



**REPUBLIC OF KENYA**

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

**CONSTITUTIONAL PETITION NO. 3 OF 2019**

**HON. BENJAMIN KOECH.....PETITIONER**

**VERSUS**

**BARINGO COUNTY GOVERNMENT.....1<sup>ST</sup> RESPONDENT**

**THE COUNTY ASSEMBLY OF BARINGO.....2<sup>ND</sup> RESPONDENT**

**BARINGO COUNTY PUBLIC SERVICE BOARD.....3<sup>RD</sup> RESPONDENT**

**AND**

**JOSEPH C. KOECH.....INTERESTED PARTY**

**RULING**

1. Before the Court is an application by Notice of Motion dated 13<sup>th</sup> June 2019 for conservatory orders in terms that:

**“Pending hearing and determination of the Application/Petition a conservatory order of temporary injunction be issued to restrain the 2<sup>nd</sup> and 3<sup>rd</sup> respondents herein from appointing any other person to replace the Interested Party herein as Clerk of the Baringo County Assembly pursuant to the 2<sup>nd</sup> Respondent’s Resolution of 2<sup>nd</sup> May 2019 and the 3<sup>rd</sup> Respondent’s advertisement for the vacancy in the Daily Nation of 7<sup>th</sup> May 2019.”**

2. The application is supported by its beneficiary, the Interested Party, but opposed by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents who have raised a Preliminary Objection, by way of a Notice of Motion dated 19<sup>th</sup> June 2019, as to the jurisdiction of the court, in view of alleged previous similar proceedings in the High Court and the Employment and Labour Relations Court, the latter which is said to be pending judgment before that court.

3. In the course of preparation of the ruling, as I set out to consider, on the principles prescribed by the Supreme Court of Kenya in *Gatirau Peter Munya v. & 2 Others (2014) eKLR*, **“the inherent merit of the case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes”** herein, I recalled a decision of the Court of Appeal from a judgment of this court, in *Attorney General & another v Andrew Kiplimo Sang Muge & 2 others*, Civil Appeal No. 247 of 2017, [2017] eKLR, (the *MCAs’ Security of Tenure* case), which may have a bearing on the outcome.

4. In the interest of justice and fair hearing of the dispute, the court could not properly rely on the said Court of Appeal decision without hearing submissions of the parties thereon as regards its application to the case at hand. The court’s practice of calling attention of counsel to a decision that may apply to the matter before the court and inviting submissions is salutary, especially in situations where the court discovers or recalls such an authority at the point of considering a reserved ruling or judgment, after parties have already made the submissions on a matter. This would prevent the court making a *per incuriam* decision and also ensure that parties are heard on issue before a decision is reached. As I understand it, the practice is also consistent with the right to fair hearing under Article 50 (1) of the Constitution, that the court should not rely on a provision of law or case-law authority on which the parties have not had an opportunity to make representations.

5. The decision of the Court of Appeal in *Attorney General & Another v Andrew Kiplimo Sang Muge & 2 Others*, supra, held that a public officer, whether elected or appointed, had no property in the public office, as follows:

**“To begin with there is no such a thing as legitimate expectation to hold, to the end of its term, a public or elective office since a public office is not the property of the office-holder. See *South African Veterinary Council V Szymanski* 2003 ZASCA 11. See also *Justice Kalpana H. Rawal V. Judicial Service Commission & 3 others* (supra).**

In Eckerson V City of Des Moines, 137 Iowa 452, the Iowa Supreme Court emphasized that:

**“Public offices are created in the interests of the general public, and not for the benefit of any individual. And no one in possession of an office has a constitutional right to remain therein for the full period of the term for which he was elected..... In the case of statutory office, the Legislature may even abolish the office, and with the taking effect of the law providing thereof, the right of the incumbent to further act ceases eo instante, notwithstanding the term for which he was elected has not expired.”**

Specifically the “employment” of an elected leader differs qualitatively from other forms of employment. The Supreme Court of Pennsylvania in Sweeney v Tuckers 473 Pa 493, 375 A2d 698 (1977) held that:

**“It is questionable whether [an elected official's] interest in his office is a property interest. An elected office is a public trust, not the private domain of the officeholder. A member of the Legislature. . . holds office for the benefit of his constituents and cannot justifiably rely on a private need or expectation in holding office ....[T]he public interest in the office far outweighs any private interest of the office-holder.”**

In our case, under Article 194 of the Constitution, an MCA may vacate office, inter alia, at the end of the term of the county assembly; or if he dies; or removed from office; or if he resigns; or becomes disqualified for election on grounds specified in **Article 193(2)**. If they can leave office before the expiration of the term of the office, it cannot be said to be entitled to be compensated should his term be interfered with in accordance with the law.

As this Court did, with approval in Justice Philip K. Tunoi & Another V Judicial Service Commission & Another, Civil Appeal No. 6 of 2016, we cite the following passage from the decision of the Philippines Supreme Court in The Provincial Government of Camarines Norte V Beatriz O. Gonzales, G.R. No. 185740 to stress the point that a public office holder or an elected political official has no property right in his office.

**“Security of tenure in public office simply means that a public officer shall not be suspended or removed or dismissed except for cause as provided by law and after due process. It cannot be expanded to grant a right to public office. Security of tenure is only violated if an individual is removed from position without sufficient cause and due process as provided by law.”**

6. This court considers that the decision in Muge, supra, **may** affect the application for conservatory orders in this Petition whose effect will be to halt the removal or the replacement of the Clerk of the County Assembly of Baringo the Interested party herein. The court, therefore, takes the view that it should be properly served with the submissions of the parties thereon as to its application, or extent of application, if at all, in the matters raised in this Petition.

7. The decision of the Court of Appeal in Muge, supra (copy to be supplied to Counsel), if applicable to the matters subject of the Notice of Motion and Petition herein, shall, on the doctrine of precedent and **stare decisis**, be binding on this Court as a superior court subordinate to the Court of Appeal.

8. If the **ratio** of the decision in the case that **“there is no such a thing as legitimate expectation to hold, to the end of its term, a public or elective office since a public office is not the property of the office-holder”** is applicable and binding on this court, it may determine the outcome of this application for conservatory orders. Yet, with respect, there appears to be an equal counter-argument and holding in the same decision of Muge, supra, in relying on the Philippines Supreme Court decision The Provincial Government of Camarines Norte v. Beatriz O. Gonzales, cited herein, which explained that **“Security of tenure is only violated if an individual is removed from position without sufficient cause and due process as provided by law.”**

9. For these apparently **contradictory**, or probably **paradoxical**, holdings in Muge, I consider it paramount for the purpose of the court’s constitutional duty under Article 20 (3) (a) of the Constitution to **“develop the law to the extent that it does not give effect to a right or fundamental freedom”** to hear the Counsel’s comments on the issue and its bearing to the rights to fair hearing and fair administrative action, before taking a view in the reserved ruling.

10. I have noted that the decision, though apparently relevant, was not cited by any of the Counsel for the parties in this Petition.

## **Orders**

11. I would, therefore, call the attention of Counsel to the said decision of the Court of Appeal (a copy whereof is attached) and invite their submissions, in writing or orally, thereon within the next seven (7) days before the court may rule on the application for conservatory orders herein. The ruling of the Court is rescheduled to a date thereafter to be fixed in consultation with Counsel for the parties.

12. In the meantime, in the interest of justice so that the situation on the ground is not irretrievably disturbed before the decision on the application for conservatory orders, the court directs that the status quo in the matter which is that the undertaking through Counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents that they will not to take a final decision as to appointment or filling of the position of the Clerk of the Baringo County Assembly shall remain in force.

Order accordingly.

DATED AND DELIVERED THIS 26<sup>TH</sup> DAY OF JULY 2019

EDWARD M. MURIITHI

**JUDGE**

**Appearances:**

Mr. Kibe Mungai, Advocate for the Petitioner.

N/A for the 1<sup>st</sup> Respondent.

Mr. Magare, Advocate for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.

Ms. Gladys Mwangi, Advocate for the Interested Party.