



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYAMIRA**

**MISC. JUDICIAL REVIEW NO: 02 OF 2019**

**REPUBLIC.....APPLICANT**

**=VRS=**

**1. THE COUNTY ASSEMBLY OF NYAMIRA**

**COMMITTEE OF POWERS & PRIVILEGES.....1<sup>ST</sup> RESPONDENT**

**2. THE COUNTY ASSEMBLY**

**SERVICE BOARD NYAMIRA COUNTY.....2<sup>ND</sup> RESPONDENT**

**3. THE NYAMIRA COUNTY ASSEMBLY.....3<sup>RD</sup> RESPONDENT**

**4. THE HON. SPEAKER NYAMIRA COUNTY ASSEMBLY.....4<sup>TH</sup> RESPONDENT**

**5. THE CLERK OF COUNTY ASSEMBLY NYAMIRA COUNTY...5<sup>TH</sup> RESPONDENT**

**EX-PARTE**

**1. HON. THADDEUS NYABARO.....1<sup>ST</sup> EX-PARTE APPLICANT**

**2. HON. VIOLET NYAKORA.....2<sup>ND</sup> EX-PARTE APPLICANT**

**RULING**

This is a ruling on the respondents’ preliminary objection dated 24<sup>th</sup> September 2019. The same was filed to forestall the hearing of the Ex-parte applicants’ chamber summons dated 19<sup>th</sup> September 2019 which seeks leave to bring judicial review proceedings in respect of the recommendations by the Joint Committee of the 1<sup>st</sup> and 2<sup>nd</sup> respondents tabled in the House on 8<sup>th</sup> August 2019 purporting to take certain actions against them and suspending them from the Assembly and the committees to which they are members. The Ex-Parte applicants also prayed that the leave granted operate as a stay pending the hearing and determination of the substantive motion. The preliminary objection challenges the jurisdiction of this court to hear the application on the ground that the same seeks to impugn the proceedings of the County Assembly against the express provisions of **Section 11 (1) (2) and (3) of the County Assemblies Powers and Privileges Act 2017**. The preliminary objection is opposed.

In his argument, Counsel for the respondent contended that it would be an affront of the independence of the County Assembly of Nyamira and the doctrine of the separation of powers for this court to hear this application. Counsel argued that not even the unlimited jurisdiction vested upon this court by Article 165 of the Constitution would clothe it with jurisdiction to hear the application the same having been expressly ousted by the said **Section 11 (1) (2) and (3) of the County Assemblies Powers and Privileges Act 2017**. Counsel argued that this court would have to declare the said Section unconstitutional before it can hear the application. He urged that the application by the ex-parte applicants is not premised on the infringement of constitutional rights and as such they cannot come under the cover of **Article 165 or Articles 22 and 23 of the Constitution**.

On his part, Counsel for the Ex-Parte applicants urged this court to overrule the preliminary objection. He submitted that the proceedings by the Ex-Parte applicants are premised on infringement of their rights under the Bill of Rights as well as the Fair Administrative Actions Act

and as such this court is clothed with jurisdiction to hear the application under Article 165 of the Constitution. He contended that the County Assemblies Powers and Privileges Act is subordinate to the Constitution and its provisions cannot oust the jurisdiction vested upon this court by the Constitution. To support his submission, Counsel relied on the case of **Ruth Wangui Ndirangu & 2 others v Clerk County Assembly of Embu & 3 others [2019] eKLR** where a similar preliminary was raised and overruled.

As was held in the celebrated case of **The Owners of Motor Vessel "Lilian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1** jurisdiction is everything and without it the court must down its tools. In **Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2010] eKLR** the court stated: -

**"A court's jurisdiction flows from either the constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the constitution or the written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law."**

The issue for determination by this court therefore is **whether it has jurisdiction to hear the chamber summons application or whether its jurisdiction is ousted by Section 11 (1) (2) and (3) of the County Assemblies Powers & Privileges Act.**

**Section 11 (1) (2) and (3) of the said Act stipulate: -**

**"(1) No civil or criminal proceedings shall be instituted against any Member for words spoken before, or written in a report to a county assembly or a Committee, or by reason of any matter or thing brought by him or her therein by a report, petition, Bill, resolution, motion or other document written to a county assembly.**

**(2) No civil suit shall be commenced against the Speaker, the leader of the majority party, the leader of the minority party, a chairperson of a committees or any member for any act done or ordered by them in the discharge of the functions of their office.**

**(3) The Clerk or other members of staff shall not be liable to be sued in a civil court or joined in any civil proceedings for an act done or ordered to be done in the discharge of their functions relating to proceedings of a county assembly or its committees."**

**Section 11 (1)** provides immunity to members of the Assembly from legal proceedings whether criminal or civil for words spoken before or written in a report to a County Assembly or a Committee or by reason of any matter or thing brought by him or her. This particular section preserves the freedom of speech of the Members of the County Assembly during debate in the house or when discharging their duties in the committees. **Sub-sections (2) and (3)** grant similar immunity to the Speaker, the Leader of the Majority Party, the Leader of the Minority, Chairpersons of the committees, the Clerk or other members of staff for any act done or ordered to be done in the discharge of their functions. Looking at these provisions and those of **Section 10** this court wonders whether objection by Counsel for the respondents was not made in reference to **Section 10 of the Act** as clearly the proceedings by the Ex-Parte applicants do not impugn communication of the respondents in the assembly as such but the proceedings and decision of the County Assembly and the Committee of Powers of Privileges to fine, reprimand, suspend and remove them from the committees in which they are members. The proceedings are not against the words spoken or written in the reports.

Be that as it may the issue raised by Counsel for the respondents is not novel. Various courts have considered this self-same issue. In the case of **Ruth Wambui Ndirangu & 2 others v Clerk County Assembly of Embu & 3 others [2019] eKLR** Muchemi J, overruled a similar preliminary objection and stated: -

**"36. The petition before this court seeks for reliefs and orders based on the allegation that the constitutional rights of the applicants were violated by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents. It also seeks for judicial review orders to quash the resolution of the respondents.**

**37. Article 165 (3) of the Constitution confers jurisdiction to this court to hear any question for the interpretation of the constitution including the determination of whether any law in question is inconsistent or in contravention with the constitution.**

**38. I am in agreement with the findings and observations made in the Protus Moindi case (supra) that the High Court has jurisdiction to deal with all matters of alleged constitutional violations by the respondents or any other state organs within its jurisdiction.**

**39. I find no merit in the preliminary objection and hereby find that this petition is within jurisdiction of this honourable court....."**

Similarly, in the case of **National Gender & Equality Commission v Majority Leader, County Assembly of Nakuru & 4 others; Jubilee Party & another (Interested Parties) [2019] eKLR**, Joel Ngugi J, considering a similar preliminary objection analysed decisions from the High Court as well as that of the Court of Appeal in **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR** and concluded: -

**"21. In the Mumo Matemu case, the Court of Appeal was explicit that the doctrine of separation of powers can never mean that decisions and processes of the other two arms of government are immunized from judicial interrogation. It is the standard utilized by the courts for such interrogation that determines whether the courts have sufficiently applied the**

doctrine of separation of powers. Hence the Court of Appeal prescribed a standard of review which it described as “rationality standard” distinct from “reasonableness standard” to be utilized in such cases.....”

22. In the present case, the Petitioner claims that the intent purpose and effect of the impugned resolution by the County Assembly of Nakuru would be to perpetuate constitutionality, impermissible discrimination. This is a precisely stated complaint which, if true, would yield the Constitution that the Respondents violated the Constitution. The only question, then would be whether such a conclusion can be reached by applying the “rationality standard” prescribed by the Court of Appeal, and not whether the courts have been rendered powerless to consider such controversy. I would therefore hold that the court has jurisdiction to consider the matter at hand.”

In *County Assembly of Kisumu & 2 others v Kisumu County Assembly Service Board & 6 others* [2015] eKLR the Court of Appeal held inter alia: -

“e. All persons, including state organs are obliged to comply with and defend the constitution. The constitution subjects the discharge of the mandates of all persons including the National and County Assemblies, which are quasi-judicial in nature to the supervisory jurisdictions of the High Court and the ELRC. As the doctrine of the separation of powers is part of the architecture of the self same constitution, it is no derogation from the doctrine of separation of powers to subject the County Legislative Assemblies (and even the National Assembly) to the supervisory jurisdiction of the court if, in the exercise of their quasi-judicial functions, they violate the constitution.....”

Similar jurisprudence runs through the decision of the Supreme Court in the case of *Judicial Service Commission v Speaker of the National Assembly & 8 others* [2014] eKLR where the court stated: -

“The constitution disperses powers among various constitutional organs. Where it is alleged that any of these organs has failed to act in accordance with the constitution then the courts are empowered by Article 165 (3) (d) (ii) to determine whether anything said to be done under the authority of the constitution or of any law is inconsistent with or in contravention of the constitution.”

It is my finding therefore that **Sections 10 and 11 of the County Assemblies Powers & Privileges Act 2017** do not oust the supervisory jurisdiction of this court provided in **Article 165 (3) (d) (ii) of the Constitution**. The said Act is subordinate to the Constitution which is the supreme law and it cannot override it. As to the submission that this court can only proceed after declaring the section unconstitutional my view is that as that is not a matter before me this court shall refrain from making any such declaration save to note that a similar provision in the **Parliamentary Powers and Privileges Act (No. 21 of 2017)** suffered that fate in *Apollo Mboya v Attorney General & 2 others* **NBI Petition 472 of 2017** [2018] eKLR where Mativo J pronounced himself as follows: -

“a. A declaration be and is hereby issued decreeing that sections 7 and 11 of the Parliamentary Powers and Privileges Act (No. 29 of 2017) are inconsistent with and contravene Articles 1, 2, 3, 10, 19, 20, 21 (1), 22, 23, 24, 48, 50, 9 (2), 94 (4), 159 and 258 of the Constitution of Kenya, 2010.

b. A declaration be and is hereby issued declaring that Sections 7 and 11 of the Parliamentary Powers and Privileges Act (No. 29 of 2017) are unconstitutional and therefore null and void.”

In the upshot I find no merit in the preliminary objection and the same is overruled. It is so ordered.

Dated, signed and delivered in Nyamira this 25<sup>th</sup> day of September 2019.

E. N. MAINA

JUDGE