



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CONSTITUTIONAL PETITION NO.10 OF 2016

**IN THE MATTER OF CONSTITUTION OF KENYA 2010 AND IN THE MATTER OF FAIR ADMINISTRATIVE ACTION ACT,
NO.4 OF 2015**

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES
19(2), 22, 23, 27, 28, 35(2), 38(3)(C), 41(1), 47, 50, 181, 182, 258 AND 259 OF THE CONSTITUTION**

AND

**IN THE MATTER OF THE INTERPRETATION OF ARTICLES 174(I) AND 175(A) OF THE CONSTITUTION AND SECTION
40 OF THE COUNTY GOVERNMENTS ACT, 2012 AND STANDING ORDER 62(1) AND 44(3) OF THE COUNTY ASSEMBLY
OF LAMU**

AND

**IN THE MATTER OF THE COUNTY GOVERNMENT ACT, 2012(ACT NO.17 OF 2012) AND IN THE MATTER OF SECTION
7(2) OF THE FAIR ADMINISTRATION ACT 20**

BETWEEN

AMINA RASHID MASOUD.....PETITIONER/APPLICANT

AND

THE GOVERNMENT – LAMU COUNTY.....1ST RESPONDENT

THE SPEAKER COUNTY GOVERNMENT OF LAMU.....2ND RESPONDENT

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

HON. ATTORNEY GENERAL.....4TH RESPONDENT

JUDGEMENT

BACKGROUND

On 5.4.2016 a motion for the removal of the petitioner was filed before the Lamu County Assembly. The motion was passed by the members of the County Assembly on 6.4.2017. A select committee of five members was appointed by the Assembly. The committee met the Petitioner on 25.4.2016 and presented its report to the Assembly recommending the removal of the petitioner. On 28.4.2016 the County Assembly adopted the report. The 2nd respondent forwarded the resolution to remove the petitioner to the Governor Lamu County on 29.4.2017. Before the Governor acted on the recommendations, the petitioner filed this petition and obtained temporary orders of injunction.

The Petitioner's Case

The Petition is dated 27th April, 2016. It was amended on 21st May, 2016. It is supported by the petitioner's affidavit. The Petitioner's case

is contained in the Petition itself, the supporting affidavit as well as the written submissions filed by her Counsel on 1st December, 2016.

The Petitioner is the County Executive member for land, Physical Planning, Urban Development, infrastructure and Water in Lamu County. On 21.4.2016 she received a letter dated 20.4.2016 from the Select Committee asking her to appear before the committee on Friday 21.4.2016 and Saturday 22.4.2016. The letter also asked her to provide certain information to the Committee. The Petitioner maintains that she had travelled to Kiunga on 21.4.2016 and requested to meet the Committee on Monday 25.4.2016. On that day she appeared with her advocate before the Select Committee and responded to all the allegations raised against her.

The Petitioner maintains that she was accused of incompetence, violation of the constitution and under Performance. On the same day of 25th April, 2016 at around 5.17p.m this Select Committee delivered its report to the Petitioner recommending her removal from office. It is the Petitioner's case that she had provided several documents to the Select Committee and did not expect the Committee's report to be ready that fast.

It is the Petitioner's position that the motion presented to the speaker by the mover of the motion, Hon. Abdu Kassim Ahmed, was defective and contrary to the Provisions of Section 40(2) of the County Government Act (CGA). The motion sought to impeach the Petitioner instead of being one seeking the Petitioner's removal from office. It is contended that motions for impeachment are provided under Articles 145 and 150(2) of the Constitution for the Impeachment of the President and his deputy.

The Petitioner further maintains that the County Assembly contravened its own standing order number 62(2) which provides as follows:-

A member who has obtained the approval of the speaker to move a motion under paragraph(1) shall give three (3) clear days notice calling for dismissal of a member of County Executive Committee by the Governor.

The motion was presented on 5th April, 2016 and was debated and passed the following day on 6th April, 2016. The date of the motion by the mover was dated 5.4.2015 instead of 5.4.2016. The speaker immediately wrote to the Governor on 6.5.2016 notifying him about the motion yet the required three days had not lapsed. The Petitioner contends that the mover of the motion recommended the names of the members to be in the Select Committee including its chairman. This was Contrary to the Provisions of Standing Order number 159(1)(a) which provides:-

“A Select Committee shall upon appointment elect its chairperson and vice chairperson amongst its members.”

It is the Petitioner's contention that the Select Committee went ahead and held its sittings on Friday 21st April, 2016 and Saturday 22nd April 2016 in the absence of the Petitioner. Those sittings, according to the Petitioner, were illegal and a nullity as were held in the Petitioner's absence. The Petitioner maintains that even after the report of the Select Committee was adopted by the members of the Lamu County Assembly, no resolution was sent to the Governor. What was sent was a letter dated 29.4.2016 indicating that the County Assembly had adopted the report of the Select Committee. This was Contrary to Section 40(b) which requires the delivery of the resolution to the Governor.

The Petitioner maintains that all the allegations against her were not proved. The offences labelled against her on Under Performance do not disclose any breach under the provisions of Section 40 of the CGA. No particulars of violation of the Constitution were provided. The Petitioner was asked to have assisted her relatives to receive billions of shillings in compensation from the Kilalana area but no proof was provided. Those named as the Petitioner's relatives swore affidavits indicating how they received their compensation from the National Government. According to the Petitioner, the complaints did not meet the threshold for her removal. The Petitioner was accused of being incompetent. The Petitioner provided the Select Committee with a report of the Controller of Budget for the Financial year 2014/2015. The Petitioner's docket was ranked the highest in Lamu County in absorption of development funds.

The Petitioner submit that she was accused of having failed to provide spatial plans for the County. Under section 110(3) of the County Government Act, Spatial plans are to be developed by the entire County Executive Committee and not by one member only. That was discrimination against her by the County Assembly. The Assembly breached Article 27 on Equality and freedom from discrimination. It is submitted that the Petitioner is a state Officer. She could only be removed from office for contravention of Articles 75(1), 76, 77 or 78 of the Constitution. The Petitioner's constitutional rights were violated. These included the right to be a candidate for a Public Office under Article 38(3). The right to fair labour practice Under Article 41, The right to fair administrative action under Article 47 and the right to a fair hearing under Article 50 of the constitution.

The 2nd and 3rd Respondents' Case

Mr. Balala appeared for the two respondents. Counsel relied on the replying affidavit sworn by the speaker of the Lamu County Assembly, Hon. Mohamed Hashim Salim on 18th November 2016 and on the written submission filed on 9th December, 2016.

It is submitted that when the members of the County Assembly deliberated on the impeachment motion, they were discharging their Constitutional oversight role over the executive under article 185(3) of the Constitution. Article 174(1) of the Constitution provides for a system of checks and balances between the County Assembly and the County Executive. Further, the County Assembly was exercising the sovereignty of the people under Articles 1 and 10(2)(c) of the constitution.

It is the Petitioner's case that Section 40 of the County Governments Act provide for the removal of a member of the Executive: Section 40(2) of the Act Provides as follows:-

A member of the County Assembly supported by at least one third of all the members of the County assembly may propose a motion requiring the Governor to dismiss a County Executive Committee member on any of the grounds set out in subsection

(1).

It is the respondents' case that standing orders number 62, 63 and 64 of the Lamu County Assembly provides for the procedure for removal of members of County Executive Committee. It is submitted that a motion for the removal of the petitioner was presented to the speaker. It was passed by the County Assembly within the seven days provided under the standing orders. A Select Committee was appointed by the Assembly. The Petitioner was invited to appear before the Committee and duly appeared in the company of her advocate. The report of the Select Committee was adopted by the County Assembly on 28.4.2016. A resolution to remove the Petitioner was forwarded to the Governor on 29.4.2017. It is submitted for the respondents that the Lamu County Assembly complied with all the legal Provisions Under Section 40 of the County Governments Act and its own Standing Orders. Five members of the County Assembly constituted the Select Committee and were picked from different political parties under standing orders number 155(1). The County Assembly is composed of twenty(20) members. The fact that a majority of the Assembly members voted to set up the Committee does not point to a predetermined position or they being biased but rather to the view of the majority of the members that the Petitioner was not deserving of holding office.

It is further submitted that the Petitioner was aware of the entire removal process. She chose to take the process lightly and travelled to Kiunga yet she was notified to appear before the Select Committee on 22nd and 23rd April 2016. The petitioner was in Lamu on those days and wrote a letter on 22nd April 2016 which she signed personally requesting for the adjournment. The petitioner was treated with Courtesy and decorum during the proceedings before the Select Committee. It is contended that the County Assembly complied with the due process but the Petitioner failed to take the entire process and accusations seriously but instead approached the special Committee with arrogance and contempt without realizing the serious charges leveled against her. The impeachment proceedings met the threshold of a fair process. The Speaker of the County Assembly attended the proceedings of the Select Committee as an ex official member. Other members of the Assembly are allowed to attend the proceedings of committees where they are not members.

It is submitted that Article 195 of the Constitution bestows the County Assembly with investigative and quasi Judicial functions. The respondents maintain that the Petitioner has listed several Articles of the Constitution but none of those Provisions were violated by the respondents. The petitioner was the one given the responsibility of developing the spatial plans but failed to do so. Spatial plans are a statutory requirement and she was expected to coordinate with the other departments in the County to have the spatial plans ready. There was no violation of the petitioner's human dignity. She was accorded a fair hearing as the details of the complaints were forwarded to her and she was given ample time to defend herself.

Analysis and Determination

The Initial motion dated 5.4.2016 by Hon Abdu Kassim Ahmed cited three grounds for the Petitioner's removal. These are:-

(i) Incompetence

(ii) Under Performance

(iii) Violation of the Constitution

On the ground of incompetence, the allegations were that:-

(a) Failure to submit to the Assembly spatial plans as provided by Section 107 of the County Governments Act despite Ksh.30 million having been allocated between 2014 and 2016.

(b) Failure to submit regular reports on her docket.

(c) Failure to improve performance on her docket.

On the issue of Under Performance, the allegations were:-

(a) Not attending to water affairs despite allocation of Ksh.35 million in the budget.

(b) Not attending to infrastructure matters in the County despite allocation of Ksh.150million in the budget.

(c) Not attending to Hindi/Magogoni settlement scheme phase II and Mokowe town planning despite allocation of Ksh.40 million in the budget.

On the issue of violation of the Constitution, the accusations levelled against the petitioner were that the petitioner abused her office on the Kililana compensation beneficiaries' list which amounted to gross violation of the constitution.

The letter dated 20.4.2016 addressed to the petitioner by the clerk of the County Assembly indicated under the allegations of incompetency that the petitioner failed to develop and submit for approval an infrastructural development policy. The letter required the petitioner to provide certain information including list of beneficiaries and survey maps for Mkunumbi, Mapenya, Nagele, Kiongwe mjini and Ndambwe. Several other issues are raised in the letter.

The petitioner filed her response to the allegations. She submitted that under the law the regular reports to the County Assembly were supposed to be submitted by the Governor. Her department has been submitting regular project implementation reports to the Executive Committee. She provided a progress report for the 2nd quarter of 2014/2015 financial year on her docket to show that she had improved

performance in her docket. On Infrastructural Development Policy, the petitioner stated that it was not an immediate priority and the County was using the National Polices at the moment. The petitioner provided project implementation reports for the financial years 2013/2014 and 2016/2017. She provided documents to show that she was attending to water affairs. These included reports showing implementation of projects in the water sector. The same applied to the infrastructure sector.

On the issue of violation of the constitution and abuse of office, the petitioner's response was that the County Survey team was not involved in the Survey exercise. The compensation process was done by the National Land Commission (NLC).

The County Assembly appointed a Select Committee of five members namely:

MCA Zahara Shee Mohamed – Chairperson

MCA Omar Mohamed Said Lali – Member

MCA Anthony Njomo Maina - Member

MCA Athman Mohamed Amin – Member

MCA Monicah Njambi Kirunyu – Member

During the proceedings of the Select Committee the Speaker and eight members of the County Assembly were in attendance. The report of the select committee presented to the Assembly indicate that the petitioner was incompetent and underperformed as she failed to utilize allocated funds in the two financial years of 2014/2015 and 2015/2016. It is further noted in the report that Water project for Kiunga Ward was not being implemented. No draft spatial plan was prepared despite allocation of Ksh.37.million and this proved to be under performance.

The report by the select Committee made the following recommendations:

1. The Committee recommends that each and all the allegations against Ms Amina Rashid Masoud, as moved and resolved to be investigated through a motion of MCA Abdu Kassim Ahmed on Thursday, 14th April 2016 have been substantiated and therefore recommends for the removal of Ms. Amina Rashid Masoud from office.

2. The motion on the impeachment of Ms. Amina Rashid Masoud was brought with due diligence having been down on the allegations. The committee is very pleased to note that for the interest of public a motion for impeachment was subjected to a thorough scrutiny that ensured there is sufficient, reliable and compelling evidence that was proven before being accepted for tabling in the county assembly.

3. That Amina Rashid Masoud is incompetent, under performer in her duties and abused her office by violating the constitution. She is not fit to hold the office of the county executive committee for Land, Physical Planning, Infrastructure, urban Development and Water.

4. In conclusion we urge the county assembly to approve and adopt this report.

The petition herein raises the following three issue.

1. Whether the Lamu County Assembly's process of removal from office of the petitioner complied with the law.
2. Whether the petitioner's constitutional rights were violated.
3. Whether the allegations leveled against the petitioner were established to warrant the removal

According to the petitioner she was not accorded a fair administrative process and the impeachment process was not fair. On their part, the 2nd and 3rd respondents maintain that the removal process was fairly conducted and all the statutory provisions were complied with. The record shows that the removal process started with the motion presented by Hon. Abdu Kassim Ahmed on 5.4.2017. The motion was supposed to be debated after the expiry of three (3) days after presentation. This is in line with standing order number 62(2) of the County Assembly standing orders. However, the motion was debated and passed the following day 6th April 2017.

It is clear that the Assembly did not comply with its own standing orders.

There is the issue of the manner in which the Select committee was picked. The mover of the motion moved the motion in the County Assembly and stated as follows:-

Mr. Speaker, I beg to move the following motion

That aware that the Department motion of Ms Amina Rashid Mashud, the County Executive committee member for land, Physical Planning, Infrastructure, Urban Development and Water was passed in accordance with standing order No.62m

further aware that standing order No.62(6) requires the Assembly to appoint a special committee to investigate the matter and shall report to the Assembly whether it finds the allegations against the member of County Executive Committee to be substantiated and concerned that this is a priority motion as stipulated in standing order No.64(1), I therefore urge this assembly to appoint the following to investigate into the matter and tale a report to this assembly within ten(10) days as the law dictates:

MCA Zahara Shee Mohamed – chairperson

MCA Paul Kimani Njuguna

MCA Omar Mohamed Said Lali

MCA Anthony Njomo Maina

MCA Athman Mohamed Amin

MCA Monicah Njambi Kirunyu

MCA Azhar Ali Mbarak

Out of the seven members recommended by Hon Abdu Kassim, five of them were selected to be members of the Select Committee. This was in line with the legal requirement that the Select Committee should be composed of only five members. Mr. Abdu Kassim recommended that MCA Zahara Shee Mohamed be the Chairperson. That recommendation was passed and indeed the Honourable Zahara Shee became the Chairperson of the Select Committee and signed the committee's report. Standing order number 159(1)(a) provide that the Select Committee was to appoint its own chairman. The respondents correctly point out that this was not a standing committee. A standing committee normally has its own chairman. Being a Select Committee, it is upon the members themselves to decide who would be the chairperson. Once again the Assembly failed to comply with its own standing orders. Hon Abdu Kassim was the mover of the motion. Ordinarily he can be taken to be the complainant or plaintiff. He is the one who recommended those to sit in the Select Committee including the one to be the Chairperson. It can be taken that Hon. Abdu Kassim knew very well that those members of the Assembly he recommended were not going to let him down. They identified with his complaint against the petitioner. In effect the selection process of the select committee cannot be held to be impartial.

Turning to the removal proceedings, the record shows that thirteen members signed in favour of the motion. During the hearing on 25th April, 2016, Eight members of the Assembly were in attendance. These eight members plus the five Select Committee members add up to thirteen. The members in attendance were not mere observers, they intensively participated in the proceedings. The mover of the motion was present during the hearing. His presence is procedural as he was the complainant and ordinarily was expected to present his complaint before the committee. It appears from the proceedings of the Select Committee that all the five members, the eight members in attendance and the mover of the motion were all in favour of the Petitioner's removal. The respondents contention that those who appended their signature in favour of the motion cannot be held to have been already in favour of the removal cannot be true. The record show that the following MCAs appended their signatures in support of the motion.

1. Abdu Kassim Ahmed
2. Paul Kimani Njuguna
3. Azhar Ali Mbarak
4. Omar Mohamed Said Lali
5. Athman Mohamed Amin
6. Mohamed Delo Nusura
7. Anthony Njomo Maina
8. Ali Bakari Mohamed
9. Zahara Shee Mohamed
10. Johana Thuo Karanja
11. Monicah Njambi Kirunyu
12. Khadija Hamid
13. Husuni Alawi Husuni

Out of the fourteen MCAs, Zahara, Paul, Omar, Anthony, Athman, Monica and Azhar were recommended by the mover of the motion to be members of the Select Committee. Five of them became members of the Select Committee. Three of the members who appended their signatures excluding the mover of the motion were in attendance during the hearing of the select committee. Four other MCAs Amina Kale Loo, Sanda Bamkuu Parura, Joseph Githuku Kamau and James Njuguna Komu Janko were also in attendance. In essence therefore out of the twenty members of the County Assembly, its possible that only one or two members could have not been aware of the removal proceedings before the report of the Select Committee was tabled in the full Assembly. The Hansard record of the Select Committee is clear and most of the committee members and those MCAs in attendance actively participated in the proceedings and were in favour of the removal of the petitioner from office.

The process of removal from office of the Petitioner was a quasi Judicial function endowed to the County Assembly by both the constitution and section 40 of the County Government Act. It is submitted that when the Assembly is conducting such proceedings it is equivalent to the High Court. This functions are only limited to the summoning of witnesses, examining them on oath or otherwise. It includes compelling attendance of witnesses before the County Assembly or its committee. The Article does not make the County Assembly or any of its committees an institution of equal jurisdiction to the High Court and Courts of equal status in all other matters. That being the case, the Assembly is expected to be impartial. The Select Committee was expected to investigate the allegations leveled against the petitioner and find out whether the same were true or not. From the proceedings of the select committee and its report, it is clear to me that the Assembly had already determined the outcome of the process. The responses by the petitioner were ignored. Utilization of funds is a process and consultants have to be procured. The issues on development projects were adequately responded to. Issues relating to violation of the constitution and other laws were disproved. The compensation paid to the Lamu residents was done by the National Government through the National Land Commission. There is no proof that the petitioner personally included her relatives in the compensation list. The National Land Commission paid those beneficiaries it was convinced were affected by the Government project. The Commission did not pay people merely because someone like the petitioner directed it to pay. It is an Independent Commission.

The Lamu County Assembly violated its own standing orders. The mover of the motion was actively involved in the Selection of the members of the Select Committee. Many members of the Assembly supported the motion to impeach the petitioner both during the deliberation of the motion and during the proceedings of the Select Committee. Such a process cannot be termed as a fair administrative action. The Hansard report of the Select Committee show that members of the committee and those in attendance were clearly bent on the removal of the petitioner as opposed to finding out whether the allegations were substantiated.

According to the record, the decision to impeach the petitioner was pre-meditated. The Assembly was simply trying to comply with the law.

Although Section 40 of the County Governments Act empowers County Assemblies to remove members of the executive Committee from office, that right has to be exercised carefully and is the subject of control of the Court. These are quasi – Judicial administrative functions which are subject to the rules of natural Justice. The county Assembly of Lamu started from the wrong position. It concluded by its own majority, fourteen members out of twenty, that the petitioner be removed. The proceedings of the Select Committee were not intended to get details of the complainants as well as the response by the petitioner. The proceedings were purely intended to comply with the law but members were already resigned into removing the petitioner from office. The process is tantamount to reaching at a conclusion on an issue then retracing justifiable reasons for the conclusion. The subsequent process does not alter the conclusion.

The Petitioner has prayed for several orders. Most of the prayers are repetitive. I can't grant prayer (o) of the amended petition as the County Assembly exercise oversight roles on the executive. Calling for reports and information from members of the executive Committee cannot be held to be unconstitutional. The prayers in the petition runs from prayer (a) to prayer(S). The many prayers are unnecessary and are a duplication.

In the end, I do find that the petitioner was not accorded a fair hearing. The proceedings before the Select Committee were conducted with high tempers and use of abusive language. The Select Committee was more concerned with the timelines and not the contents of the replies by the petitioner. There was no fair administrative action. I do find that the petition herein has been proved.

From the above findings, I do find that the orders which are appropriate to grant are prayers (i) seeking an order of prohibition and prayers (m) seeking a conservatory order. I will not grant an order of certiorari or Declaration. The above two prayers sufficiently caters for the petitioner's claims. The rest of the prayers are not granted. The petitioner shall continue to serve as a member of the Lamu County Executive Committee. The Lamu County Assembly is at liberty to start fresh proceedings for the removal of any of the members of the Lamu County Executive Committee including the petitioner. This is their constitutional mandate only that such mandate must be undertaken within the law.

In the end the petition herein succeeds. It is granted in the above terms. Parties shall meet their own respective costs.

Dated and Signed at Marsabit this day of2017

SAID CHITEMBWE

JUDGE

Dated, Signed and Delivered this 26th Day of July, 2017

WELDON KORIR

JUDGE