



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CONSTITUTIONAL REFERENCE NO. 26 OF 2017

IN THE MATTER OF:

Breach of the Constitution and Especially Articles 1 (1), 1(4) (B), 2, 3, 10,, 19, 20, 21, 22, 23, 27, 28, 47, 50, 73, 75, 77, 174, 175, 185, And 197 of the Constitution of Kenya, 2010

Section 7, 9, 12, 13 And 14 of the County Governments Act, 2012

Articles 2, 3, 4, 7, 13 & 19 of the African Charter on Human & People’s Rights and Other Provisions thereof

Standing Orders 4 And 14 of the 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 REPSONDENT

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

ELIAS MUREGA JULIUS.....INTERESTED PARTY

RULING

[1] I am considering a Notice of Motion dated 6th July 2018 which is expressed to be made pursuant to the provisions of Order 42 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules, 2010 and all other enabling provision of the law. The substantive orders sought in the Motion are:

1. A temporary stay execution of the judgment delivered on 31st May, 2018 by Hon. Justice F. Gikonyo (MR) and all consequential orders emanating there from pending the hearing and determination of the appeal challenging the said judgment.

2. Costs of the application to be provided.

[2] The application is premised on grounds set out in the Motion and the supporting affidavit of Justus Kiambi Arithi sworn on 6th July 2018. The applicants asserted that they have already filed a Notice of Appeal in the Court of Appeal at Nyeri to challenge the judgment herein. They intend to argue that; (1) this court lacked jurisdiction to delve into merits of the constitutional reference; (2) this matter is of tremendous public interest since the effects of the judgment cascade to the rest of the County Assemblies in the country; and (3) the Interested Party risks losing privileges and benefits pertaining to the seat of the Deputy Speaker thereby rendering the appeal moot. They stated that the application has been brought without inordinate delay and the petitioner will not suffer any prejudice if an order for temporary stay of execution is granted.

Petitioner: No substantial loss

[3] The application was opposed vide the replying and further replying affidavit sworn by Douglas Bundi Kirimi on 26 July and 29th August 2018 respectively. He deposed that the position of the deputy speaker has been declared unconstitutional by several courts and the law on that aspect is now settled. It was also argued that the applicant who has made the application on behalf of the interested party has not demonstrated what substantial loss the latter would suffer. The appeal will not be rendered nugatory since in the unlikely event of success the interested party will regain his position. The seat of the deputy speaker was not “tailor made” for the interested party and hence cannot allude to ludicrous allegations of him losing several privileges in

terms of allowances as a matter of public interest. No functions will be hampered in the county assembly since Article 178 is crystal clear that any member of the county assembly may be elected to act as the speaker in the absence of the speaker.

Submissions by the applicants

[4] The application was canvassed by way of written submissions. The applicants submitted that if there is no overwhelming hindrance a stay must be granted so that an appeal may not be rendered nugatory should the decision be reversed. The purpose of the stay is to maintain the status quo and ensure there is a proportionate resolution of the appeal. No prejudice will be suffered by the petitioner in the event that this court grants the respondents the orders sought. In any event, the interested party is no longer the deputy speaker. They relied on the cases of Lake Tanners Limited & 2 others v Oriental Commercial Bank Limited [2010] eKLR, Telkom Kenya Limited v John Ochanda (Suing On His Own Behalf and on Behalf of 996 Former Employees of Telkom Kenya Limited) [2014] eKLR and Lucy Nungari Ngigi & 128 others v National Bank of Kenya Limited & another [2015] eKLR.

Submissions by the Petitioner

[5] The respondent submitted that the applicants have not met the benchmark stay of execution which is substantial loss occurring and provision of security. He relied on the cases of Republic vs The Commissioner For Investigations & Enforcement 'Ex-Parte' Wananchi Group Kenya Limited [2014] eKLR.

ANALYSIS AND DETERMINATION

Threshold for stay of execution

[6] Should or should not this court grant the stay of execution pending appeal? Order 42 Rule 6 of the Civil Procedure Rules on which this application is premised states as follows about stay of execution pending appeal:

“(2) No order for stay of execution shall be made under subrule (1) unless—

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”

Timeous application

[7] This is the easiest hurdle/ Judgment was delivered on 31st May 2018 and this application was filed 6th July 2018; that is about a month later. The applicants stated that the time period taken was due to consultation that had to be undertaken with the County Assembly before instructions could be concretized. I am satisfied that the application has been brought without inordinate delay.

On substantial loss occurring

[8] The applicants have the onus of proving that substantial loss would occur if stay is not granted. They stated that their performance and functions would be prejudiced unless a temporary order of stay is granted. They also argued that there is real danger of prejudice to the interested party as well as other 46 public officers. They view this matter as one of public interest as it would affect the other county assemblies in the country. They argued further that the interested party would face the risk of losing his privileges and benefits pertaining to the seat of the deputy speaker.

[9] I note that in the *Hansard* of the County Assembly of Meru dated 20th June 2018 several people were appointed pursuant to Article 178(2) (6) of the Constitution to be presiding over proceedings of the County Assembly in the absence of the speaker. Further in the respondents/applicants submissions they stated that interested party is no longer the deputy speaker. In these circumstances, what substantial loss would be occasioned upon the applicants? The applicants have put in place mechanism that ensures the day to day operations of the County Assembly are not affected or halted in the absence of the speaker. The interested party is also no longer the deputy speaker. I do not see how substantial loss would occur to any of the parties herein. The applicants have not demonstrated any substantial loss would occur unless stay is granted. See the decision of the Court of Appeal in the case of Kenya Shell Limited v Kibiru & another [1986] KLR 410, Platt Ag JA that:

“The affidavit in support has not set out any information to show that the appeal will be nugatory. It is loud in its claim that the appeal will fail. But no reasons are given why the appeal will be rendered nugatory. The court inquired into the respondent’s circumstances, but the information that was forthcoming did not confirm the applicant’s misgivings.

It is usually a good rule to see if order XLI rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented.”

[10] Before I close let me state that, whereas I agree with the general statement by the applicants that this is a matter of public interest, I find their reasons for so stating to only portend inclination or mere desire to maintain and sustain the position of deputy speaker; a position of which I hold the view, rattles the principles of public finance in article 201 particularly that:-

(d) public money shall be used in a prudent and responsible way;

[11] From the foregoing, the applicants have not met the threshold on stay of execution. By not issuing stay the appeal will not be rendered nugatory. For those reasons, I dismiss the application with no orders as to costs. It is so ordered.

Dated, signed and delivered in open court at Meru this 31st day of October, 2018

F. GIKONYO

JUDGE

In presence of

Muriuki for petitioner

M/s Wambugu for respondent

Njenga for proposed Interested party.

F. GIKONYO

JUDGE