



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BOMET**

**JUDICIAL REVIEW NO. 3 OF 2017**

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF CERTIORARI, MANDAMUS, AND PROHIBITION**

**-AND-**

**IN THE MATTER OF THE CONSTITUTION OF KENYA 2010**

**-AND-**

**IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT 2015**

**-BETWEEN-**

**REPUBLIC ..... APPLICANT**

**-VERSUS-**

**COUNTY GOVERNMENT OF BOMET ..... RESPONDENT**

**DAVID CHERUIYOT & CPA MITEY RONO ..... EXPARTE APPLICANTS**

**RULING**

1. The application dated 1<sup>st</sup> August, 2017 and filed in court on 3<sup>rd</sup> August 2017 seeks the following orders;

- (a) Orders of certiorari to issue directed against the Respondent quashing the implementation of Budget and Appropriation committee report, which was adopted on the 29<sup>th</sup> July 2017 and any other consequential decisions.
- (b) That on order of prohibition do issue against the Respondent from implementing the findings of Budget and appropriation committee report.
- (c) That an order do issue restraining the Respondent from acting or continuing to take further administrative action against the applicants by themselves and or their agents.
- (d) That an order of mandamus do issue directing the Respondent and compelling it to undertake public duty owed in law and in respect of which the applicants have a legally enforceable right and legitimate expectation.

2. The grounds are that:-

1. That the budget and Appropriate Committee report that was adopted on the 26<sup>th</sup> July 2017 by the County Assembly of Bomet is unlawful un procedural and offends the meaning and spirit of articles 49 and 50 of the Constitution of Kenya 2010 and hence should be declared a nullity.
2. That for the aforementioned reason, the Respondent and or any other body has no powers to implement and or operationalize its findings and or recommendations.
3. That the Budget and Appropriation Committee report which was adopted by the Respondent on 26<sup>th</sup> July 2017 was complied and published without offering the applicants a fair hearing as enshrined in S.4 and 5 of the fair Administrative Act.

3. That the purported Budget and Appropriation Committee report which was adopted by the Respondent on 26<sup>th</sup> July 2017 was done under the directive of the specific individuals of the Respondent's herein with predetermined minds and that this was a mere formality and no procedure was followed.

4. That the actions of the Respondent amount to abuse of power and ought not to be allowed in the interest of Justice.

5. That the Respondents is a party to Bomet High Court Misc Application No. 25 of 2017, Bomet High Court petition No 7 and 8 of 2017 which were scheduled for mention on 19/7/2017 and which same were discussed in the Budget and Appropriation Committee on the same date in clear disregard of S.6 of the Civil Procedure Rules.

6. That the applicant were not given enough time to seek legal counsel and advise when the Budget and Appropriation. Committee sat on 19<sup>th</sup> July 2017.

7. That the applicants were not give a fair hearing and virtue of the fair Administrative Action Act.

8. That S. 4(1) of the fair Administrative Act 2015 gives every person the right to administrative Action which is expeditious, efficient, lawful, reasonable and procedurally fair.

9. The applicants pray that the Judicial Review application for orders of prohibition certiorari, and mandamus be granted.

The second county assemble of Bomet did file grounds of application which are:-

1. That there is a misjoinder of parties in the instant suit as it is a settled position in law that a county Assembly is not a juristic person capable of suing and being sued.

2. That under article 177(A) of the Constitution a county Assembly is elected for a term of five years. Therefore even if the actions of the 1<sup>st</sup> County Assembly of Bomet are being impugned, it was dissolved on the 8<sup>th</sup> August 2017 and its acts and omissions are not transferable to the 2<sup>nd</sup> County Assembly of Bomet Inaugurated on the 6<sup>th</sup> of September 2017.

3. That the County Assembly as a body of elected officials does not have perpetual succession in law. That infact the assets and liabilities of a County Assembly as an entity are assumed by the County Assembly Service Board established under S.12 of the County Government Act and that it is a corporate body with perpetual succession.

4. That a County Assembly Service Board cannot however, assume any liabilities in terms of legislative business conducted by a county assembly as a representative body.

5. That the suit is predicated on the actions of a County Assembly Committee that is no longer in existence as it has since been replaced by a new committee with new members elected in the general elections of 8<sup>th</sup> August 2017.

6. That the present suit is seeking to maintain the action on a party who in the eye of the law is no party at all but a mere name only, with no legal existence.

### **Applicant's Submissions**

In their submissions the applicants have abandoned prayer 'D' of their application. It is their contention that they were employees of the County Government of Bomet at the time when the Respondent through summons dated 14<sup>th</sup> July 2017 required them to appear before the Budget and Appropriation Committee meeting on 19<sup>th</sup> July, 2017. These summons were received under protest on the grounds that the applicants were required to attend court in Kericho in respect to Bomet High Court.

Misc Application No. 25 of 2017. It is submitted that some of the issues were still pending before court in Bomet High Court petition Nos 7 and 8 of 2017 and to respond to them would be contrary to the provisions of S.6 of the Civil Procedure Act. It is contention of the applicants that their request for adjournment on 19<sup>th</sup> July 2017 on account of the pending cases was not allowed due to the fact that the speaker of the County Assembly of Bomet had given the committee a limited number of days. That this was contrary to the provisions of article 49 and 50 of the constitution.

It is further submitted that upon a perusal of the findings of the committee report it has far reaching ramifications. If it is implemented in its state and form and hence the need for it to be quashed.

The applicants contention is that the Respondents did not do proper investigations and or seek legal counsel before the preparation and adoption of the report and this violates their right to equal protection and equal benefit of the law under article 27 of the Constitution. That article 47(1) of the Constitution and S.4(1) of the fair Administrative Act provides for her right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.

That contrary to the provisions of S.4 (3) (b) of the Fair Administrative Action Act the applicants were not given an opportunity to be heard and defend themselves regarding the allegations leveled against themselves before the preparation and adoption of the report.

Reliance is placed on the case of *JR NO. 21 Nakuru High Court. R –vs- Commission for Co-Operative Development & Others Nairobi High Court JR No. 429 of 2014 - R –vs- Commission on Administrative Justice & others.*

### **Respondents Submissions.**

It is the contention by the Respondents that the application dated 1<sup>st</sup> August 2017 was served on the County Assembly of Bomet on 3<sup>rd</sup> August 2017 which was four days to the end of the term of the 1<sup>st</sup> County Assembly of Bomet. That at midnight of the 7<sup>th</sup> August 2017 the term of the first County Assembly of Bomet ended together with all its legislative business and therefore no legislative business could have been carried over to the second County Assembly of Bomet as per the Bomet County Assembly standing orders and the general parliamentary practices and traditions. That all notices of motions that had been given in the previous County Assembly including motions violated to adoptions of reports of committees also lapsed.

It is submitted that the instant application has been overtaken by events and the suit ought to be struck out. Further that there is a misjoinder of parties in that a County Assembly is not a juristic person with powers of suing and being sued. That under article 177 (4) of the Constitution a county Assembly is elected for a term of five years and even if the first County Assembly of Bomet was found to have acted irregularly it was dissolved on 7<sup>th</sup> August 2017 and its act or omissions cannot be transferred to the second and current Assembly of Bomet which came into existence on 6<sup>th</sup> September, 2017. It is further submitted that the County Assembly as a body of elected officials does not have perpetual succession in law. That it is the county Assembly Board established under S.12 of the County Government Act which is a corporate body with perpetual succession but even then it cannot assume liabilities in terms of legislative business carried out by a county Assembly as a representative body.

That the County Assembly Committee is no longer in existence and that it has been replaced by a new one with members elected after the General elections of 8<sup>th</sup> August 2017.

On whether the report of the 1<sup>st</sup> County Assembly of Bomet was subject to Judicial review as prayed.

It is submitted that the applicants were given adequate notice to appear before the last County Assembly Budget and Appropriation Committee in accordance with the provisions of S.4(3) (a) of the fair Administrative Action Act. In that the applicant were served with summons on 14/7/2017 and were required to appear before the committee on 19/7/2017. That the applicants were informed the reasons for the summarizes.

That the provision of S.6 of the Civil Procedure Act relate to matters sub-Judice before the courts but not to a County Assembly Committee conducting an inquiry pursuant to its oversight role and which was not sitting as a quasi-judicial body.

As regards the applicability of articles 49 of the Constitution in this application it is contended that it deals with the rights of arrested persons and none of the applicants was an arrested person.

That the provisions of article 50 of the constitution are not dissimilar to those under S.4 of the fair Administrative Action Act 2015 and that the applicants were given a fair hearing.

It is the submissions of the Respondents that the recommendations as to the implementation of the report was vested on the County Secretary and any Judicial Review orders should have been sought against the County Secretary after taking any administrative action on account of the report and hence the application was premature.

On the question of internal procedure and conduct of parliamentary business. Reliance is placed in the case of the Speaker of the Senate & Anor –vs- the Attorney General & 4 others 2013 eKLR it was held “The court cannot supervise the workings of a parliament and the institutional community between the three arms of the government must not be endangered by the unwarranted intrusions into the workings of business of the legislature.

### **Analysis and conclusion**

#### **Issues for determination**

1. MisJoinder of parties
2. Whether the report by the County Assembly of Bomet is subject to Judicial Review.

Article 177(1) of the Constitution provides for the membership of County Assembly thus”-

“A County Assembly consists of

- (a) Members elected by the registered voters of the wards, each ward constituting a single member constituency, on the same day as a general election of members of Parliament, being the second Tuesday in August in every fifth year.

(b) The number of special seat members necessary to ensure that no more than two thirds of the membership of the assembly are of the same gender.

(c) The number of members of marginalized groups including persons with disabilities and the youth, prescribed by an act of parliament and

(d) The speaker who is an ex-officio- member.

3. The members contemplated in clause (1) (b) and (c) shall in each case, be nominated by political parties in proportion to the seats received in that election in that county by each political party under paragraph (a) in accordance with article 90.

4. The filing of special seats under clause (1) (b) shall be determined after the declaration of elected members from each ward.

5. A County Assembly is elected for a term of five years”.

The uncontested facts are that this application dated 1<sup>st</sup> August 2017

was served on the County Assembly of Bomet on 3<sup>rd</sup> August 2017. This was 4 days before the end of the term of the 1<sup>st</sup> County Assembly of Bomet. The term of the 1<sup>st</sup> County of Assembly of Bomet ended on 7<sup>th</sup> August 2017.

The second county assembly of Bomet was inaugurated on the 6<sup>th</sup> September, 2017.

The orders sought against the county Assembly of Bomet are in the main for quashing of the implementation of the Budget and Appropriation Committee Report which was adopted on the 26<sup>th</sup> July 2017 among others.

The first Budget and Appropriation Committee was replaced by a new one with new members elected after the general election of 8<sup>th</sup> August 2017.

Under article 177(4) of the Constitution the life of a County Assembly is five years.

Consequently therefore the legislative work be it in the form of bills motions including adoption of reports lapses within the expiry of the county Assembly life time unless there are instruments of transfer which I find to be non-existent. The County Assembly being a body of elected officials does not have perpetual succession in law.

A County Assembly board established under S.12 of the County Government Act is the corporate body with powers of perpetual succession. Those powers do not extend to legislative business but only to the assumption of the liabilities and assets of a county assembly.

I do find that there was misjoinder of parties as the actions of the 1<sup>st</sup> County Assembly of Bomet are not transferable to the 2<sup>nd</sup> County Assembly of Bomet.

Even if they were, and I have determined that they were not, has it been established that the ex parte applicants were not treated in accordance with the provisions of the fair Administrative Action Act of 2015?.

A perusal of the proceedings before the Budget and Appropriation Committee annexure CMRI summons were issued on the 14<sup>th</sup> July 2017 for attendance on 19<sup>th</sup> July 2017.

They attended before the committee on 19<sup>th</sup> July 2017 while in the company of their advocates and presented their defence that the matter was sub-judice.

S.6 of the Civil Procedure Rules provides; “No court shall proceed with the trial of an suit or proceedings in which the matter in issue is also directly or substantially in issue in a previously instituted suit or proceedings between the same parties or between parties under whom they or any of them claim, litigating under the same to title, where such suit or proceedings is pending in the same or any other court having jurisdiction in Kenya to grant relief sought”.

What was before the committee was not a suit, it was conducting an inquiry pursuant to its oversight role and was not sitting as a quasi-judicial body.

As regards article 49 of the constitution “it provides for the rights of an arrested person. None of the ex parte applicants were arrested persons as envisaged under that article.

As for article 50 of the Constitution and the fair Administrative Action Act. The ex parte applicants were given notice to appear and defend themselves. They did attend the meeting and gave reasons why they were not willing to address the meeting. In the meeting they were in the

company of their advocates.

I do not find in which manner or form their rights were violated. This application and the suit have no merit and are dismissed. Each party to bear its costs.

**Ruling delivered and signed dated this in the 26/7/2018 presence of learned counsel for the applicant Mr. Mugumya present learned counsel for the Respondent , Mr. Oscar Sang absent court assistant Mr. Rotich.**

**M. MUYA**

**JUDGE**

**26/7/2018**

Certified copies of the ruling to be furnished to the parties.