jurisdiction, under Article 22 of the Constitution, to determine whether a right or fundamental freedom in the Bill of Rights has been violated or is threatened with violation. Further, the court also has jurisdiction, under Article 165 (3)(d)(ii), to determine the question whether anything said to be done under the authority of the Constitution or of any law is inconsistent with the Constitution.

36. In this case, the respondent has averred that the petitioners acted contrary to standing order number 229 of the county assembly's standing orders. This is to the following effect:

" A Member intending to travel outside Kenya whether in an official or a private capacity, shall give to the Speaker a written notice to the effect, indicating:-

a) the destination intended to be visited.

b) the dates of the intended travel and period of absence from Kenya; and

c) the email, telephone contact, postal or physical address of the Member during the period of absence from Kenya.

2) All information submitted under this Standing Order shall be kept in a register which the clerk shall maintain for that purpose and shall not be disclosed to any person without the permission of the Speaker."

37. It appears from this standing order that the required notice must be served on the Speaker of the county assembly, not to any other

person. It has been averred by the respondent, and this has not been controverted by the petitioners, that they did not comply with standing order number 229. Instead, they wrote to the Clerk of the county assembly. They allege that there is a practice in the county assembly to give notice to the Clerk but they have not placed any evidence before the court to show the existence of such a practice.

38. The respondent further averred, and again this was not controverted by the petitioners, that there was a resolution of the county assembly to the effect that none of the members of the Justice and Legal Affairs Committee would attend the status conference.

39. As members of the county assembly, the petitioners are bound by the rules of the assembly, which are set out in the standing orders. They are also bound by the resolutions of the county assembly. While the court has the jurisdiction to inquire into the actions of other state organs, it will do so only in clear circumstances, and will not ordinarily, except for very good reasons, enter into an inquiry as to whether or not the internal processes of a legislative body were followed.

40. In its decision in **County assembly of Kisumu & 2 Others v Kisumu County assembly Service Board & 6 Others** (supra) the Court of Appeal stated:

“With regard to the issue before us, under the doctrine of separation of powers, the court should not interfere with the freedom of speech and debate of legislative bodies. The court must resist unwarranted intrusion into internal procedures of Parliament and the County Assemblies unless they act unconstitutionally. As this court stated in *Martin Nyaga Wambora & Others v Speaker of the Senate & Others*, where it is shown that in conducting its proceedings, a legislative authority has acted within the confines of the Constitution, courts have no jurisdiction and ought not to interfere simply because anybody is aggrieved by a decision passed by the legislative authority. However, where they are not, the court can interfere. This is because the legislative assemblies, like all other organs of state and indeed every person must act in accordance with the constitution.” (Emphasis added)

41. In the circumstances of this case, I am not satisfied that there has been a violation of the rights of the petitioners by the respondent. Membership of the county assembly committees must be governed by the rules of the county assembly, and members of such committees are required to comply with the standing orders and the resolutions of the county assembly.

42. While the petitioners allege that their removal was not done in accordance with the standing orders of the county assembly and the Constitution, they have not placed before the court the provisions of the standing orders or the Constitution that provide for the manner in which a member of a county assembly may be removed from a committee. Nor have they placed before the court the manner in which the tabling of the motion to remove them violated either the standing orders or the Constitution.

43. I am accordingly unable to find that there has been any violation of any of the rights of the petitioners that would justify this court’s interference with the decision of the county assembly. I accordingly find no merit in the petition, and it is hereby dismissed.

44. The parties shall bear their respective costs of the petition.

Dated and Signed at Nairobi this 19th day of June 2019

MUMBI NGUGI

JUDGE

Dated, Delivered and Signed at Kericho this 11th day of July, 2019

GEORGE DULU

JUDGE