



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

JR –MISC APPLICATION NO. 5 OF 2018

IN THE MATTER OF: ARTICLES

1(2),2,3,10,19,20,23,25,27,47,165(6),185, 258 AND 260 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF SECTIONS 8 AND 9 OF THE COUNTY GOVERNMENT ACT 2012

AND

IN THE MATTER OF CONTRAVENTION OF RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLES 2(1), 3(1), 10(1)(2), 20(2), 27(1), 35(1), 38(1)(2) & (3), 47(1)(2), 48, 50(1)(2) OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF SECTIONS 15 AND 16 OF THE COUNTY ASSEMBLY POWERS AND PRIVILEGES ACT 2017

AND

IN THE MATTER OF STANDING ORDER NO. 1, 106, 107 & 109 OF THE KISUMU COUNTY ASSEMBLY STANDING ORDERS

BETWEEN

JOACHIM OKETCH OMIENO 1ST APPLICANT

JACKTON OJWANG OGENDO 2ND APPLICANT

JOSEPH OPIYO OLALE 3RD APPLICANT

VERSUS

COUNTY ASSEMBLY OF KISUMU 1ST RESPONDENT

THE SPEAKER OF

THE COUNTY ASSEMBLY OF KISUMU 2ND RESPONDENT

RULING

1. The Applicants, **JOACHIM OKETCH OMIENO**, **JACKTON OJWANG OGENDO** and **JOSEPH OPIYO OLALE** are Members of the County Assembly of Kisumu County, representing the Kondele Ward, Nyalenda A Ward and Nyalenda B Ward respectively.
2. They have asked the Court grant an order of Certiorary, with a view to quashing the decision the Speaker of the National Assembly of Kisumu, which was made on 10th April, 2018.
3. By the said decision, each of the Applicants were suspended from sittings of the house for a period of **14 days** for the 3rd Applicant, and

21 days for the 1st and 2nd Applicants respectively.

4. It is alleged that the Speaker acted contra and in excess of his jurisdiction.

5. Secondly, the Speaker is said to have unilaterally condemned the Applicants unheard, contrary to the principles of fair administrative action.

6. The Speaker allegedly failed to follow the clearly outlined process, which provided that a member should be first heard through the Powers and Privileges Committee, if he was accused of committing breaches.

7. Furthermore, the penalties which the Speaker handed down were described as being excessive, as they went beyond the penalty contemplated under the Kisumu County Assembly Standing Orders.

8. The matters in issue before me are said to have arisen at a “Kamukunji”, where members were striving to find consensus on the contentious issue of the leadership of the House Committees.

9. According to the Applicants, various members were shouting during the said “Kamukunji”.

10. It is then that the Speaker pointed out the Applicants as being the culprits, and he then slapped them with the suspensions from the sitting of the House.

11. The Applicants believe that the decision of the Speaker was inexplicable.

12. They say that the Speaker ought to have given specifics about the breaches which each Applicant had committed, and the Speaker should thereafter have given each of them an opportunity to respond to such allegations.

13. In this case, the Applicants emphasize that the Speaker neither gave particulars of any breaches attributed to each of them, nor gave them an opportunity to respond to such allegations.

14. The Applicants made available to the court, the Communication from the Chair of the 2nd Session of the Second Assembly of the County Assembly of Kisumu. The said Communication is dated 10th April, 2018.

15. The part of the said Communication which is relevant to this case relates to the “Kamukunji” which took place in the Main Chamber on 9th April, 2018.

16. The Speaker stated that during the “Kamukunji” in issue, there occurred a Gross Violation of the **County Assembly Powers and Privileges Act, 2017**.

17. In particular, the Speaker alluded to the fact that the Applicants had refused, declined and persisted in not complying with the Speaker’s request that they should resume their seats when the Speaker was on his feet.

18. When the Applicants did not resume their seats, despite being reminded by the Speaker, he came to the conclusion that the Applicants were guilty of the breach of the Standing Orders.

19. The Speaker did not provide the Hansard which ought to have reflected what had exactly transpired on the floor of the Main Chamber on 9th April, 2018.

20. Secondly, the Speaker did not, in his replying affidavit, depone about whether or not he accorded the Applicants an opportunity to respond to the allegations he made against them.

21. In the absence of clear, unambiguous response to the Applicants’ contention, I find that the Speaker did not accord the Applicants, an opportunity to respond to specific allegations of breach of Standing Orders.

22. Obviously, when the Speaker made a determination, finding the Applicants guilty of a breach of the Standing Orders, yet he had not given them a chance to answer to any specific charges before he made his determination, that constituted a violation of the Applicants’ rights to fair administrative action.

23. The Applicants’ contention that the “Kamukunji” was a sitting of the House need not be determined by me, before I can arrive at the final conclusion in this matter. I so find because regardless of whether or not the “Kamukunji” was a sitting of the House, the rights of the Applicants must be protected.

24. Similarly, the Applicants cannot be heard to reason that just because a “Kamukunji” was not a sitting of the House, they could throw out decorum without any fear that the Speaker would take appropriate action to curtail miscreant conduct.

25. Nonetheless, I am alive to the fact that in these Judicial Review proceedings, the court is called upon to deal only with the process through which the decision was made, and not the merits of the decision.

26. When the Speaker made a decision on 10th April 2018, in relation to matters that took place on 9th April 2018, and in respect to which he had not given the Applicants an opportunity to respond, that constitutes a procedural unfairness.

27. In the result, the decision cannot be permitted to stand.

28. Notwithstanding that fact, I wish to reiterate that if the applicants or any other Member of the County Assembly considers the Standing Orders to be punitive or irregular, they ought to challenge the legality of such Standing Orders through a proper constitutional package. They cannot simply decide for themselves that a particular Standing Order will not be respected, and proceed to ignore it.

29. For as long as the Standing Orders were validly passed, they must be respected.

30. Currently, pursuant to **the Kisumu County Assembly Standing Order No. 106**, a Member is considered to have conducted himself or herself in a disorderly manner if he or she, inter alia;

“.....commits any serious breach of these Standing Orders that in the opinion of the Speaker constitute a disorderly conduct.”

31. In this case the Speaker invoked **Standing Order No. 107**, which deals with situations in which a member is guilty of Gross Misconduct.

32. The Speaker said that Applicants refused to resume their seats when the Speaker was on his feet. He then made the following statement as Page 3 of the Communication from the Chair;

“.....The Speaker may call upon the Member who has grossly misconduct himself in a disorderly manner, and shall order the Member to withdraw immediately.”

33. Clearly, the Speaker had the power, in his understanding, to order a Member who was guilty of Gross disorderly conduct to withdraw immediately.

34. However, it appears that the Speaker did not exercise that authority.

35. If he had done so, his action could be comparable to the action taken by a Court of Law, when a Judge or Magistrate invokes his or her authority to punish a person who had committed a contempt of Court, in the face of the court.

36. But even for a Court of Law, punishment for contempt of court can only be meted out immediately, if the contempt was in the face of the court. In any other instance, the court would have to go through a process akin to a full trial.

37. When the Speaker did not order the Members to withdraw immediately, he became obliged to take each of them through a process in which they would be accorded a hearing.

38. In the Communication from the Chair, the Speaker noted thus;

“Hon. Members, on the first occasion for a maximum of 3 (Three) sitting days including during the sitting day of the Assembly and on the second or subsequent occasions, during the second session for a minimum of 7 (seven) sitting days and a maximum of 21 (twenty one) sitting days including the day of suspension.”

39. Had the Speaker taken into account his own words, he ought not to have suspended **JOSEPH OPIYO OLALE** for 14 days. He could only have suspended him, for a maximum of 3 sitting days.

40. And in respect to all the applicants, justice could only have been deemed to have been done if each of them was given a chance to “mitigate” before the punishment was handed down.

41. This court is unable to ascertain whether or not the speaker was right when he said that both **JACKTONE OGENDO** and **JOACHIM OMIENO OKETCH** had misbehaved for a second time during the same session.

42. In the absence of a Hansard Report on the day in issue, the Court is unable to ascertain whether or not the Speaker had violated the principles of proportionality.

43. In the case of **SUCHAN INVESTMENTS LIMITED VERSUS MINISTRY OF NATIONAL HERITAGE OF CULTURE AND THREE OTHERS [2016] KLR** the Court of Appeal noted, inter alia, that;

“In our view, whether relevant factors were taken into account in making the impugned decision invites aspects of merit review.”

44. I know that in matters of Judicial Review, the court does not delve into merits of the decision. Therefore, although it is possible that the punishment meted out could be excessive, it is not the basis for this decision.

45. In conclusion, the decision of the Speaker, in finding the applicants guilty of gross misconduct is removed to the court, and is hereby

quashed.

46. I order that each party will pay his own costs. I so order because although the decision of five speaker has been overturned, the applicants appear to have misconducted themselves.

DATED, SIGNED and DELIVERED at KISUMU this 22nd day of May, 2018.

FRED A. OCHIENG

JUDGE