



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CONSTITUTIONAL PETITION NO.2 OF 2017

IN THE MATTER OF ARTICLE 19, 20, 21, 22, 23, 28, 47, 50 AND 53 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS OR FUNDAMENTAL FREEDOMS UNDER ARTICLE 28, 47, 50 AND 53 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF ALLEGED BREACH OF ARTICLE 10, 236, AND 179(6) OF THE CONSTITUTION OF KENYA, 2010

BETWEEN

SALMA MUHIDDIN AHMED PETITIONER

VERSUS

1.COUNTY ASSEMBLY OF KILIFI1ST RESPONDENT

2.THE SPEAKER OF KILIFI COUNTY ASSEMBLY.....2ND RESPONDENT

3.THE GOVERNOR KILIFI COUNTY.....3RD RESPONDENT

RULING

The application dated 28th February 2017 seeks the following orders:-

- 1. This Honourable Court do grant a conservatory order that restrains the respondents from proceeding to impeach the petitioner or an order of prohibition prohibiting the Respondents from proceeding to impeach the petitioner pending the hearing and determination of the petition herein.*
- 2. The Honourable court do grant prayer 1 above on interim basis pending the hearing and determination of this application.*
- 3. Costs of this application to be borne by the Respondent.*

The application is supported by the Petitioner’s affidavit sworn on 28th February, 2017 and a supplementary affidavit sworn on 30th March, 2017. The 1st and 2nd respondents filed a replying affidavit sworn on 13th March, 2017 and a further affidavit sworn on 10th April, 2017 by **Kadhua Jimmy Kahindi, the speaker of the Kilifi County Assembly.**

Mr. Aboubakar, Counsel for the applicant maintains that the applicant has established a prima facie case. One member of the County Assembly sought for information from the Petitioner who is a member of the Executive Committee in charge of Education, Youth affairs and Sports in Kilifi County. On 4.8.2016 the County Assembly wrote to the Petitioner seeking for the information. The Petitioner responded on 10.8.2016. Subsequently, the petitioner was invited to appear before a Committee of general oversight on 24.10.2016. Members sought for further clarification to be made on the 24.10.2016. It is submitted that the Petitioner complied with the invitation and appeared on 24.10.2016. The committee prepared its report after considering the petitioner’s presentation. On 22.11.2016 a motion was presented by **Emmanuel Kazungu Charo, a member of the County Assembly** seeking the removal of the petitioner from office on the grounds of

incompetency.

Counsel submit that the respondents were under a duty to hear the petitioner. Under Section 39 of the County Governments Act, a member of the County Assembly can seek necessary information that may impede the implementation of the Assembly's action. Once the information is given, it helps the Assembly to formulate laws and policies. The information is not intended to be the basis for the removal of a County Executive member. The 1st respondent used the report to recommend the impeachment of the petitioner. Counsel maintains that that was both wrong and unconstitutional. The petitioner was not given an opportunity to interrogate the report. A fair evaluation of the report shows that there was no justification to recommend the removal of the petitioner from office. The petitioner is not to blame for the non-completion of some of the projects. Other departments such as the finance department was to take other actions.

Counsel further submit that on 30th November 2016, a select Committee was formed to initiate the removal of the petitioner. This was a process conducted under section 40 of the County Governments Act. The Petitioner was invited to appear before the Committee on Monday 19th December, 2016 but appeared on 10.1.2017. She responded to all the issues raised. By the time she appeared before the Select Committee, the Petitioner had not been served with the report of the General Oversight Committee. A report of the Select Committee was to be tabled on 21.2.2017 before the County Assembly. It was adjourned to 29.2.2017. On 28.2.2017 the Petitioner obtained temporary orders from the Court.

Mr. Aboubakar further contends that Article 47 on fair administration of Justice was violated. Section 4 of the Fair Administration of Justice Act was also not followed. The Committee ought to have wrote to the Petitioner giving reasons for the removal. Further, the petitioner should have been given an opportunity to challenge the findings contained in the report of the oversight Committee. This is a requirement under the Fair Administration of Justice Act. The Petitioner had the right to cross examine the witness or for the witnesses to be cross examined by her advocate. The entire County Assembly became a Committee. A decision had already been made to have the Petitioner removed. Article 50 of the Constitution on fair hearing was violated. The Assembly had already concluded that the Petitioner be removed. There was no impartial arbiter. The Select Committee could not have been objective as its members participated in the deliberations of the General Oversight Committee.

Counsel observes that after the Petitioner appeared before the Select Committee, no report was made available to her. The report has not been tabled before the County Assembly and there are no good grounds for the removal of the Petitioner. Under section 40 of the County Government Act, the report of the Select Committee has to be presented within 10 days. The report was due by 20.2.2017 and cannot be presented after the expiry of that period. No report or Hansard records have been annexed to indicate the findings of the Select Committee. This leads to an adverse interference on the respondents. Counsel relies on the case of **STEPHEN NENDELA V THE COUNTY ASSEMBLY of BUNGOMA & 3 OTHERS Bungoma Constitutional** Petition number 4 of 2014 and that of **AMINA RASHID MASOUD V THE GOVERNOR LAMU COUNTY & 3 OTHERS, Malindi** Constitutional Petition No.10 of 2016 Mr. Aboubakar maintains that the case of Stephen Nandela(Supra) held that Section 40 of the County Governments Act is Unconstitutional. Section 4 of the Fair Administration Justice Act contradicts section 40 of the County Governments Act. The Petitioner is not enforcing her private interests. Her removal from office will affect public interest. Her private interest also need to be safeguarded. The Petition is intended to stop the respondents from violating the Petitioner's constitutional rights but not to gag the County assembly. There is a likelihood that the Assembly will violate and has already violated the Petitioner's rights.

Mr. Munyao appeared for the 1st and 2nd respondents. Counsel submit that the Petitioner held the dockets of Education, Youth and sports. What is in dispute is the Education docket. The County Assembly is required to uphold their mandate under the law. The effect of the application is to gag the County Assembly from its mandate. The County Assembly is immune from being sued from actions that it undertakes while carrying public duties under the constitution. It can only be sued if the county Assembly's conduct is contrary to the Constitution and affects public interests in a particular way. If the interest to be protected is private, then the Court should not interfere. Counsel rely on the case of **SIMON WACHIRA KAGIRI V COUNTY ASSEMBLY OF NYERI & 2 OTHERS [2013] eKLR**. The application involves private interest. The Petitioner is trying to protect her job.

Counsel further submit that the Committees of the County assembly are protected from Court action. It is not the duty of the court to direct County Assembly Committees how to carry out their functions. The law allows the formation of the Committee of the whole house. Once a Committee of the whole house is constituted, it remains a Committee and not the County Assembly.

Mr. Munyao contends that the process followed by the 1st respondent is constitutional. Both the petition and the application are premature and preemptive. The petitioner was accorded a fair hearing under the law. All the required steps under the law were followed. The process has not been concluded by a decision to have the Petitioner removed from office. Once the County Assembly receives the report, it can reject or accept it. The Assembly's decision will be submitted to the Governor. The matter is still with the Select Committee. The report is supposed to be debated and a resolution passed. Thereafter the Court can interfere by way of a petition or Judicial Review. The Petitioner cannot stop the debate of the Assembly. She is speculating about the report of the Select Committee as well as the motion. There is No 29/2/2017 in this calendar year. The Assembly was two steps away from making a resolution as to whether to impeach or not. Counsel relies on the case of **OKIYA OMTATA OKOITI & 3 OTHERS V THE ATTORNEY GENERAL & 5 OTHERS [2014] eKLR**.

It is further submitted that the Petition is not precise. It does not set out the grounds upon which it is brought or the rights that have been violated. Article 47 on fair administration of Justice was complied with. The Petitioner indicated that she was sick and she was given more time. Article 50 on fair hearing was complied with. There is no irreparable injury that will be suffered by the Petitioner if the orders being sought are denied. The Court should wait for the County Assembly to deliberate on the issue and make a decision on whether to quash it if called upon.

The application herein raises the following issues:-

- i) *Whether the Court can restrain the County Assembly from deliberating on the report of the Select Committee.*
- ii) *Whether the applicant has made up a case for the grant of a conservatory order.*

iii) Whether the application is premature and speculative.

The Petition is based on the contention that a decision to remove the Petitioner from office was made by the Committee on General Oversight. That Committee is composed of the entire County Assembly. The reference to the Select Committee was just a mere procedural formality. A decision to remove had already been made.

The dispute herein can be traced to a statement by the member of County Assembly for Ganda Ward, Honourable Stephen Bahati Mlanda. This statement was issued sometimes in August, 2016. The statement reads as follows:

Whether the County Executive Committee Member in charge of Education, Youth Affairs and Sports is aware that many Early Childhood Development (E.C.D) centers project, for the Financial Year 2015/2016 have not been completed within the stipulated time frame. What action has the County Executive Committee Member in charge taken to remedy this challenge?

The above statement was forwarded to the Petitioner on 4.8.2016 by the clerk to the County Assembly of Kilifi, Mkare A. Jefwa. On 10.8.2016 the Petitioner responded in writing to the statement. From 10.8.2016, nothing happened until 10.10.2016 when the Petitioner was invited to appear before the Committee on General Oversight. The appearance was scheduled for 24.10.2016. The letter of invitation itemized the issues the Petitioner was expected to respond to.

The record show that the committee on General Oversight prepared its report which is dated November 2016. The committee recommended that the Petitioner be removed from office. A notice of motion was filed on 22nd November 2016. The committee recommended that the Petitioner be removed from office. A notice of motion was filed on 22nd November, 2016 by the member for Jaribuni ward, Honourable Emmanuel Kazungu Chai seeking the removal of the Petitioner.

The notice of motion gives the reasons for the removal as incompetence. A Select Committee comprising five members was appointed. The Select Committee's mandate was to find out if the allegations against the Petitioner are substantiated. This Committee was formed on 30th November, 2016. The petitioner was invited to appear before the Select Committee on Monday 19th December, 2016. On 15th December, 2016 the Petitioner wrote to the Committee indicating that she was on sick leave until 5th January, 2017. On 4.1.2017 the petitioner wrote her submissions responding to the issues raised against her. These submissions were filed with the Committee. The Petitioner appeared before the Committee on 10.1.2017. It is contended by the respondents that the Petitioner was given all the opportunity to ventilate her defence on the allegation made against her. The committee was to prepare its report and present it before the full Assembly. On 28.2.2017 the petitioner obtained Court orders restraining the respondents from impeaching her pending the hearing and determination of the application.

It is not disputed that the County Assembly is empowered by the law to summon a member of the Executive Committee Section 39 of the County Governments Act states as follows:-

(1) The members of the county executive committee are individually and collectively accountable to the governor in the exercise of their powers and performance of their duties and responsibilities.

(2) A committee of the county assembly may require a member of the executive committee to -

(a) attend or appear before the committee; and

(b) answer any question relating to the member's responsibilities.

It is contended for the respondents that the Committees of the County Assembly have equal powers as the High Court as provided under Article 195 of the Constitution. Article 195 of the Constitutions provide that:-

(1) A county assembly or any of its committees has power to summon any person to appear before it for the purpose of giving evidence or providing information.

(2) For the purposes of clause (1), an assembly has the same powers as the High Court –

(a) Enforce the attendance of witnesses and examining them on Oath, affirmation or otherwise; (b) Compel the production of documents; and

(c) Issue a commission or request to examine witnesses abroad.

It is true that the County Assemblies are entitled to carry out their duties and Courts should not be seen to be interfering or gagging their mandate. The general principle in law is that when the Assemblies, both National and Counties are exercising their legislative roles, the Courts will not generally interfere with their respective mandates. However, where the Committees are merely exercising their administrative jurisdiction, the Courts are at liberty to interfere with their proceedings to avoid violation of both private and public rights. There are rare situations where the Courts can interfere with the legislative role of the Assemblies. Such include a situation where the National Parliament or a County Assembly are deliberating on a legislation with the intention of having it enacted Contrary to the Provisions of the Constitution. This will include situations where the National Assembly would like to amend an Article of the Constitution which requires the undertaking of a public referendum without involving members of the public. The court can stop the debate and order that Parliament follow the Provisions of the Constitution.

From the above, I do conclude that the Courts can restrain the County Assembly from deliberating on the report of the Select Committee.

This is subject to sufficient evidence of violation of the Petitioner's rights by the Select Committee being provided.

The Petitioner contends that a decision had already been made by the General Oversight Committee to have her impeached. The proceedings of the Select Committee were a mere formality to justify the decision of the General Oversight Committee. Mr. Aboubakar relies on the case of **AMINA RASHID MASOUD –V- THE GOVERNOR, LAMU COUNTY & 4 OTHERS, Malindi Constitution Petition No.10 of 2016**. In that case I had this to say on a similar matter:-

“My view on section 40(3) is that the Section is not unconstitutional. However, its implementation requires the County Assembly to exercise extreme objectivity and adherence to principles of fair administration of Justice. Where the motion to remove a member of the Executive Committee is not based on complaints from members of public but from the Assembly members themselves, great caution should be exercised to avoid condemning the state officer before even hearing him/her”

The orders 153 of the Kilifi County Assembly standing orders create the General Oversight Committee which is a Committee of the whole house. The Committee membership is given in the replying affidavit and is composed of all the 53 members of the County Assembly. It is referred to as a select Committee on General Oversight. That Committee met and resolved that the petitioner be impeached. Apart from that Committee's report of November, 2016, the deliberations of the Committee are not annexed by both parties. The petitioner's case is distinguishable from that of Amina Masoud (Supra). In the latter case, there were only twenty members of the County Assembly and thirteen of them appended their signature in support of the impeachment. In the current case, there is no record of what transpired during the deliberations of the General Oversight Committee. Further, it is not established whether all the 53 members participated in the deliberations of the general oversight committee. The deliberations in the Amina Masoud case were clearly captured by the Hansard record. From that record, the Court was able to analyse whether there was fair administration of justice.

The petitioner relies on Article 47 of the Constitution. Section 4 of the Fair Administration action Act extensively provides for the parameters to be followed when dealing with an administrative action. The Section states as follows:-

4. Administrative action to be taken expeditiously, efficiently, lawfully etc

(1) Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) Every person has the right to be given written reasons for any administrative action that is taken against him.

(3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision –

(a) prior and adequate notice of the nature and reasons for the proposed

administrative action;

(b) an opportunity to be heard and to make representations in that regard;

(c) notice of a right to review or internal appeal against an administrative decision, where applicable;

(d) a statement of reasons pursuant to section 6;

(e) notice of the right to legal representation, where applicable;

(f) notice of the right to cross-examine or where applicable; or

(g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.

(4) The administrator shall accord the person against whom administrative action is taken an opportunity to:-

(a) Attend proceedings, in person or in the company of an expert of his choice;

(b) Be heard;

(c) Cross-examine persons who give adverse evidence against him; and

(d) Request for an adjournment of the proceedings, where necessary to ensure a fair hearing

(5) Nothing in this section, shall have the effect of limiting the right of any person to appear or be represented by a legal representative in judicial or quasi-judicial proceedings.

(6) Where the administrator is empowered by any written law to follow procedure which conforms to the principles set out in article 47 of the constitution, the administrator may act in accordance with that different procedure.

5. Administrative action affecting the public

In any case where any proposed administrative action is likely to materially and adversely affect the legal rights or interests of a group of persons or the general public, an administrator shall:-

(a) Issue a public notice of the proposed administrative action inviting public views in that regard;

(b) Consider all views submitted in relation to the matter before taking the administrative action;

(c) Consider all relevant

The Fair Administration action Act No. 4 of 2015 was enacted in order to give effect to Article 47 of the Constitution. Article 47 is the cornerstone of fair administrative action. Whereas the petitioner contends that Article 47 of the Constitution was violated, the respondents maintain that it was not. I have given the background of the dispute hereinabove. The Petitioner was notified of the statement of Honourable Stephen Bahati Mlanda. She responded to that statement. The Petitioner was subsequently invited to attend the select Committee of five members. On the appointed date the petitioner was on sick leave. The meeting was adjourned from 19th December, 2016 to 10.1.2017. The Petitioner duly attended the meeting. In her letter dated 4.1.2017, the petitioner thanked the Committee for having given her an opportunity to appear before them.

The petitioner therefore responded to the statement by Honourable Stephen Bahati Mlanda, attended the proceedings of the General Oversight Committee as well as the deliberations of the Select Committee of five members of the County Assembly. There is no allegation by the petitioner that during the proceedings of the two committees, she was harassed, intimidated or denied ample time to present her defence. The petitioner contends that she was not given a copy of the report of the General Oversight Committee. That could be true but the main contents of that report is the resolution to impeach the Petitioner. The letter dated 13.12.2016 from the County Assembly to the Petitioner indicate that the Assembly made a resolution on 30.11.2016 and appointed a Select Committee. The letter indicates that the petitioner was to be removed from office. The petitioner responded in writing to the allegations of incompetence and subsequently appeared before the Select Committee on 10.1.2017.

Section 4 of the Fair Administration Action Act calls for written reasons for any administrative action, adequate notice of the nature and reason for the action, an opportunity to be heard and to make presentations, right to attend the proceedings involving the administrative action, right to be heard and cross examine those who give adverse information and also the right to request an adjournment of the proceedings.

From the background of the dispute, I am not able to find that there was any violation of the petitioner's rights to fair administrative action under both Article 47 of the Constitution or Section 4 of Act number 4 of 2015 by the respondents. The petitioner was given ample opportunity to defend herself. Where she sought an adjournment, it was granted. She was fully aware of the allegations against her. Written notices were sent in advance giving the allegations that were being made against her. I do find that there is no violation of the petitioner's right to a fair administrative action. There is equally no violation of Article 50 of the Constitution on fair hearing.

Section 40 of the County Governments Act provides for the removal of a member of the Executive Committee. One of the grounds for removal is incompetence. According to the members of the County Assembly, the petitioner was not performing her duties to their expectation. Under Section 40 (3) (b), the Select Committee is required to report to the Assembly within ten (10) days after its appointment. The Select Committee's report is yet to be deliberated upon. It is submitted that since no report was submitted within the ten (10) days period, then the Committee should be barred from presenting its report. My view on this issue is that although section 40(3)(b) gives a 10 days period, the speaker of the Assembly or the Assembly itself can extend that period. The work of the County Assembly has to be undertaken at the convenience of the Assembly members and not at the convenience of the work itself. At time members of the County Assembly are engaged in meetings of various committees and that affects the work of some committees. I am unable to bar the Select Committee of five members of the Kilifi County Assembly from presenting their report simply because it was not presented within the ten days period provided under Section 40(3)(b) of the County Governments Act.

As of now, members of the County Assembly are yet to see the report of the Select Committee. This can partly be attributed to the interim Court orders issued by this Court. The Court cannot at this moment speculate as to the contents of the report. It is not established that the report recommends the removal of the petitioner from office. Section 40(5)(b) gives an opportunity to the County Assembly to vote if the Select Committee approves the removal of the member of the Executive Committee. This is yet to be done.

I do agree with the contentions by counsel for the respondent that the application is both premature and speculative. It would have been prudent for the petitioner to have been patient until the report of the Select Committee was tabled before the County Assembly and a decision against her is made. This Court cannot simply conclude that the report of the Select Committee is pro-impeachment. It can be presented to the Assembly and rejected. The Court cannot anticipate that a majority of the members support the impeachment.

Does the applicant's application calls for the granting of a Conservatory Order? In the case of **GATIRAU PETER MUNYA & 2 OTHERS [2014] eKLR**, the Supreme Court of Kenya observed as follows on Conservatory orders 86:

“Conservatory orders” bear a more decided public law commutation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore are not, unlike interlocutory injunctions, linked to such private-party issue as “the prospects of irreparable harm” occurring during the pendency of case; or “high probability of success” in the supplicant’s case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.”

The totality of my finding is that the applicant has not established a case for the granting of a Conservatory order. The merits of the petition does not call for the granting of the orders being sought. Once the report of the Select Committee is made public, it will inform each affected party whether the report is fair and objective or whether it was simply done to fulfill the requirements of Section 40 of the County Government Act. Upon seeing the report and a resolution made against the petitioner by the County Assembly, the petitioner shall be at liberty to approach the Court. At the moment, I do find that the application herein has been brought with much haste. It is not prudent at this moment to stop the presentation of the Select Committee's report and subsequent voting by the County Assembly on the findings of the Committee.

In the end, I do find that the application dated 28/2/2017 lacks merit and is hereby dismissed. Being a Constitutional Petition filed with the intention of pursuing one's constitutional rights, I will not condemn the applicant to pay costs. Parties shall meet their own respective costs.

Dated and Signed at Marsabit this day of2017

SAID CHITEMBWE

JUDGE

Dated, Signed and Delivered at Malindi this 26th day of July, 2017

WELDON KORIR

JUDGE