



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CONSTITUTIONAL PETITION NO. 1 OF 2019

**IN THE MATTER OF: ARTICLES 20(3) & (4), 21(1) & (3), 22(1), 23(1) & (3), 25(c), 50(1),
159(2)(a), & (e), 165(3) (b) & (d), and 258(1) OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF: INFRINGEMENT AND VIOLATION OF ARTICLES 1 (3) & (4),
2(1), (2) & (4), 3(1), 10(1) & (2), 24 (1) & (2), 27, 38 (3), 40, 41(1) & (2), 48, 54, 55 (b), 56 (a),
57(a), 73(2), 174, 175, 177(1)(b), (c) & (2), 185, 196(1)(b), and 232(1)(b),
(c), (d), (e), (i) & 2 OF THE CONSTITUTION OF KENYA 2010**

AND

**IN THE MATTER OF: SECTIONS 5, 7A, 9, 12, 14, 2, 87, 97, 116 AND 117
OF THE COUNTY GOVERNMENTS ACT, NO. 17 OF 2012**

AND

**IN THE MATTER OF: SECTIONS, 4, 5, 12 AND 35 OF THE
COUNTY ASSEMBLY SERVICES ACT NO. 24 OF 2017**

AND

**IN THE MATTER OF: AN AMENDMENT OF THE KISII COUNTY ASSEMBLY
STANDING ORDERS VIDE THE MOTION DATED 3RD MAY 2017, PURPORTING
TO LIMIT VOTING RIGHTS OF NOMINATED MEMBERS WITHIN THE COUNTY
ASSEMBLY, IN AN UNCONSTITUTIONAL AND UNLAWFUL MANNER**

AND

**IN THE MATTER OF: NON-COMPLIANCE BY THE 1ST, 2ND AND 3RD RESPONDENTS
WITH THE COMMISSION OF REVENUE ALLOCATION CIRCULAR REF.CRA/FA/01
VOL II(22) DATED 28TH JUNE 2018, TO THE PETITIONERS' DETRIMENT**

BETWEEN

HON. KAREN NYAMOITA MAGARA.....1ST PETITIONER

HON. BATHSEBA GESARE SANAYA.....2ND PETITIONER

HON. RISPER KEMUNTO ONGUTO.....3RD PETITIONER

HON. CLAIRE MORAA OBINO.....4TH PETITIONER

HON. JOSEPHINE KERUBO OMBATI.....5TH PETITIONER

HON. MARY GOIMA MICHIEKA..... 6TH PETITIONER

HON. BEATRICE MONGINA DOYLE.....7TH PETITIONER

HON. LOICE MWONGELA.....8TH PETITIONER

HON. EDMOND MOKUMI ANTONY.....9TH PETITIONER

HON. ISABELLA NYABOKE OIGARA.....10TH PETITIONER

HON. CAROLINE MOKOBI OTACHI.....11TH PETITIONER

HON. JOYCE KWAMBOKA OMBASA.....12TH PETITIONER

HON. MARGARET BONARERI ATINA.....13TH PETITIONER

HON. BEATRICE MORAA KAYAGA.....14TH PETITIONER

HON. AGATHA BOSIBORI MAYORA.....15TH PETITIONER

VERSUS

KISII COUNTY ASSEMBLY SERVICES.....1ST RESPONDENT

THE COUNTY ASSEMBLY OF KISII.....2ND RESPONDENT

THE SPEAKER, COUNTY ASSEMBLY OF KISII.....3RD RESPONDENT

AND

HON. ATTORNEY GENERAL.....INTERESTED PARTY

JUDGMENT

The Fifteen Petitioners herein are all Members of the County Assembly of Kisii, who were duly nominated to represent Minorities, Vulnerable and Special Interest Groups including Women, Persons with Disability, Youth and Elder Members of the Society.

1. It is their case that All Members of County Assemblies enjoy equal rights of voting in the County Assembly and also that all of them are entitled to equal benefits appurtenant to their positions. Therefore, they asserted that there should not arise any differential treatment within the ranks of Members of County Assemblies.

2. Notwithstanding that position, as set out by the Petitioners, the County Assembly of Kisii debated and passed a Motion on 5th March 2018, which amended the Standing Orders of the County Assembly, so that the Nominated MCAs were restrained and prevented from;

“... voting in the Assembly on ANY question, and make voting a privilege reserved for elected MCAs....”

3. As a result of the amendment in question, the Nominated MCAs felt that they had been subordinated to the Elected MCAs; and that they had been reduced to ceremonial individuals with no reasonable say in the County Assembly of Kisii.

4. A second issue that was raised by the Petitioners was founded upon the Commission on Revenue Allocation Circular Ref. **CRA/FA/01**

5. It was the Petitioners' case that pursuant to that Circular the Kisii County Assembly Board became obliged to provide the Petitioners with;
- (a) *Office Space*
 - (b) *Resources for office operations; and*
 - (c) *Three members of staff.*
6. However, the Petitioners said that they had been compelled to spend their private financial resources in the discharge of their respective Public Duties because the Respondents had failed to make available resources which the Petitioners need, to carry out their duties.
7. It was asserted that each Petitioner had incurred an expenditure of Kshs 1,600,000/=, using their respective private funds, between August 2017 and January 2019.
8. By being compelled to utilize their own financial resources to perform their Public Duties, the Petitioners submitted that they were being incapacitated and crippled from effectively discharging their mandates.
9. Therefore, they asked the court to order the County Assembly of Kisii to provide them with the resources cited in the Commission of Revenue Allocation Circular (hereinafter "*the Circular*").
10. In their submissions, the Petitioners have reminded the court that when called upon to give an interpretation to the Constitution, the court must do so in a manner that promotes its purpose, values and principles.
11. It is well settled that the courts ought to provide a purposive interpretation, which advances the rule of law and contributes to good governance.
12. It was the Petitioners' case that they ought to be reimbursed for the money which they spent, from their personal resources, when they were discharging their public duties.
13. As far as they were concerned, the ;
- "... funds earmarked by the CRA Circular were NOT DISBURSED to nominated MCAs as intended; and considering no averment is made that the funds were surrendered to the National Treasury, those funds remain within the Respondents' custody and accounts thereof must be fully furnished."***
14. Let us have a look at the Circular to ascertain its scope, and thus determine whether or not it earmarked funds which were to be disbursed to nominated MCAs.
15. The Circular is in respect to;
- "County Government Recurrent Expenditure Ceilings for the Year 2018/19."***
16. The Circular goes on to make it clear that the Commission on Revenue Allocation had made recommendations to the Senate regarding "*recommended ceiling.*"
17. It is clear from the Circular that the Senate had processed the recommendations. Therefore, the Commission said;
- "We expect that the amounts approved by the Senate will be included in the County Allocation of Revenue Act."***
18. In my understanding of the Circular, it does not say that Members of County Assemblies have to be paid some specified allowances and also be given some specified resources.
19. The Circular provides a clarification about the items which each County Government ought to incorporate on account of recurrent expenditures in their respective budgets.
20. Secondly, and more importantly, the Circular provides the ceilings in respect to each item.
21. Thirdly, the Circular makes it clear that the responsibility of incorporating the recommendations into relevant pieces of legislation, remained with the legislative arm of government.
22. The Petitioners appear to have made an assumption that funds were made available.

23. It would be completely wrong for the Court to make an Order based on an assumption or a presumption.

24. Therefore, even assuming that funds had been made available to the County Assembly of Kisii, at some point of time relevant to this case, the Court would be utterly irresponsible to conclude that such funds remained within the Respondents' custody.

25. In my considered opinion, the Petitioners were not right when they said;

“It is immaterial whether or not the Petitioners’ concerns exist as a matter of fact.”

26. Courts are not forums for academic or any other theoretical discourse.

27. When the Applicants first moved the court they also filed a Certificate of Urgency in which they said, inter alia, that they continue to suffer discrimination and financial hardship due to differentiated treatment. In other words, the Petitioners were facing real discrimination and differential treatment. They cannot now turn around and tell the Court that it was immaterial whether or not their concerns exist as a matter of fact.

28. Discrimination would be deemed to be present when one group of persons is being treated differently from another group. In this case, the nominated MCAs would have to prove that whilst the Elected MCAs were being given allowances in accordance with the Circular, the Nominated MCAs were being denied the same kind of allowances, simply on account of the fact that they were Nominated MCAs.

29. The Petitioners have failed to make out a case that would warrant the issuance of an order compelling the Respondent to immediately comply with the Commission for Revenue Allocation Circular Ref. **CRA/FA/01 VOL. II (22)** dated 28th June 2018.

30. However, I hasten to add that in the event that the County Assembly of Kisii starts operationalizing the said Circular, the same should be applied to all Members of the said County Assembly.

31. On the issue of the Standing Orders, I find that from a procedural point of view the amendment which was passed in accordance with the Standing Orders of the County Assembly on 5th March 2018, was so passed in accordance with the Standing Orders of the County Assembly. I so find because both the Elected and the Nominated MCAs cast their votes on the Motion which gave rise to the amendments.

32. Prior to the amendment, **Standing Order No. 65** provided as follows;

“(1) Unless otherwise provided under the Constitution, a question arising in the County Assembly shall be decided by a majority of the members of the County Assembly, present and voting.

(2) In ascertaining the results on the question under paragraph (1) the Speaker shall, in the first instance, collect the voices of the ‘Ayes’ and the ‘Noes’ and shall declare the results accordingly.

(3) On a question proposed for a decision in the Assembly, the Speaker has no vote.

(4) In determining the number of Members of the County Assembly for the purpose of voting, the Speaker shall not be counted as a member.”

33. Pursuant to that Standing Order there was no distinction between Elected and Nominated MCAs. Provided that they were present in the County Assembly, each MCA would be entitled to cast his or her vote on a question which had arisen in the Assembly, and which required a decision to be made on it.

34. Following the amendment to the Standing Orders, under the sub-heading “*Ward Delegations*”, the **Standing Order No. 65 (1)** now reads as follows;

“ 65 (1) On election, all Members of the County Assembly who were registered as voters in a particular Ward shall collectively constitute a single delegation for purposes of paragraph

(2) and the Member of County Assembly elected under Article 177 (1) (a) of the Constitution shall be the head of the delegation.

(2) Except as otherwise provided in the Constitution, in any matter in the County Assembly affecting wards –

(a) each Ward delegation shall have one vote to be cast on behalf of the Ward by the head of the Ward delegation or, in the absence of the head of the delegation, by another member of the delegation designated by the head of the delegation;

and

(b) the person who votes on behalf of a delegation shall determine whether or not to vote in support or against the matter, after consulting the head of the delegation; and

(c) the matter is carried only if it is supported by a majority of all delegations.

(d) when the county assembly is to vote on any matter, the Speaker shall rule on whether the matter affect, or does not affect Wards.

(e) The Speaker's ruling under paragraph (d) shall be made after conclusion of debate on the matter before the question is put.

(f) When the County Assembly votes on a matter that does not affect Wards, each Member of County Assembly has one vote."

35. The Respondents submitted that the amendment did not deny the Petitioners the right to make contributions, to vote or to introduce Bills or Motions within the County Assembly.

36. As far as the Respondents were concerned, the amendment;

"is only limited to questions affecting wards, and such participation is not curtailed but rather enabled through single delegations."

37. It is noteworthy that the amendment in issue appears to mirror, to a large extent, the provisions of **Article 123** of the **Constitution of Kenya**, which reads as follows;

"(1) On election all the members of the Senate who were registered voters in a particular county shall collectively constitute a single delegation for the purposes of Clause (4) and the member elected under Article 98 (1)

(a) shall be the head of the delegation.

(2) When the Senate is to vote on any matter other than a Bill, the Speaker shall rule on whether the matter affects or does not affect counties.

(3) When the Senate votes on a matter that does not affect counties, each senator has one vote.

(4) Except as provided otherwise in this Constitution, in any matter in the Senate affecting counties –

(a) each county delegation shall have one vote to be cast on behalf of the county by the head of the county delegation, or in the absence of the head of the delegation, by another member of the delegation designated by the head of the delegation;

(b) the person who votes on behalf of a delegation shall determine whether or not to vote in support of, or against the matter, after consulting the other members of the delegation; and

(c) the matter is carried only if it is supported by a majority of all the delegations."

38. Pursuant to **Article 123** of the **Constitution**, it is only the Elected Senators who are eligible to be the head of their respective county delegations.

39. In their wisdom Kenyans decided that the 16 nominated women senators, the 2 who represent the youth, and the 2 who represent persons with disabilities are not eligible to head the county delegations.

40. In the same vein the County Assembly of Kisii decided that in respect of matters affecting wards, it was only elected MCAs who were eligible to be the heads of the ward delegations.

41. Whereas the Constitution expressly spells out the issue appertaining to Senators, it is silent on the issue which the County Assembly of Kisii has legislated upon, as regards Members of County Assemblies.

42. I am cognizant of the fact that the Constitution cannot possibly address all manner of issues.

43. However, I find that by enacting an amendment to the Standing Orders in a manner that mirrors that which is in **Article 123** of the **Constitution**, the County Assembly had acted in a manner that was consistent with the Constitution.

44. But then again, it cannot be denied that the said enactment created a distinction between Elected **MCAs** and Nominated **MCAs**.

45. Those who were elected are eligible to become heads of ward delegations, whilst those who were nominated were not eligible.

46. Apart from the fact that the amendment mirrors **Article 123** of the **Constitution**, the Respondents have not satisfied the court that the decision that permanently precludes Nominated MCAs from becoming heads of ward delegations is in conformity with **Article 10 (2) (b)** of the **Constitution**.

47. Pursuant to **Article 10**, the national values and principles of governance bind all State Organs, State Officers, Public Officers and all persons whenever they, inter alia, enact, apply or interpret any law.

48. And pursuant to **Article 10 (2) (b)**;

“The national values and principles of governance include –

.....

.....

(b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized.”

49. I find that when the amended Standing Order provides a pre-determined position, that bars Nominated MCAs from ever becoming the heads of the ward delegations, that is inconsistent with the national values and principles of equality and non-discrimination.

50. The nominated MCAs represent Women, Youth and Persons with Disabilities. Those categories of persons do not hail from some “Special Wards”. They are our brothers and sisters, who live within the wards that constitute each County.

51. Therefore, in my considered opinion there cannot be matters which can be categorized as affecting **ONLY WARDS**, to the exclusion of the persons represented by the Nominated MCAs.

52. In effect, the amendment which seeks to limit the Petitioners from being eligible to be head of wards delegations is discriminatory against them, and is therefore unconstitutional.

53. As regards the amendment which provides that each ward delegation will have one vote, I find that that provision applies to all Members of County Assemblies.

54. It is not applicable only to the Petitioners.

55. Therefore, that aspect of the amendment is neither discriminatory against nor prejudicial to the rights of the Petitioners.

56. I note that the head of the ward delegation is obliged to consult the MCAs in his or her ward, to ascertain whether or not to vote in support of or against the matter. Therefore, the Petitioners would have an opportunity to influence the vote to be cast by the delegation which they are a part of.

57. The final issue that I need to determine is about the Costs of the Petition.

58. The said Petition has been partially successful and partially unsuccessful.

59. Secondly, the matters raised in the Petition are matters of Public Interest.

60. In the event, I find and hold that the interests of justice will be best served by an order that each party will pay his or her own costs: It is so ordered.

DATED, SIGNED and DELIVERED at KISUMU

This 30th day of **September** 2019

FRED A. OCHIENG

JUDGE