



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**PETITION NO. 29 OF 2018**

**IN THE MATTER OF ARTICLE 1(1) (2) 3(B) 4 (B) 2,3,10,19,20,21,22,23,73,  
75,159,174,175,232,235,251,258 AND 259 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF THE FUNDAMENTAL RIGHTS  
AND FREEDOM UNDER ARTICLE 27,28,41,47 AND 50 (1) OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF THE PURPORTED IMPEACHMENT AND/OR DISBANDMENT  
PETITIONER FROM THE OFFICE OF THE MERU COUNTY PUBLIC SERVICE BOARD**

**BETWEEN**

**MERU COUNTY PUBLIC SERVICE BOARD.....PETITIONER**

**VERSUS**

**CLERK COUNTY ASSEMBLY, MERU.....1<sup>ST</sup> RESPONDENT**

**SPEAKER COUNTY ASSEMBLY, MERU.....2<sup>ND</sup> RESPONDENT**

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

**JUDGMENT**

1. The petitioner herein filed petition dated 4<sup>th</sup> December 2018 listing nine (9) prayers that can be aptly summarised as follows;

a. That a declaration be issued to declare that the purported intended disbandment or any impeachment or disbandment of the petitioner by the 3<sup>rd</sup> Respondents through a motion in the assembly or otherwise is unlawful and illegal on account of violation of section 58 (5) of the County Government Act No. 17 of 2012 as read with Article 47 and 251, 10, 73 and 75 of the constitution.

b. that a declaration be issued to declare that the purported grounds or reasons specified in the 3<sup>rd</sup> Respondents purported motion are ultra vires section 58 (5) of the County Government Act No. 17 of 2012 and do not constitute any reasonable grounds for suspension of the petitioner as the Meru County Public Service Board as anticipated under 251 (1) of the Constitution of Kenya.

c. That a declaration be issued to declare the decisions, actions, omissions or commissions of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents in respect of the purported intended disbandment or impeachment of the petitioner have violated the petitioner’s right and fundamental freedoms secured and guaranteed under articles 27,28,41,47 and 50 of the Constitution of Kenya 2010.

d. That an Order of certiorari be issued to bring into this Honourable Court, for purposes of being quashed, the purported intended

disbandment and or disbandment of the petitioner.

e. That the costs of these proceedings be provided for.

2. The petition was supported by the sworn affidavit of **Christine Kawira Ungu**, the acting chairperson of the Meru County Public Service Board and on the grounds that;

(i) by a motion *suo moto* and unilaterally prepared by the 3<sup>rd</sup> Respondent, the 3<sup>rd</sup> Respondent has purported to disband the petitioner in clear violation of the law and the constitution and in violation of the petitioners fundamental rights and freedoms as enshrined in the Constitution of Kenya 2010.

(ii) Prior to the illegal decision via the motion the petitioner had never been notified of any proceedings, ongoing investigation against its members, complaints or the existence of any petition for his removal from office pending against him or afforded the right to be heard and the said action is thus taken without notice or knowledge of the petitioner hence the same is irregular unprocedural and contravenes the law and the constitution.

(iii) The motion to disband the petitioner by the 3<sup>rd</sup> Respondent is void ab initio as the 3<sup>rd</sup> Respondent has no authority or any constitutional mandate to issue and/or purport to suspend the petitioner without first obtaining approvals of 75% of the total membership of the 3<sup>rd</sup> Respondent and only upon the petition presented thereof.

(iv) That the alleged intended disbandment of the petitioner is being brought about by the fact that several members of the 3<sup>rd</sup> Respondent handed over list of preferred people whom they requested to be given preferential treatment during the employment/recruitment process, but the petitioner ignored the same and instead made the recruitment and employment on sheer merit and transparency.

3. The petition has been opposed by the Respondent vide Replying Affidavit dated 20<sup>th</sup> February 2019 sworn By **Ariithi J.K** the Clerk of the County Assembly (the 1<sup>st</sup> Respondent herein). The respondents averred that;

(i) Through powers vested in the County Government Act and the Constitution of Kenya the County Assembly has the power to remove various members within the County Government structure including removal of the members of the County Public Service Board under the provisions of Section 58 (5) of the County Government's Act 2012.

(ii) That the County Assembly of Meru has constituted amongst other committees, a committee on Labour, Public Service and Social Welfare. The mandate of the committee was to investigate the issues of corruption, favouritism, nepotism and bias in the recruitment of employees to the County Public Service. The said committee invited members of the County Public Service board (petitioner) to attend its sittings and give information and evidence on the impugned recruitment process but they refused, failed and/or neglected to attend.

(iii) That the investigations revealed that there was a discrepancy in the list of Shortlisted candidates submitted to the County Assembly and the list submitted to the General public leading to the conclusion that there was intentional concealment and supply of misleading information to the County Assembly and the public with regard to the recruitment of persons to the County Public Service.

(iv) That the candidates who were fraudulently listed in the shortlist were nevertheless appointed to various positions in the County Public Service.

(v) That the report has to be tabled, debated and adopted by the County Assembly and the present petition is therefore premature to the extent that the issues raised before the court is pending for discussion and determination by the County Assembly and this court has no jurisdiction to stop or interfere with the processes of a County Assembly.

(vi) That the complaints giving rise to the investigations and subsequent charges against the petitioner were made by the public to their elected representatives and who raised them in the County Assembly and thereby precipitating investigations against the 1<sup>st</sup> Respondent.

4. During the filing of the petition the petitioner equally filled an application under Certificate of Urgency and of similar date seeking this Honourable Court to issue temporary conservatory orders prohibiting and restraining the petitioners from debating and/or passing a motion to impeach the petitioner or acting on the purported motion pending the hearing and determination of the petition. The court considered the application on 5<sup>th</sup> August 2018 and granted the temporary Orders pending the hearing and determination of the petition. On 18<sup>th</sup> December 2018 parties consented to extend the temporary stay pending the hearing and determination of the petition. They equally agreed to canvass the application through written submissions.

#### **Submission of the Parties**

5. The petitioner filed its written submissions on 13<sup>th</sup> March 2008 and replied to the Respondents Submission on 27<sup>th</sup> May 2019. The petitioner submitted that Article 251 (1) of the Constitution Outlines the grounds on which members of the petitioner may be removed from office and any person seeking to remove the aforesaid members must satisfy the reasons enumerated in the constitution and secondly submit an appropriate petition to the county assembly as opposed to a report as submitted by the Sectorial Committee on Labour, public Service and social welfare of Meru.

6. That a look at the County Assembly of Meru Hansard revealed that the members of the County Public Service appeared before the assembly to explain queries that had been asked. That on the next scheduled meeting the petitioner wrote to the assembly explaining that they would not be available on the date for various reasons and the same were equally captured in the Hansard.

7. That the recommendations from the *Hansard* purports to remove all officers of the petitioner without giving them a chance to be heard and without advancing any ground for their removal as envisaged under article 251 of the constitution. In support of their submissions they relied on the following authorities; **Elrc Petition Cause No. 8 of 2016 Johnstone Chebusit & Anor vrs the Governor Bomet County & 4 others, Elrc Petition Cause No. 11 of 2015 Hussein Bora vrs County Government Isiolo& 2 Others, Elrc Petition No. 5 of 2015 Mundia Njeru Gateria vrs Embu County Government & 3 others.**

8. The Respondent submitted that the role of the County assembly are clearly spelt out in the Article 185 of the Constitution of Kenya as read with section 8 of the County Government Act and includes inter alia exercising oversight over the county executive and any other county executive organs so as to ensure there is accountability and transparency in the execution of the functions of the county executive and in the application of resources of the county government. That in exercise of its oversight role, the county assembly is given power in law to remove officers within the county government structure where it so determines under the provisions of the law including removal of the members of the County Public Service board as provided under Section 58 of the County Government's Act 2012.

9. That the only way the members of the County Public Service board could be removed from office is on the grounds set out under Article 251 of the Constitution and by a vote of not less than 75% of all members of the County Assembly under section 58(8) of the County Government Act 2012.

10. That the report made by the committee on labour, public service and social welfare is yet to be tabled, debated and adopted by the county assembly hence the petition herein is premature to the extent that the issues raised before the court are pending discussions and determination by the county assembly and this court has no jurisdiction to stop or interfere with the process of the county assembly.

11. THEY RELIED ON THE FOLLOWING AUTHORITIES IN SUPPORT OF their submissions i.e. **Daniel Omondi Ogada& 6 Others vs County Assembly of Homabay& 2 Others [2019] eKLR, Hussein RobaRobu v County Government of Isiolo& 2 others (2015) eKLR, Margaret Lorna Kariuki& Anor vrs County Assembly of Embu 7 Anor; National Forum for County Assemblies(Interested party) [2019] eKLR, Ibrahim Swaleh v Speaker, County Assembly of Embu & 2 others [2015] eKLR, Justus Kariuki Mate & Anor v Martin NyagaWambora& Anor [2017] eKLR, Peter O. Ngoge t/a Peter O Ngoge and Associates Advocates v Coffee Board of Kenya & 2 others [2018] eKLR.**

#### ANALYSIS AND DETERMINATION

12. I have considered the pleadings, the nature of the proceedings as well as arguments by the parties and the following emerge as the issues for determination;

**a. Whether this Honourable Court has jurisdiction to hear and determine the petition?**

**b. Whether the petition as presented is premature?**

**c. Whether the applicant has satisfied the threshold to be met to warrant the Orders sought.**

**of jurisdiction**

13. The sweetest canticle on jurisdiction was composed by Nyarangi JA in the landmark case of **The Owners of Motor Vessel Lilian S Vs Caltex Kenya Ltd. (1989) KLR** that; *jurisdiction is everything*. The Supreme Court in the case of **Samuel Kamau Macharia & Another Vs Kenya Commercial Bank Limited and 2 Others (2010) eKLR**, elaborated on the foundations of jurisdiction as follows: -

**“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 other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.**

14. Does this court have jurisdiction over matters complained of in this petition? In **Margaret Lorna Kariuki & another v County Assembly of Embu & another; National Forum for County Assemblies (Interested Party) [2019] eKLR** the Court citing the Supreme Court decision **In Speaker of the Senate & Another v Attorney General & 4 Others, Reference No. 2 of 2013 [2013] eKLR** stated that;

**“no arm of Government is above the law as the constitution is the guiding light for the operations of all state organs. Consequently, the courts mandate, where it applies, is for the purpose of averting any real danger of constitutional [sic] violation.”**

15. The jurisdiction of the High Court is spelt out in article 165(3) as follows:-

**(3) Subject to clause (5), the High Court shall have—**

**(a) unlimited original jurisdiction in criminal and civil matters;**

**(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been**

denied, violated, infringed or threatened;

(c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;

(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of —

(i) the question whether any law is inconsistent with or in contravention of this Constitution;

(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;

(iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and

(iv) a question relating to conflict of laws under Article 191; and

(e) any other jurisdiction, original or appellate, conferred on it by legislation.

16. The main grievance in this petition is that due process for the removal from office of the members of the County Service Public Board was not followed. In addition, the petitioner claims that sufficient or reasons for removal were not provided, thus, violating the fundamental rights of the petitioner. The Respondents on the other hands argues that they have the power to remove the members of the petitioner under article 251 of the Constitution and section 58 of the County Governments Act. They stated that they acted within the confines of the Constitution and the law. Doubtless, the twin questions that arise are; (1) whether the removal or attempted removal from office of the members of the petitioner was done in accordance with or is inconsistent with, or in contravention of, the Constitution and the law; and (2) whether the removal or attempted removal from office of the members of the service board is a violation of their fundamental rights. Determination of such question falls within the jurisdiction of this court. Accordingly, this court has jurisdiction to try this petition. I now move to determine the real issue in controversy.

#### **Establishment of the Board**

17. Some foundational information: Section 57 of the County Government Act, 2012 establishes the County Public Service Board. The section provides;

##### **57. Establishment of the County Public Service Board**

**There is established a County Public Service Board in each County, which shall be—**

**(a) a body corporate with perpetual succession and a seal; and**

**(b) capable of suing and being sued in its corporate name.**

18. Section 58 provides for the Composition of the County Public Service Board whereas Section 58 (5) provides for removal of the members of the board. See the section below

**(1) The County Public Service Board shall comprise—**

**(a) a chairperson nominated and appointed by the county governor with the approval of the county assembly;**

**(b) not less than three but not more than five other members nominated and appointed by the county governor, with the approval of the county assembly; and**

**(c) a certified public secretary of good professional standing nominated and appointed by the governor, with the approval of the county assembly, who shall be the secretary to the board.**

**(5) The members of the Board may only be removed from office—**

**(a) On grounds set out for the removal of members of a constitutional**

**Commission under Article 251(1) of the Constitution; and**

**(b) By a vote of not less than seventy five per cent of all the members of the county assembly.**

**251. (1) A member of a commission (other than an ex officio Removal from office member), or the holder of an independent office, may be removed from**

**office only for—**

- (a) serious violation of this Constitution or any other law, including a contravention of Chapter Six;**
- (b) gross misconduct, whether in the performance of the member's or office holder's functions or otherwise;**
- (c) physical or mental incapacity to perform the functions of office;**
- (d) incompetence; or**
- (e) bankruptcy.**

19. According to the law highlighted above especially Section 58 of the County Government Act the members of the County Public Service board are nominated and appointed by the County governor with the approval of the County Assembly. But their removal is by the County Assembly. These proceedings challenge the procedure, process and grounds for the removal or attempted removal of the members of the public service board. Of importance is the reference in section 58 of the County Governments Act of article 251 of the Constitution. This is important as shall be borne out later.

20. On procedure, this is my considered thought: constitutionally-backed prudence dictates that a proper petition should be filed in the county assembly for consideration by the county assembly in accordance with the rules of the house. Due process must also be observed in considering the petition in order to attain fair hearing and fair administrative action requirements. The petition should also clearly set out the grounds for removal in accordance with article 251 of the Constitution. I am aware that the County Government Act does not prescribe a specific format which the petition ought to take. I am also aware that according to the **Black's Law Dictionary 9<sup>th</sup> Edition Pg. 1261** a petition is described as;

**a formal written request presented to a court or other official body.**

21. Be that as it may, it bears repeating that the petition must clearly set out the grounds in a manner that it conveys the substance of the grounds for removal. This enables the person to be removed to know the case he is faced with and therefore make appropriate response thereto.

22. On this I am content to cite the case of **Mundia Njeru Gateria v Embu County Government & 5 others [2015] eKLR** where the Court held;

**“The person desirous that the chairperson is removed from the office must satisfy the substance and the procedure first, alleging the details of the grounds that satisfy any of those enumerated in the constitution and secondly, submitting the appropriate petition to the county assembly for the assembly's consideration and resolution. There is no exception of the application of the procedure where the removal is to be desired by the county governor.”**

23. The 3<sup>rd</sup> Respondent has explained the procedure it is currently undertaking in the removal of the members of the County Public Service Board. It has summoned the members on two occasions. On the first occasion Hon. Lucas Athinya Thianie provided the response but on two other occasions they did not provide a response. It is their averment that the Secretary and Chairman of the Board failed to attend the meetings of the committee despite being summoned on various occasions. It is after their failure to provide a response that the committee wrote a recommendation for their removal.

24. It is not clear how these proceedings were initiated. It is not also clear whether the petitioner was served with details of the allegations against them as well as clear grounds for which their removal is being sought. Removal from office is a serious matter for it impinges on a person's rights. It should therefore be done strictly in accordance with the Constitution and the law; inform them of the case they are facing and afford them fair hearing. I am aware however that the petitioners appeared before the relevant committee of the assembly on one occasion and did not appear on another occasion they were summoned to appear. They however gave reasons for non-attendance. Despite this, the procedure undertaken is obscure and did not adhere to the requirements for fair hearing and fair administrative action. On that basis, I quash the recommendation for removal made by the committee of the assembly in these circumstances. However, courts should not be seen to impede or circumvent the processes and operations of county assemblies in the removal of members of the public service board. The concern for the court is adherence with the law and the Constitution. See **Speaker of the Senate & another v Attorney-General & 4 others [2013] eKLR**. In the circumstances, the most appropriate order therefore is and I do hereby order that the members of the petitioner board be accorded an opportunity to appear before the relevant committee of the county assembly of Meru County to answer to allegations levelled against them. I expect the members of the petitioner board shall be served with clear grounds for removal from office as required in article 251 of the Constitution. I note also that the allegations herein are serious and relate to hiring of professionals for the County Government of Meru; the more reason why it should be properly evaluated in public interest. Needles to state that the county assembly undertakes and determines such assignment in accordance with article 251 of the Constitution, Section 58 of the County Government Act and the rules and standing orders of the house. The petitioner should also comply with any summons duly served by the assembly. This way, the rights of the petitioners, the mandate and working of the assembly are safeguarded.

25. Given the nature of these proceedings, I order each party to bear own costs of the petition.

Dated and signed at MERU this 28<sup>th</sup> day of October, 2019

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**F. GIKONYO**

**JUDGE**

In presence of

Muriuki for petitioner

Muthomi for Njenga for respondents

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**F. GIKONYO**

**JUDGE**