



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

CONSTITUTIONAL PETITION NO. 376 OF 2019

MARYAN MOHAMED HASSAN.....1ST PETITIONER

YUSUF OMAR ABDI.....2ND PETITIONER

VERSUS

THE SPEAKER COUNTY GOVERNMENT OF GARISSA.....1ST RESPONDENT

THE COUNTY ASSEMBLY, GARISSA COUNTY.....2ND RESPONDENT

AND

THE PARTY FOR DEVELOPMENT AND REFORM.....1ST INTERESTED PARTY

THE JUBILEE PARTY.....2ND INTERESTED PARTY

RULING

1. Through the notice of motion dated 23rd September, 2019 and amended on 30th September, 2019 Maryan Mohamed Hassan (the 1st Petitioner) and Yusuf Omar Abdi (the 2nd Petitioner) pray for orders as follows:-

“1. This Application be certified urgent and be heard ex-parte.

2. Pending the hearing and determination of the Petition and/or Application, a Conservatory Order be and is hereby issued staying the entire decision made by the 1st Respondent on the 17th September discharging the Petitioners from their membership of the Garissa County Assembly Select Committees on Agriculture, Livestock and Fisheries and Roads, Transport and Public Works Committee.

3. Pending the hearing and determination of the Petition and/or Application, the 1st and 2nd Respondents be and are hereby ordered not to conduct any nomination, selection and/or replacement with regard to the membership of the Garissa County Assembly Select Committees on Agriculture, Livestock and Fisheries and the Roads, Transport and Public Works Committee.

4. The decision by the 1st and 2nd Respondents to nominate fresh members to Garissa County Assembly Select Committees on Agriculture, Livestock and Fisheries and the Roads, Transport and Public Works Committee on 26th and 27th September 2019 be hereby declared null and void.

5. Any other order that the Honourable Court deems fit.

6. The Costs of this application be provided for.”

2. The Party for Development & Reform (PDR), the 1st Interested Party supported the application. The Jubilee Party, the 2nd Interested Party, though duly served did not reply to the application. The Speaker, County Government of Garissa (1st Respondent) and the County

Assembly, Garissa County (2nd Respondent) opposed the application.

3. The facts of this case as narrated to the court by the petitioners are that through a letter dated 13th October, 2017 the 1st Interested Party nominated the 1st Petitioner to serve in the Roads and Transport Committee of the County Assembly of Garissa. Through the same letter the 2nd Petitioner was nominated to serve in the Agriculture, Livestock and Fisheries Committee. Their nomination was subsequently approved by the County Assembly.

4. On 17th September, 2019 the 1st Respondent communicated to the members of the 2nd Respondent as follows:-

“Pursuant to Section 157(1) the Majority Party hereby discharge the following members from the committees as follows:-

1. Hon. Yussuf Omar Abdi has been discharged from the committee of Agriculture, Livestock and Fisheries.

2. Hon Maryan Mohamed Hassan has been discharged from the committee of Roads, Transport and Public Works.”

Through the same communication, the 1st Respondent directed the members of the affected committees to elect new chairpersons to replace the ousted petitioners.

5. The petitioners were aggrieved by that decision and rushed to this court where they filed their petition and an application for conservatory orders dated 23rd September, 2019. On 24th September, 2019, my brother, Makau, J directed them to serve their pleadings and appear before me on 30th September, 2019. When the petitioners appeared before me on 30th September, 2019 they informed me that things had changed on the ground and they needed leave to file and serve amended pleadings. That leave was granted hence the amended notice of motion dated 30th September, 2019 in which prayer No. 4 of the application was introduced.

6. Through the amended application and the further affidavit sworn on the same date, the petitioners informed the court that the committees in which they were serving had acted on the instructions of the 1st Respondent and elected new chairpersons on 26th September, 2019 and 27th September, 2019. That is the damage the petitioners seek to undo through their amended application.

7. In brief, the petitioners’ case is that they gained entry to the County Assembly of Garissa through the 1st Interested Party. They are therefore perplexed that the majority party, presumably the 2nd Interested Party, proceeded to write to the 1st Respondent seeking to discharge them from the committees. Further, that they were not given an opportunity to be heard before being discharged from the committees. As already stated, their political party the 1st Interested Party supports their case. That support came through the replying affidavit sworn on 1st October 2019 by Abdi Noor Mohamed, the Chairman of the 1st Interested Party.

8. The respondents opposed the application through two replying affidavits sworn on 30th September, 2019 and 3rd October, 2019 by Hon. Ahmed Ibrahim Abass, the Speaker of the County Assembly of Garissa. In summary, their case is that this court is divested of jurisdiction to hear and determine this matter by dint of the fact that there exist a High Court in Garissa vested with competent jurisdiction to hear and determine the matter; that the 1st Respondent has never received any letter from the 1st Interested Party nominating the petitioners to the committees; that it is the County Assembly’s Committee on Selection in consultation with the parties that nominates members to the committees; and that there is no office by the name Party for Development and Reform Whip as alleged in the petitioners’ alleged letter of nomination.

9. It is further the respondents’ case that the County Assembly of Garissa is made up of the majority coalition and the minority coalition; that the majority coalition is made up of the Jubilee Party (2nd Interested Party) and its affiliates being PDR (the 1st Interested Party), KANU and KPP; that the minority coalition, NASA, is made up of ODM, ANC and WIPER; that both the majority coalition and the minority coalition has one Party Whip and Deputy Party Whip; that the 1st Respondent fully complied with the requirements of the County Assembly of Garissa Standing Order No. 157 and his duty was merely to inform the Assembly of the decision of the majority coalition as communicated to him by the Leader of Majority; that the replacement of the petitioners in the committees on 26th September, 2019 was in compliance with Standing Order 156 of the County Assembly of Garissa; that the petitioners were given a hearing as they were invited to appear before their party leadership to show cause for their misconduct; and that the petitioners can only fault their political parties and not the respondents for not affording them an opportunity to be heard prior to their removal from their committees.

10. It is also the respondents’ case that in so far as the petitioners have not challenged the constitutionality or legality of Standing Orders 154, 156 and 157, the said Standing Orders remain binding on them. The respondents aver that the dispute presented before this court by the petitioners is an intra-coalition dispute which ought to be resolved through the internal coalition dispute mechanisms or the Political Parties Disputes Tribunal. There are other averments targeting the competency of the application and I need not reproduce them for they are well captured through the respondents’ grounds of opposition dated 3rd October, 2019 which is the next item on my agenda.

11. Through their said grounds of opposition, the respondents oppose the petitioners’ amended notice of motion on the grounds that:-

“1. THAT the Notice of Motion application dated 30th September, 2019 is fatally defective and incompetent.

2. THAT the said application is misconceived, unsupported, unmeritorious, frivolous and vexatious.

3. THAT according to Section 2 of the Civil Procedure Act a Notice of Motion is not a pleading before the eye of the law and

it is therefore not capable of being amended.

4. THAT the application is defective in form and substance for failure to comply with the provisions of law.

5. THAT the Plaintiff/Applicant should withdraw the Notice of Motion Application in its entirety and file a fresh one.

6. THAT the said Application is without merit.

7. THAT the said application should be dismissed with costs.”

12. The advocates for the parties filed submissions in support of their positions. I will consider those submissions as I proceed to determine the application. The respondents have submitted that this court has no jurisdiction to handle this matter considering that the cause of action arose within the jurisdiction of Garissa High Court.

13. In **Christopher Orina Kenyariri t/a Kenyariri Associates Advocates v Salama Beach Hotel Limited & 3 others**, Civil Appeal No. 62 of 2016 (Malindi), the Court of Appeal addressed the question of the jurisdiction of the High Court as follows:-

“We must reiterate that the High Court of Kenya remains one and the same court, only that it sits at different locations of the country, such as Malindi and Nairobi. The location where it sits cannot therefore affect its jurisdiction. The practice and requirements that suits be filed in particular stations of the High Court are purely for administration and convenience in the hearing and determination of suits. That is not in any way to suggest that such requirements or practice is unreasonable or unnecessary, it is intended to reduce costs of transporting witnesses from one court of the country to another for hearing of cases and to expedite hearing and determination of suits, thus giving meaning to the overriding objective and the constitutional value in Article 159 which emphasize the need to reduce costs and delay in the hearing and determination of suits.”

14. In light of the said decision, I find that this court has jurisdiction to hear and determine the application and petition. Ideally, cases ought to be filed in the nearest High Court. In this case, the nearest High Court is Garissa. However, the petitioners have averred that violence may be visited upon them if the petition is heard at Garissa High Court. This averment has not been rebutted. For that reason, this matter will be heard before this court.

15. Another point on jurisdiction taken up by the respondents is that the petitioners have not exhausted alternative dispute resolution mechanisms. In **Speaker of the National Assembly v Hon James Njenga Karume [2008] 1KLR 425** the Court of Appeal pronounced the principle of exhaustion of alternative dispute resolution mechanisms by stating that **“where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of parliament, that procedure should be strictly followed.”**

16. It is the respondents’ case that the petitioners’ case is an intra-party dispute, which ought to have been first placed before the parties’ internal disputes resolution mechanisms and then upscaled to the Political Parties Disputes Tribunal if no solution was found. Without going into the details of the dispute, it is clear that the petitioners’ case is against the respondents’ action to remove them from the County Assembly committees based on communication from a party that did not sponsor them to the County Assembly. Their case is not about intra-party dispute. As was stated by the Court of Appeal in **Dr, Lillian Gogo v Joseph Mboya Nyamuthe & 4 others**, Civil Appeal No. 135 of 2017:-

“A common denominator of the categories of disputes that must in the first instance be submitted to the internal political party dispute resolution mechanism is that the disputants would all be subject to the political party and therefore subject to such party’s internal dispute resolution mechanism.”

17. The dispute here is not between the petitioners and their political party. It is therefore not a dispute that can be resolved through the political party’s internal dispute resolution mechanism. The Political Parties Disputes Tribunal has no role to play considering that the petitioners’ complain is not against a political party but against the respondents. In the circumstances, I hold that this court has jurisdiction to deal with the petition.

18. The respondents raised an issue about the defectiveness of the amended petition. Their assertion is that Section 2 of the Civil Procedure Act does not define an application as a pleading hence the rules applicable to amendment of pleadings do not apply to applications. The answer to this objection is found in the decision of A. Mabeya, J in **Edermann Property Limited v Registered Trustees of the Kenya Railways Staff Retirement Benefit Scheme & another [2012] eKLR** when he held that:-

“Section 2 of the [Civil Procedure] Act has defined pleadings to mean principal documents of claim or defence of litigants. It has not included interlocutory applications. The question that arises is whether by not providing for amendment of applications, no application can be amended. Was it the intention of the legislature and the Rules Committee that applications cannot be amended? What if there is a slight mistake on an application, is the only remedy available to such an applicant to withdraw such an application and file a fresh one? My view goes contra to that. Taking such a course will be contrary to the overriding principle of the Act under Sections 1A and 1B of the Act which require that civil disputes be resolved expeditiously and proportionately. Withdrawals and refileing of applications will not only lead to delays but also unnecessary expenses. Courts are there to dispense justice not to be overly concerned with technicalities that do not inhibit substantive justice. In any event, Section 3A of the Civil Procedure Act was enacted to fill those areas where there is lacunae, or where if there is strict application of the rules, there would be an injustice. In my view, if in the instant case the court rules that a Notice of Motion cannot be amended because it is not a pleading, it will cause an injustice as that will lead to delays and expense contrary to the spirit of the double “O” principle contained in sections 1A and 1B of the Civil Procedure

Rules. Accordingly, I reject that contention.”

I agree with the position taken by Mabeya, J and find that the respondents’ claim that the application is defective is without merit.

19. In an application for conservatory orders an applicant must establish a *prima facie case*; imminent and real likelihood of violation of rights and fundamental freedoms; the prejudice to be suffered if no orders are granted; and in matters touching on the public, that it is in the public interest to grant orders.

20. It is the petitioners’ case that they have met the conditions for grant of conservatory orders in that (a) the decision by the 1st Respondent was taken despite the fact that the petitioners were never afforded any opportunity to be heard; (b) the decision by the 1st Respondent was taken despite the fact that the petitioners were never afforded the opportunity to meet the charges against them; (c) the decision by the 1st Respondent was taken despite the fact that the petitioners were never afforded any opportunity to respond to any allegations against them; and (d) the 1st Respondent never bothered to ensure that the sponsoring party had sanctioned the removal of the petitioners from the County Assembly committees.

21. The respondents’ position is that the petitioners have not established a case for grant of conservatory orders. Firstly, they contend that Standing Order 157(2) clearly states that once the letter discharging the petitioners was received the petitioners stood discharged or dewhipped and were no longer members of the committees. The respondents therefore submit that the petitioners having not asked for orders of reinstatement, the orders sought are both practically and legally impossible to grant. Secondly, the respondents contend that the orders sought are mandatory in nature and although the court can grant mandatory orders at the interlocutory stage, such orders cannot be granted in this case considering the kind of orders sought. Thirdly, that the positions targeted by the petitioners’ orders have already been filled and the prayers sought are practically and legally impossible to grant.

22. Have the Petitioners established a *prima facie case*? In **Mrao Ltd v First American Bank of Kenya Ltd & 2 others [2003] eKLR**, the Court of Appeal stated that a *prima facie case* in civil cases **“is a case in which on the material presented to the court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”**

23. It would indeed be difficult to conclude at this stage, without discussing the evidence, that the petitioners have not established a *prima facie case*. This being an application for conservatory orders, this court is not required to discuss the evidence in detail, for to do so may end up prejudicing the case of the parties. In the case of **Centre for Rights Education and Awareness (CREAW) & 7 others v Attorney General [2011] eKLR** Musinga, J (as he then was) held that:-

“It is important to point out that the arguments that were advanced by counsel and that I will not take into account in this ruling relate to the prayer for a conservatory order in terms of prayer 3 of the Petitioner’s application and not the petition. I will not therefore delve into a detailed analysis of facts and law. At this stage, a party seeking a conservatory order only requires to demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the conservatory order there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution.”

24. It is necessary to point out that the respondents have indicated in their defence that the petitioners were given notice to show cause why disciplinary action should not be taken against them. Further, that the 1st Interested Party is a member of a coalition coalescing around the majority party. This defence will indeed be tested during the hearing of the petition.

25. In **Tom Onyango v Mimosa Investments Limited [2017]eKLR** the Court of Appeal held that:-

“[A] mandatory injunction may be granted on an interlocutory application as well as at the hearing but in the absence of special circumstances, it will not be normally granted. It may be granted in clear cases where, *inter alia*, the court is satisfied that the matter ought to be decided at once or where the circumstances are such that the court is satisfied that the case is unusually strong and clear. In exceptional cases, the court has discretion to grant an interim relief although it amounts to granting the final relief itself prayed in the suit,”

26. The prayers sought by the petitioners are mandatory in nature. If the application is allowed, the petitioners will go back to their positions in the committees. In light of the defence raised by the petitioners, it cannot be said that the petitioners’ case is **“unusually strong and clear”** to warrant grant of a mandatory order at the interlocutory stage. Will the petitioners suffer prejudice if orders are not granted? I am of the view that the petitioners will not be prejudiced by denial of orders. A quick disposal of the petition will determine once and for all whether the petition has merit.

27. It is not in the public interest to paralyze the operations of the two committees. Those committees already have chairpersons elected by the members. If at the conclusion of the hearing, the petition is allowed, this court has powers to restore the petitioners to their former positions – see the Court of Appeal decisions in **Katiba Institute v Attorney General & 9 others [2018] eKLR** and **Nelson Andayi Havi v Law Society of Kenya & 3 others [2018] eKLR**.

28. For the reasons stated, I find no merit in the application dated 23rd September, 2019 and amended on 30th September, 2019. The application is therefore dismissed. The costs for the application shall abide the outcome of the petition.

Dated, signed and delivered at Nairobi this 31st day of October, 2019.

W. Korir,

Judge of the High Court