



**REPUBLIC OF KENYA**

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

**MISCELLANEOUS CIVIL APPLICATION NO. 24 OF 2016**

**JULIUS MASIVA OBUGA.....PETITIONER**

**VERSUS**

**JACKSON MANDAGO.....1<sup>ST</sup> RESPONDENT**

**(Sued as the County Governor of Uasin Gishu County)**

**THE COUNTY GOVERNMENT OF UASIN GISHU.....2<sup>ND</sup> RESPONDENT**

**(Sued as a statutory body established by the Constitution)**

**SYLVESTER METTO.....3<sup>RD</sup> RESPONDENT**

**(Sued as the Legal Advisor to the 1<sup>st</sup> and 2<sup>nd</sup> Respondent)**

**RULING**

This matter was filed by the petitioner Julius Masiva Obuga, by way of petition dated 3<sup>rd</sup> November, 2015. The said petition lists 3 prayers: -

- i. That the 1<sup>st</sup> and 3<sup>rd</sup> Respondents be barred from holding any public office till death as dictated by the constitution.**
- ii. That the 1<sup>st</sup> and 2<sup>nd</sup> Respondents be ordered to refund all earnings enjoyed financially to the county, failure their estates jointly and or severally owned by their respective families be attached and auctioned to realize the same.**
- iii. That all the appointees made by 1<sup>st</sup> Respondent after dissolving the 2<sup>nd</sup> Respondent make good as 2 above.**

The Petitioner also prayed for costs and interests. The Respondents duly responded to the petition. However, before the hearing of the petition could commence, the Respondents filed a Notice of Preliminary Objection dated 10<sup>th</sup> June, 2016 challenging the petition. On 4<sup>th</sup> April, 2017, the court ruled that the Notice of Preliminary Objection would be heard first before the main petition. The same was fixed for hearing in the presence of both sides for 27<sup>th</sup> June, 2017. On the set date of 27<sup>th</sup> June, 2017, however, the petitioner failed to appear in court. Since no explanation was given for his non-attendance, the court ruled that the case could proceed as fixed. Counsel for the Respondents accordingly proceeded to argue the preliminary objection.

Ms. Chesoo, for the Respondents argued that this court lacks Jurisdiction to hear and determine this matter. First, that removal for a Governor is under Article 181 of the constitution and Section 33 of County Government Act. That in the Nyeri Case of Court of Appeal 21 of 2014, it was held that the resolution of the County Assembly must be forwarded to the Senate, which shall then investigate the charges and conduct an impeachment hearing.

Counsel also referred to Article 144 on removal on grounds of incapacity. And that none of these procedures have been followed. She summed up that the High Court cannot usurp the powers of the County Assembly and the Senate in removing the Governor from office.

On the 2<sup>nd</sup> prayer of dissolution of the County Assembly, learned counsel referred to Article 192, 123 and 123 vesting the powers on the Senate, not the High Court. And lastly, that on the contract of the legal advisor, this are under Article 236 and Section 40 of County Government Act and same are governed by the Employment Act.

In summary, counsel submitted that this petition is frivolous, scandalous and vexatious, misconceived and an abuse of the process of the court. She prayed that the Preliminary Objection be upheld, while noting that the time of the County Assembly had come to an end.

As I understand it, this petition basically seeks removal of the Governor, Uasin Gishu, from office. I say this, because whereas on the petition, prayer 1 seeks to bar the Governor and 3<sup>rd</sup> Respondent from holding public office, these are persons who are already holding the public offices. Barring them from holding the public offices would be tantamount to removing them from the offices they hold. Once this process is done, then orders barring them from holding such public offices may properly issue. Similarly, the prayer that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents be compelled to repay the earnings they have earned by the virtue of being holders of such public offices, would also demand that they be removed from such offices first.

The preliminary objection herein challenges this petition as filed on grounds of failure by the petitioner to follow the constitutional and statutory requirements for barring a Governor from holding office. So, what are the procedures for barring a Governor from holding public office (or removing a Governor from office)?

Under Article 181 (i) of the Constitution:

**“A county Governor may be removed from office on any of the following grounds: -**

- a. Gross violation of this constitution or any other law.**
- b. Where there are serious reasons for believing that the county governor has committed a crime under the Nation and International Law.**
- c. Abuse of office or gross misconduct, or**
- d. Physical or mental incapacity to perform the functions of the office of county Governor.**

The procedure for removal of Governor from office is itself in Section 33 of the County Governments Act, No. 17, 2012, thus;

Section 33(1) A member of the County Assembly may by notice to the speaker, supported by at least a third of all the members, move a motion for the removal of the governor under Article 181.

(2) If a motion under Section S.(1) is supported by at least 2/3 of all the members of the County Assembly,

- (a) the Speaker of the county assembly shall inform the speaker of the senate of that**

**resolution within 2 days and**

**(b) The governor shall continue to perform the functions of the office pending the outcome of the proceedings required by this section.**

(3) within 7 days after receiving notice of the resolution from the speaker of the county Assembly:

**(a) The speaker of the senate shall convene a meeting of the senate to hear the charges against the governor: and**

**(b) The Senate, by resolution, may appoint a special committee comprising 11 of its members to investigate the matter.**

The section goes on to direct how the special committee shall investigate the matter, with the governor having a right to appear. And that at the end of the whole process, if a majority of all the members of the senate vote to uphold any impeachment charge, the governor shall cease to hold office.

This, is the constitutional and legal process to be followed for removal of a governor from the office. In all this, the court only has the jurisdiction to determine whether the impeachment or removal of a Governor was done in accordance with the constitution (Martin Nyaga Wambora & 3 others -vs- Speaker of the Senate & 6 others (2014) eKLR, page 15/19).

In our instant case, the petitioner has not commenced the legal process of removal of the Governor. He has simply moved the court by way of petition, apparently on the belief that the High Court can on its own, to the exclusion of the County Assembly and the Senate remove a governor from office. Obviously, this is not correct as in the removal of Governor, the Jurisdiction of the court is to determine whether or not the constitutional threshold for removal of governor have been met. This basically means that it is not the duty of the High Court to conduct impeachment or removal process of a governor. To the extent therefore, that the petitioner has failed to satisfy both the constitutional and statutory requirement as to removal of governor, the prayer that the 1<sup>st</sup> and 3<sup>rd</sup> Respondents be barred from holding public office till death has no merit and cannot issue in this manner.

As to the 2<sup>nd</sup> prayer regarding refunds of monies earned, this, to me is dependent on the 1<sup>st</sup> prayer on the petition. Unless the petitioner successfully initiates the process of removal of the governor, succeeds in both the removal of the governor and consequently an order barring the governor from holding a public office, an order for refund of the monies earned cannot issue in the matter prayed. For by the petitioner.

As to the 3<sup>rd</sup> Respondent, I agree with counsel for the Respondent that his employment is under the Employment Act. His removal can only be under the Act. And in the petition filed, I do not see any nexus between the Responsibilities of the 3<sup>rd</sup> Respondent and the grievances of the petitioner. There is not even a claim that he is in breach of any term of his employment contract or the Employment Act.

In all therefore, I do not find any merit in this petition. To say the least, the same is frivolous, and an abuse of the process of this court. I so find and I accordingly uphold the objection of the Respondents and dismiss this petition dated 3<sup>rd</sup> November, 2015 with costs to the Respondents.

**DATED, SIGNED and DELIVERED at ELDORET, this 26<sup>th</sup> day of July, 2017.**

**D.O. OGEMBO**

**JUDGE**

**Ruling read out in open court in the presence of: -**

*Mr. Chesoo for the Respondents,*

*The Petitioner in Person is absent.*

**D.O. OGEMBO**

**JUDGE**