



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

PETITION NO. 10 OF 2017

DAVID KERARIO MARWA.....APPLICANT

VERSUS

BOAZ AWITI OKOTH.....1ST RESPONDENT

CLERK TO COUNTY ASSEMBLY OF MIGORI.....2ND RESPONDENT

J U D G M E N T

1. By a ruling of this court dated 22/11/2017 petition number 3 of 2017 at Kehancha Senior Resident Magistrates court was consolidated with this petition.

2. The substantive prayers in this petition dated 4/9/2017 are that;

a) The Petitioner be declared the winner of the 2nd vote of the Migori County Assembly held on 31st August 2017 where he garnered 31 votes to 25 votes of the 1st respondent.

(b) The Petitioner be declared to be the duly elected speaker of the Migori County Assembly.

(c) The 2nd Respondent be ordered to convene the Migori County Assembly and swear in the petitioner as the speaker of the Migori County Assembly within specific timelines by the court, but in any event not more than 7 days after the declaration herein or in the alternative the Deputy registrar Migori High Court to swear the petitioner as the speaker of the County Assembly of Migori.

(d) Both respondents be held to have committed election offences under Section 65 of the Elections Act as read with 2nd schedule thereof and do recommend prosecution by the relevant agencies in accordance with Section 87 of the Election Act.

(e) Costs of this petition to be paid by the Respondents jointly and severally.

3. In the now consolidated Kehancha matter aforesaid, the petitioner therein became the 2nd petitioner herein and the respondent became the 3rd respondent herein.

4. The 2nd petitioner had prayed for the following reliefs

(a) that this honourable court do declare that the 3rd respondent could not and cannot be elected and declared a Deputy speaker in the absence of a speaker hence the purported

election of the Deputy speaker on 19/9/2017 is null and void.

(b) That this honourable court do declare that no election of a Deputy speaker can validly take place unless there is a speaker of the County Assembly.

(c) That this honourable court declare all the decisions , activities, motions, elections, resolutions of the 1st Respondent done without a speaker or done under the chair of the 3rd respondent or before him to be null and void of no legal consequence.

(d) That this honourable court do declare that the only way the Migori County Assembly 1st Respondent can conduct business including the election of a Deputy speaker is through the provisions of Article 178 of the Constitution of Kenya.

(e) Any other relief of this court as well as costs.

5. Having heard all the parties orally and having read the respective submissions, I propose to begin with the first petition dealing with the election of the speaker.

6. The matter proceeded by way of oral evidence and the 1st Petitioner called a total of 3 witnesses to back up his case. The 2nd Petitioner testified and he did not call any witness.

7. The 1st Respondent testified and called 4 witnesses. The 3rd Respondent did not call any witness but chose to rely on the submissions as well as his pleadings already on record.

8. What runs across all the evidence on record in summary is that there was vacancy in the office of the Speaker Migori County after the Country General Election of 8/8/2017. That position was well advertised and several applicants sent their applications.

9. When the 2nd Respondent convened the Assembly as per the relevant gazetment, all the 56 members of the County Assembly herein after referred to as “MCAs” turned up. The clerk indeed after the MCAs had taken their respective oaths began the second business of the day, namely the election of the Speaker.

10. From the evidence on record and in particular the Hanzard of that day as produced by the 2nd Respondent, two candidates eventually emerged, for the 2nd round namely the 1st Petitioner and the 1st respondent . This occurred after none of the contestants garnered the 2/3 votes as required. In the premises the second ballot had to be conducted.

11. It is not disputed that the 2nd ballot did proceed very well under the guidance of the 2nd Respondent. When all the MCAs (56 of them) had casted their votes, and the votes sorted, the 2nd respondent began counting. However before he could finish counting those garnered by the 1st Petitioner, pandemonium broke. There were intruders who came out of the Assembly and began ordering the members outside and destroyed the ballot boxes and the materials. There was therefore interruption and it was everyone for himself.

12. Later the Assembly was convened after about 3 hours and another voting began. The contest was according to the Respondents a continuation of the 2nd ballot. The 1st respondent emerged the winner by garnering 30 votes against 5 votes of the 1st Petitioner. The 2nd Respondent then returned the 1st Respondent speaker of the County Assembly and he proceeded to take his oath of office. He later adjourned the Assembly sine die.

13. By then the 1st Petitioner was not at the scene. According to his evidence, when chaos broke, he was sitted at the speaker’s boardroom and according to him he was literally under siege though he could see from the windows what was taking place. He was later whisked away and went to his home at Kehancha. According to his evidence, there was no valid election as the second round was interrupted

by goons allegedly hired by the 1st and 2nd Respondents. The so called election that led to the election of the 1st respondent was a sham.

14. He called several witnesses who testified in his favour. The significant witness was one Charles Olao (PW4) who was an employee of the County Assembly at the Hanzard department. He produced both the Hanzard which he allegedly prepared as well as video evidence which captured the events of that day. The video evidence in particular shows the disruption of the second ballot by some unidentified people who gained access to the Assembly.

15. The two pieces of evidences, namely the Hanzard as well as the video evidence was strongly objected to by the 2nd Respondent in particular. He argued that the said witness had been redeployed from that Hanzard department earlier on and was by then working under the department of research. That he was already having a court case against the County and further that according to him he was suffering from a psychiatric decease and had recommended for his treatment. In any event the clerk argued that he was the only person permitted to release any official communication from the Assembly.

16. DW3 testified on behalf of the 2nd Respondent. She said that she was in charge of the Hanzard at that particular time and not PW4. She said that PW4 was his supervisor earlier own but not at that particular time of the election. She produced her version of the Hanzard which she deemed authentic. She admitted though that the proceedings of that day had been captured both in print video and audio. She equally conceded that violence marred the 2nd round of voting.

17. Essentially the rest of the witnesses testified of what they saw and heard but their evidence gravitated around the fact that the 2nd round of ballot was marred with chaos and violence.

Analysis and Determination

18. Having set out the above summary of the evidence as presented and having read the lengthy submissions by respective parties the substantive issue to be determined is whether there was a valid election of the Migori County Speaker. Was the 2nd ballot a proper ballot so to speak so as to have determined the 1st Petitioner the validly elected speaker of the Migori County Assembly?

19. Can the election of the 1st Respondent be deemed a proper election and thus the status quo ought not to be disturbed?

20. Who was responsible for the chaos?

Article 178 of the Constitution provides that:

“(1) Each County Assembly shall have a speaker elected by the County Assembly from among persons who are not members of the Assembly.

(2) A sitting of the County Assembly shall be presided over by:-

(a) the speaker of the Assembly; or

(b) in the absence of the Speaker, another member of the assembly elected by the assembly.”

21. On the same breath **Section 21 of the Election Act** provides on the same issue of the speaker as follows.

“(1) The Speaker of the County assembly shall be elected by each county assembly in accordance with the standing orders of the County assembly, from among persons who are qualified to be elected as member of a county assembly but are not such members.

(2) For the purpose of the election of the speaker of the County Assembly after the first election under the Constitution, the procedure set out in the First Schedule shall apply.

(3) The deputy speaker of a County Assembly shall be elected from among persons who are members of that County Assembly.”

22. **Rule 12 of the First schedule of the Elections Act** state as follows;-

“ A person shall not be elected as a speaker of a County assembly, unless supported by votes of two-thirds of all the members of the county assembly and if no candidate is supported by the votes of two-thirds of all the members, the candidate who in that ballot receives the highest number of votes and the candidate who in the ballot receives the next highest number shall alone stand for election in a further ballot and the candidate who receives the highest number of votes on the further ballot shall be elected speaker.”

23. Clearly the set out portions of the law above were in my view not breached in terms of the procedure followed. The Migori County Assembly Standing Orders Section 7 thereof are in tandem as regards the threshold required.

24. Now turning to the events of that day, it is necessary to glean from the hanzard as presented by the respondent what really transpired. Clearly, and although I admitted the hanzard by PW4, I do not find it sufficient enough to rely on the same for the simple reason that the same is not complete. It is not equally very clear how he produced the same as in his evidence he suggested that on that material day, he did not sit at the hanzard box. I shall leave the issue of his psychiatric status and the matter in the Labour relations Court for now as I was not presented with any evidence.

25. Suffice to say that I find the evidence of Emma Ogutu relevant to the extent that she was the Editor of the hanzard at that particular time.

26. As regards the video evidence, though presented by PW4, I do not find anything to suggest that the same was doctored, photoshop or not materially accurate. Whichever way he came into conduct with it is persuasive evidence in the sense that it agreed with the evidence as presented by all the parties in this petition that there was actual violence during the exercise. DW3 Emma Ogutu infact, who was in the Assembly confirmed in her evidence that

“The hanzard is on the left back of the house. People came into the house and smashed ballot papers. One member fainted.”

27. From what was presented to the court, there was clearly sufficient evidence to show this. Infact the clerk confirmed this incidences. In the premises I find the video evidence sufficient to buttress what took place inside the house.

28. There was an objection on the part of the clerk that he was the only person authorised in law to produce both the hanzard as well as the video and any other official publication as provided under the Migori County Assembly Standing Order No. 221(1), which provides that;

“ the custody of the journals and records , whether audio, electronic or any other form including all paper and accounts howsoever presented to or belonging to the County Assembly, shall be vested in the clerk, who unless otherwise prohibited by any law allow their access by the public.”

29. Whereas this is true, I shall dismiss the argument for the simple reason that he was an interested party and any “prudent” person would ensure that no incriminating evidence leave his locker. More fundamentally the clerk chose not to produce any video or audio evidence to counteract what the 1st Petitioner presented. In the absence of such, it can be reasonably inferred that what he has in his custody was similar to that presented by the 1st Petitioner or at worst, more damning.

30. Turning now to the contents of the hanzard, the same state as follows concerning the interruption of the proceedings *that day*.

“the counting was interrupted at 2.27 pm by members of the public who stormed the House and started shouting to Hon. members to get out of the chambers since the election had been compromised. They accused some members that they had been going to the County Assembly toilets to pick bribes while voting was taking place and to such election should be halted. Thereafter, there was commotion and one Hon. Member fainted as others got out running helter skelter. The youths shattered the ballot box and destroyed the cast votes that were being counted and other materials in the House.”

31. This took place as the 2nd ballot counting of votes was ongoing. The Assembly reconvened at 5.37 pm which was approximately 3 hours 10 minutes afterwards.

32. When the Assembly reconvened, the clerk stated as follows;

“Good afternoon hon. members I want to take this opportunity to apologise on what has just happened and with a short time. I have decided to call you back. I want to appreciate that you are here with us and the quorum which is supposed to be one third of the total members for us to discharge the activity that was pending is there - - - ”

“ ---- Most of the particulars that were here were taken away but we want to straight away go to the voting process. We have a list that does not identify whether you are here or not. She is going to call upon you and if she does and you are here, come and do the voting then make it back and sit down.”

33. The clerk went ahead to state that;

“I just want to call upon the incoming members that you could be scared of this but how I wish to pray that you thicken your skin. There are things to come. We are used to this and things must move on.”

34. Several fundamental issues arises from these quotation.

First of all the voting on its own went very well. Suddenly people from outside invaded the Assembly and caused mayhem. Infact one of the members fainted. The election materials were destroyed. The Assembly could not proceed with its mandate.

35. In my view this were not ordinary goons or some rowdy youths. The words of the clerk tells it all. How did the security detail who included all the County Security apparatus allow this to take place? The evidence on record clearly shows that the entire regiment of the County Security team were present.

36. How come as the witnesses including the clerk stated nobody bothered to intervene. In my humble view someone planned for the same. I am unable to pinpoint from the evidence on record who did this but clearly they were organised and knew what they were doing. Why for instance wait till the 2nd ballot was underway and counting started then they intervened. It cannot be business as usual in this era. Infact the remarks by the clerk to the members to have ‘thick skin’ is unfortunate to say the least. Any civilised society in this era and age cannot countance this. This was the Assembly and the heart of the people of Migori County.

37. Consequently and having stated above can the 2nd ballot be termed as proper as demanded by the 1st Petitioner? I do not think so. The same does not accord with Article 38 of the Constitution. It cannot be said that the same was free and fair. The violence that followed tells it all.

38. In any case, the clerk was caught midstream while counting the votes. He had not even completed

those of the 1st Petitioner which he was required to then move to those of the 1st Respondent.

39. I do not buy the idea that sorting or separating them can be equated to tallying or counting. Sorting merely means separating the two. Even if he loudly spoke as the Petitioner witnesses stated, while he was sorting he had not began counting. The semantics of “sorting”, or “separating” as argued by the parties herein are purely academic in my view. In any case the process of sorting invariably helps to identify and set aside spoiled votes and those validly and clearly filled.

40. Nonetheless in view of the above observations I do not think that there was proper voting in the second ballot that this court can rely on. There was no clear winner in short.

41. Can it therefore be said that the subsequent election that took place three hours later be termed proper. I am afraid not. First of all there was every possibility that those who disrupted the 2nd ballot had successfully done so indeed they succeeded. The evidence on record clearly shows that they were riotous and ruthless. It caused one of the members to collapse. Each one as per the hanzard took to their heels. Is there possibility that not all the members were around? Definitely yes. This is informed by the clerks statement that:-

“We have a list that does not identify whether you are here or not.”

42. Infact from those who voted, 35 members were present. Where were the rest of the 21 members? I highly doubt whether in the normal cause of things 21 MCAs would choose not to vote in a such crucial office. I cannot hasitate to conclude that they had all scattered. In any case there was no explanation why it took 3 hours and 10 minutes for the Assembly to be reconvened. Those hours are long enough for the clerk to have reconvened the meeting. At any rate it is his evidence that the security personnel restored order immediately thereafter.

43. Consequently, I find that the subsequent election conducted by the 2nd Respondent fell short of what ought to be an election as envisaged under Article 38 of the Constitution and the First Schedule to the Election Act.

44. There was an argument that the Act and the Standing Orders presuppossess that there ought to be a first election where one has to garner 2/3 of the votes and in the event of not getting the winner a 2nd ballot ought to follow. The respondent submitted that there was therefore no room for the 3rd election and that what took place when the Assembly reconvened was a continuation of the 2nd round.

45. I respectfully disagree. The Standing Order No. 7 of the Migori County Assembly which mirrors Rule 12 of the First Schedule of the Election Act, which I have quoted above state that;

7(2) “if no candidate is supported by the votes of two thirds of all members, the candidate or candidates who received the highest number of votes in the ballot referred to in paragraph (1) and the candidate or candidates who in that ballot received the next highest number of votes shall alone stand for election in a further ballot and the candidate who receives the highest number of votes in the further ballot shall be elected Speaker.” (Underlining mine)

46. In my view the operative word is “a further ballot”. It does not restrict the Assembly to simply insist that there must be a 2nd ballot only or voting. For whatever reasons just like in this case, voting can be disrupted and thus there would be need to have another voting. I think reading the same narrowly will mean that a party can orchestrate some disturbance and benefit from the same.

47. Neither do I buy the idea that because it was a gazetted day, voting had to be done by all means. I do not think the gazette notice should be the only guiding principle. The law as relates election should not be sacrificed at the altar of a gazette notice.

48. In the premises I do not find the election of the 1st Petitioner to have been done with full mandate of

the entire County Assembly as the 2nd round of voting was inconclusive. Further the views of the 21 MCAs who did not vote was not sought in the subsequent alleged continuation of the 2nd round of voting. They are in my view an important Constituency within the Assembly. They cannot be wished away. The post of the Speaker is indeed critical and thus care ought to be taken to ensure that at least he gets the majority of the members during his election.

49. As stated earlier I am unable to state whether the 1st and 2nd Respondent or the Petitioner for that matter committed the election offences as stipulated under Section 65 of the Election Act. I think it generally and broadly came out that the goons came from outside the Assembly. It is therefore in my view left to the relevant Security agencies to carry out their investigation as per the law established.

50. Although the Respondent has invited me to determine the question of whether any rights of the Petitioner has been infringed, as well as discuss the issue of Jurisdiction of this court, I shall respectfully decline this invitation as my brother Mrima J had made an extensive decision over the same and thus the only forum perhaps is for the matter to be adjudicated at the appellate court.

Election of Deputy Speaker

51. Turning to the Petition by the 2nd Petitioner, the issues raised in my view are clear and straight forward namely, whether the 3rd Respondent was validly elected as the deputy speaker Migori County. According to his evidence his beef with the 3rd Respondents is that he was elected as a deputy Speaker despite a presence of a court order. He testified that, according to him the deputy speaker cannot be elected in the absence of the speaker. He relied on the said court order.

52. The 3rd Respondent offered no evidence. He instead stated that he was to rely on the pleadings and the submissions.

53. I have read the rival submissions by the 2nd Petitioner and the 3rd Respondent counsels as well as their oral submissions.

54. Did the County Assembly of Migori County breached the law when they elected the 3rd Respondent as the deputy speaker?

55. As clearly submitted by the 2nd Petitioner, there is no record of how the 3rd Respondent was elected. As a matter of fact none of the Respondents including the 2nd Respondent who has custody of the records of the Assembly produced any evidence. It is true as submitted by the 3rd Respondent that he who alleges ought to prove. From the evidence on board, the 3rd Respondent did not deny that he was the deputy speaker.

56. In the absence of such evidence then this court shall assume that he was duly elected the deputy speaker of the Migori County Assembly.

Section 21(3) of the Election Act provides as follows;-

“the deputy speaker of a County assembly shall be elected from among persons who are members of that county assembly.”

56. **Article 178 of the Constitution** states that;

“ 178(1) Each County assembly shall have a Speaker elected by the county assembly from among persons who are not members of the assembly.

(2) A sitting of the County assembly shall be presided over by-

(a) the Speaker of the assembly; or

(b) in the absence of the Speaker, another member of the assembly elected by the assembly.”

58. Two quick conclusions herein. One, the Election Act provides that the deputy speaker shall be gotten from the assembly, in this case the MCA. Secondly and more important as per the Constitution in the absence of the Speaker another member of the assembly can be elected to preside over the sitting. This in my view may not be necessarily the deputy speaker.

59. **Section 14 of the Migori County Assembly Standing Orders** state as follows;-

14(1) “ As soon as practicable after the election of a speaker following a general Election, a Deputy Speaker shall be elected.”

14(4) the procedure for electing a deputy speaker shall, with necessary modification, be the same that prescribed for the election of the speaker.”

60. So far none of the parties and the 3rd Respondent in particular showed how he was elected. No material was placed before court to suggest that there was any “modification” to the standing orders.

61. In the premises I assume that the 3rd Respondent was elected by the MCAs in one of their sittings. This therefore poses some critical questions namely who presided over the said elections? Did the speaker, by then the 1st Respondent preside over the same? If so was it valid? Was there a court order barring him from undertaking the exercise?

62. Clearly Article 178 of the Constitution (supra) demands that it is only the speaker or an elected member who presides over the sittings of the Assembly.

63. Paragraph (1) of the order issued by this court on 5/9/2017 stated interalia that;

(a) “ The 1st Respondent be and is hereby temporarily restrained either by himself, his agents or servants from holding himself out as speaker of the County Assembly of Migori or conducting any business of the County Assembly whatsoever until the hearing and determination of the petition.”

64. That order subsisted till the substantive application was heard and I think it is still subsisting todate.

65. If this is so then who presided over the affairs of the Assembly when the 3rd Respondent was elected deputy speaker. In the absence of the speaker, who in any event had been barred, and in the absence of any record in compliance with Article 178(2) (b) of the Constitution I am unable to appreciate how he was elected.

66. In short I do not find that the 3rd Respondent was validly elected as the deputy speaker of the Migori County Assembly on 19/9/2017.

67. The Petitioner has equally prayed that the court do declare all the acts done by the County Assembly to be null and void during the subsistence of the 3rd Respondent as the deputy speaker. I shall respectively decline this invitation. I do not have any material to support the above position, neither is this court allowed to speculate or to venture into an unknown territory. Peradventure, there could be such acts by the assembly then perhaps another forum can be used to ventilate the same.

Conclusion

68. Having therefore determine the two petitions its suffice to conclude that;-

(a) The Election of the Speaker of Migori County on 31/8/2017 declaring the 1st Respondent the winner and therefore the Speaker is hereby declared null and void.

(b) The 1st Petitioner was not elected as the Speaker of the Migori County Assembly.

(c) No evidence was presented to show that the Respondents jointly and severally committed any electoral offences in line with Section 65 of the Election Act.

(d) Within the next 14 days from the date herein, Election of the Speaker of Migori County be done under the supervision of the Deputy Registrar Migori high Court as hereunder;-

(i) The said election shall be deemed to start from the 2nd ballot and the contestants shall be the Petitioner herein David Kerario Marwa and Boaz Awiti Okoth the 1st Respondent.

(ii) The Deputy Registrar shall thereafter file his report within 3 days in court.

(iii) The Deputy Registrar shall be at liberty to seek relevant security arrangements and or protection from the County Commander Migori County or such other police assistance that may be necessary.

(e) Each party shall bear their respective costs.

68. In regard to the 2nd petition, I make the following orders;-

(i) The election of the 3rd Respondent George Okinyi Omamba as the Deputy Speaker Migori County is hereby declared null and void.

(ii) The Migori County Assembly shall immediately but not later than 7 days after the election of the Speaker proceed to elect the deputy speaker as per the provisions of Standing Order No. 14 of the Migori County Assembly

(iii) Each party shall bear their respective costs.

(iv) the following files from Kehancha Senior Resident Magistrate's Court namely Petitions Nos. 1 and 2 of 2017 are hereby marked as settled with the respective parties meeting their own costs.

Delivered, signed and dated at Migori this 19th day of January 2018.

H.K. CHEMITEI

JUDGE

19/01/18

In the presence of;

Odero holding brief for Agure Odero for the 1st Respondent.

Jura holding brief for Bosire Gichana for the 1st Petitioner

Mwita Kerario holding brief for Odhiambo for 2nd Petitioner

Odera for Sagana for 2nd Respondent as well as Oronga for 3rd Respondent.

Court clerk – Nyauke

Judgment delivered in open court.