



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CONSTITUTIONAL REFERENCE NO. 26 OF 2017

IN THE MATTER OF:

BREACH OF ARTICLES 1 (1), 1(4) (B), 2, 3, 10,, 19, 20, 21, 22, 23, 27, 28, 47, 50, 73, 75, 77, 174, 175, 185, & 197 OF THE CONSTITUTION OF KENYA, 2010;

SECTION 7, 9, 12, 13 & 14 OF COUNTY GOVERNMENTS ACT,

ARTICLES 2, 3, 4, 7, 13 AND 19 OF THE AFRICAN CHARTER ON HUMAN & PEOPLE'S RIGHTS AND OTHER PROVISIONS

STANDING ORDERS 4 & 14 OF COUNTY ASSEMBLY OF MERU

THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES 2013, SECTION 4

BETWEEN

DOUGLAS BUNDI KIRIMI.....PETITIONER

-Versus-

JOSEPH KABERIA ARIMBA

THE SPEAKER COUNTY ASSEMBLY OF MERU.....1ST RESPONDENT

THE CLERK, COUNTY ASSEMBLY OF MERU.....2ND RESPONDENT

THE COUNTY ASSEMBLY OF MERU.....3RD RESPONDENT

AND

ELIAS MUREGA JULIUS.....INTERESTED PARTY

JUDGMENT

Deputy Speaker of County Assembly

[1] n this petition, the following declarations have been sought:

a) A declaration that Standing Orders 4 and 14 of the County Assembly of Meru Standing Orders are in contravention with Section 9 and 14 of the County Governments Act and Sections 178 of the Constitution and to that extent unconstitutional and ultra-vires

b) A declaration that the substantive office of the Deputy Speaker of the County Assembly of Meru as spelt out in the standing orders does not exist in any law known in Kenya and as such any such positions held any individual in the said Assembly be declared a nullity.

- c) *A declaration that the creation of the office of the Deputy Speaker in the County Assembly of Meru is a nullity ab-initio.*
- d) *A declaration that the privileges enjoyed by the interested party courtesy of his purported position of the Deputy Speaker of the County Assembly of Meru be forthwith withdrawn and quashed.*
- e) *The court to issue any other orders it deems just in the circumstances.*
- f) *Costs be provided.*

Petitioner's Claim

[2] The Petitioner argued that Standing Orders 4, 14 and 15 promulgated by the County Assembly of Meru in relation to the office of the deputy speaker are blatantly in contravention of Article 178 (3) the Constitution and Section 9 (4) of the County Governments Act. The Standing Orders create a permanent office of the Deputy Speaker who has been illegally and unlawfully assigned an official car, bodyguard and driver and continue to draw special emoluments and privilege courtesy of that position. All of these are to the detriment of the public coffers. The standing orders ought to lay down the procedures that will be followed in the assembly as it undertakes its functions but not to create substantive office

[3] In his submissions he asserted that Article 177 only recognizes the office of the Speaker and there is no mention of deputy speaker whatsoever or creation of such a position. Article 178 (2) (b) provides that in the event that a speaker is absent the assembly may at that particular moment appoint any other member of the County Assembly but not to create a position known as a deputy speaker. Section 9 of the County Governments Act refers to the provisions of Article (2) (b). He buttressed his submissions by relying on the case of **Nathanael Nganga Reuben v Speaker, Machakos County Assembly & another [2016] eKLR.**

Interpretation of Standing orders

[4]The Respondents and the Interested Party took a different stance on the matter and submitted that, the Constitution envisages a situation where the speaker of the County Assembly could be absent and that provision is made for the election of another member from the Assembly to take up the speaker's role to ensure practicability of performance of the functions of the Speaker of the County Assembly. The application and interpretation of the standing orders do not fall within the purview of this court but that of the Speaker of the Meru County Assembly. They supported their point by referring to the following cases: **Speaker of the Senate & Another vs. Attorney General & 4 Others, Advisory Opinion Reference No.2 of 2013, Okiya Omtatah Okoiti & 3 Other vs. Attorney General & 5 Others [2014] eKLR** and **Nathanael Nganga Reuben v Speaker, Machakos County Assembly & another [2016] eKLR.**

[5] The Respondents and Interested Party further asserted that when legislation (*such as the Standing Order No. 14 of Meru County Assembly*) is challenged as not conforming to the constitutional mandate, the only duty that this court has is to lay the Article of the Constitution which is invoked beside the legislation which is challenged and to decide whether the latter squares with the former. All the court can do is to announce its considered judgment upon the question. Thus, this court neither approves nor condemns any legislative policy. **Article 178 (2) (b)** of the Constitution envisages a situation where the speaker of the County may be absent hence providing for the election of another member from the Assembly to take up his role. For that reason Meru County assembly in its Standing Order designated an elected member of the house to deputize the speaker and named such a member a deputy speaker. They also relied on the cases of **Tinyefunza vs Attorney General, Constitutional Petition 1 of 2016** and **Centre for Rights Education and Awareness and Another vs. John Harun Mwau & 6 Others, Civil Appeal No. 74 & 82 of 2012.**

THE ISSUES AND DETERMINATION

[6] Having read and carefully considered the pleadings and submissions of parties, two issues arise for determination, that is:

1. *The extent of court's jurisdiction on matters of standing orders; and*
2. *Whether the Standing Order 14 of Meru County Assembly providing for the position of deputy speaker is in contravention of the Constitution and County Government Act.*

Of Jurisdiction

[7] *Jurisdiction is everything.* This is the sweetest canticle to have ever been composed on jurisdiction; the composer is Nyarangi JA in the case of **LILIA "S" VESSEL**. Jurisdiction of court flows from the Constitution, written or unwritten law. See the case of **Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR** where the Supreme Court expressed that:

"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."

[8] In this case, a matter of interpretation of the Constitution and determination as to whether something done under the authority of the Constitution is or is not consistent with the Constitution has arisen. Immediately, one should consider whether these matters fall within the jurisdiction of the High Court. The jurisdiction of the High Court is specifically provided for in Article 165(3) of the Constitution 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.”

[9] Accordingly, this court has jurisdiction to interpret Article 178 of the Constitution and to determine whether something said to be done under the authority of the Constitution or law is inconsistent with or in contravention of the Constitution.

[10] Article 178 states:

(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.

(3) Parliament shall enact legislation providing for the election and removal from office of speakers of the county assemblies.

[11] Section 9 (4) of the County Governments Act is also relevant. It provides as follows:

“(4) At any time in the absence of the speaker of the county assembly or in matters that directly affect the speaker, the county assembly shall elect a member to act as speaker as contemplated under Article 178(2)(b) of the Constitution”

[12] So also is Section 14 (1) of the County Governments Act which states:

“(1) A county assembly—

(a) may make standing orders consistent with the Constitution and this Act regulating the procedure of the county assembly including, in particular, orders for the proper conduct of proceedings; and

(b) subject to standing orders made under paragraph (a), may establish committees in such manner and for such general or special purposes as it considers fit, and regulate the procedure of any committee so established.”

Of standing order 14

[11] I have been called upon to make a declaration whether the Standing Order 14 of the County Assembly of Meru is in line with the above provisions of the Constitution and County Governments Act. It has been argued that Standing Order 14 of Meru County Assembly providing for the position of deputy speaker is in contravention of the Constitution and County Government Act. Standing Order 14 which relates to election of deputy speaker states that:

(1) After the election of a speaker or at any time in the absence of a speaker of the assembly or in matters that directly affect the speaker, the assembly shall elect a member to act as speaker as contemplated under Article 178 (2) (b) of the Constitution.

(2) Unless otherwise removed, the first member elected under paragraph (1) shall be designated as Deputy speaker and shall, in the absence of the Speaker, preside over the sittings of the Assembly as Deputy Speaker for the term of the Assembly.

(3) If the office of Deputy Speaker falls vacant at any time before the end of the term of the Assembly, the House shall, as soon as possible, elect a Member to that office.

(4) The procedure for electing a Deputy Speaker shall, with necessary modifications, be the same as that prescribed for the election of the Speaker.

[13] Standing Orders are made by the Assembly under the authority of the Constitution and enabling legislation. They must however be consistent with the Constitution and the enabling legislation, in this case the County Governments Act. Standing Order 14 draws its authority from Article 178 (2) (b) which states that in the absence of a speaker, another member of the assembly is elected by the assembly. A little rendition on this question is necessary.

[14] The Speaker of County Assembly (hereafter the Speaker) is elected by the county assembly (hereafter the Assembly) from among persons who are not members of the assembly. The speaker presides over sitting of the county assembly and in the absence of the Speaker, another member of the assembly elected by the assembly presides over the sitting of the assembly. See article 178 of the Constitution below:-

178. Speaker of a county assembly

(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.

(3) Parliament shall enact legislation providing for the election and removal from office of speakers of the county assemblies.

[15] Notably, the primary duty of the speaker is to preside over sitting of the assembly. And this primary function is to be performed only by speaker or in the absence of the speaker by another member of the assembly elected by the assembly. Therefore, only persons elected in accordance with article 178(1) and 178(2) (b) can exercise the functions of the speaker. Any other person by whatever name called will only pretend to exercise power and duties of speaker; and of course, in violation of the Constitution.

[16] Contrast the above with provisions on Speakers and Deputy Speakers of House of Parliament in article 106 and 107 of the Constitution below:-

106. Speakers and Deputy Speakers of Parliament

(1) There shall be—

(a) a Speaker for each House of Parliament, who shall be elected by that House in accordance with the Standing Orders, from among persons who are qualified to be elected as members of Parliament but are not such members; and

(b) a Deputy Speaker for each House of Parliament, who shall be elected by that House in accordance with the Standing Orders, from among the members of that House.

(2) The office of Speaker or Deputy Speaker shall become vacant—

(a) when a new House of Parliament first meets after an election;

(b) if the office holder, as a member of the relevant House, vacates office under Article 103;

(c) if the relevant House so resolves by resolution supported by the votes of at least two-thirds of its members; or

(d) if the office holder resigns from office in a letter addressed to the relevant House.

107. Presiding in Parliament

(1) At any sitting of a House of Parliament—

(a) the Speaker presides;

(b) in the absence of the Speaker, the Deputy Speaker presides; and

(c) in the absence of the Speaker and the Deputy Speaker, another member of the House elected by the House presides

[17] The provisions on speakers and deputy speakers of House of Parliament expressly provide for deputy speaker with clear procedure of appointment of deputy speaker and their duties.

[18] Coming back to this case, standing order 14 proclaims that it is giving effect to article 178(2) (b) of the Constitution. It, however, designates the person elected under article 178(2) (b) as Deputy Speaker. My view and I so find, is that the person elected under article 178(2) (b) of the Constitution is speaker for that particular time. The designation of the said person as Deputy Speaker is therefore problematic and in violation of the Constitution and the County Governments Act. Second, the standing order 14 tends to create the position of deputy speaker with procedure for appointment of a deputy speaker in the event of a vacancy thereof. I think the drafters and the assembly were trying to borrow from the provisions on speakers and deputy speakers of the House of Parliament discussed above. But, that kind of transportation of provisions of the Constitution is clearly not permitted by the Constitution and cannot be done through legislation or standing order especially in a case such as this where there is no lacunae in the Constitution. Under article 178, it bears repeating, the only other person who will otherwise perform the functions of the office of the speaker is the person who is elected in accordance with article 178(2) (b) of the Constitution. My understanding of the Constitution is that article 178 of the Constitution does not envisage a deputy speaker to perform the duties or functions of the speaker. The County Government Act, which is also perfectly in line with the Constitution, does not envisage or authorize creation of the office of Deputy Speaker for County Assembly.

[19] I see similar thoughts were expressed in the case of **Nathanael Nganga Reuben v Speaker, Machakos County Assembly & another [2016] eKLR**. P. by Nyamweya J as follows:

“In this regard I agree to a certain extent with the arguments put forward by the Respondents that such offices are incapable of being created by Standing Orders, for the reasons that Standing Orders are subordinate rules of procedure for the conduct of business in legislative assemblies, and are provided for as such under section 14 (1) of the County Government Act which states as follows ...

Any interpretation of Standing Orders can therefore only be in the context of procedure, and not substance, and this Court will revert back to the issue as to whether it is within its remit to interpret the Standing Orders later on in this judgment. As regards the issue at hand it suffices to state that the applicable law as regards the creation of offices in the County Assemblies is the Constitution and County Government Act and not Standing Orders.”

[20] In light thereof, I must confess that I agree with the Respondents that the court will only declare the position of the Constitution but will leave the County Assembly to use its procedure to give effect to the interpretation given in this judgment on article 178 and section 9 of the Constitution and County Government Act, respectively. This approach will allow the court to render itself on a matter but also allowing other constitutional institutions to discharge their mandates. But any deliberate continuation with unsatisfactory situation may invite intrusive orders from court. I find that any creation of the position of deputy speaker for County Assembly contravenes the Constitution and the County Governments Act. In addition, only persons elected in the manner provided in article 178 can perform functions of the office of the speaker. In my honest belief, Article 178 (2) (b) give members of the county assembly an opportunity to perform duties of the speaker in his absence and this will tap into the varied competences in the assembly for the good of the office. To the extent stated above, the standing orders in question are inconsistent with the Constitution and the County Governments Act.

[21] Accordingly, I direct that this judgment be served upon the Speaker of as well as the County Assembly of Meru for appropriate action. No orders as to costs given the nature of the relief given. It is so ordered.

Dated, signed and delivered in open court this 31st day of May, 2018.

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F. GIKONYO

JUDGE

In the presence of:

Mr. Muriuki for petitioner

M/s. Wambugu for Respondent plus

interested parties.

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F. GIKONYO

JUDGE