REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

MISC CASE NO. 13 OF 2015

HAJIR MOHAMED DAHIYE ..... APPLICANT/PETITIONER

V E R S U S

GARISSA COUNTY ASSEMBLY …..... RESPONDENT

RULING

The applicant filed a petition on 24th November 2015 under the Constitution of Kenya as well as Public Finance Management Act No. 18 of 2012 under the County Government Act 2012, claiming that his Constitution rights were infringed.

The respondents were named as the Clerk of County Assembly of Garissa (1st respondent) and the Speaker Garissa County Assembly (2nd respondent).

On the 23rd November 2015, the applicant also filed the present application by way of Notice of Motion dated 23rd November 2015, wherein the respondent was named as Garissa County Assembly. This application was brought under Article 19, 20, 21, 22, 23, 24, 25(c), 35, 47, and 50 of the Constitution of Kenya 2010 and section 3 and 3A of the Civil Procedure Act Cap 21, as well as order 42 rule 2 and 4 and order 51 rule 1 of the Civil Procedure Rules. This is the application for my decision in this ruling, whose prayers are four as follows:-

1. That this application be certified urgent and be heard forthwith and exparte in the first instance.

2. That the honourable court be pleased to grant temporary injunction against the respondents and all its agents or committees from tabling any report relating to the applicant and the ministries he over sees, until this application is heard and determined.
3. That the honourable court be pleased to grant an order that the said report be reopened and the applicant be given chance to be heard and or represented, before the tabling of any such report.
4. That the costs of this application be paid by the applicant.

The application has grounds on the face of the Notice of Motion. The grounds are firstly, that through an adhoc Committee the respondent is in possession of a report which it intends to table in the County Assembly on the 25th November 2015. Secondly, that the applicant is adversely mentioned in that report. Thirdly, that the applicant had never been accorded a right of representation or heard by himself or an advocate contrary to the doctrine of natural justice and the right to be heard provided for in the Constitution. Fourthly, that the applicant intended to fly out of the country on 24th to 28th November 2015 on official duties. Fifthly, that the applicant was apprehensive that if the report was tabled before County Assembly on 25th November 2015, his name would suffer damage he as was an honourable and respectable member of the society. Sixth, that the applicant was apprehensive that if the report was tabled on 25th November 2015 he would suffer irreparable damage and loss. It was also a ground that the

respondent stands to suffer no prejudice should the application be allowed.

On the 23rd November 2015, the court certified the application as urgent and granted temporary and interim orders against tabling of the report. This disposed of prayer 1. It also ordered that application be served on the respondent and fixed it for hearing on the 22nd December 2015.

In response to the application, the respondent filed grounds of opposition as well as a replying affidavit on 30th November 2015.

The replying affidavit was sworn on 30th November 2015 by Mohamud Abdi Rashid Santul the Clerk of Garissa County Assembly. It was deponed therein that the respondent had received complaints from concerned members of the public about embezzlement and misappropriation of public funds or revenue collected in the financial year 2013/2014 by the Department of Trade. This necessitated the formation of an adhoc Committee of the County Assembly to investigate the alleged embezzlement of funds in the County Government of Garissa.

It was deponed that the respondent formed an adhoc Committee to investigate the allegations and that in carrying out its functions the adhoc Committee complied with the Laws of Kenya and the principles of natural justice by issuing letters inviting all those mentioned or alleged to have embezzled funds, the applicant being one of them. The deponent annexed a letter of invitation to the applicant ***"MAS-1".***

It was also deponed that, following a telephone call to the Chairperson, the applicant was allowed to appear before the Committee on 5th November 2015 instead of 6th November 2015. It was further deponed that from 2nd to 9th November 2015, the adhoc Committee met at Normad Palace Hotel and the applicant was one of the people who attended. It was deponed that the applicant was asked questions and he answered the same. Annexed to the affidavit was a copy of the Hansard report marked as ***"MAS-2".*** According to the deponent, further to the verbal submissions, the applicant was allowed to make written submissions which were also annexed as ***"MAS-3".*** It was deponed that after all those alleged to have misappropriated funds had appeared before the Committee, the Committee had now retired to make its recommendations and submit a report.

In response to the replying affidavit the, applicant filed a further supporting affidavit dated 3rd December 2015. He swore that he talked on the phone to the Chairman of the Committee on 4th November 2015 seeking more time to prepare for the appearance, which was declined and thus he appeared before the Committee on 5th November 2015 under compulsion. He stated also that as a result he had to prepare written submissions not because of choice but as a matter of do or die. He swore that the committee had sealed his fate as it was only from the Hansard report that he learnt that eight other people, including Revenue Clerks, Procurement Officers, Chief Officer, and owners of contracted motor vehicles had appeared and supplied the Committee with several documents on matters under investigation. He stated that the said documents were never shown or supplied to him, thus greatly prejudicing his defence as he was asked questions on information not within his reach or knowledge. He further swore that the Chairman of the Committee honourable Shafi Mohammed Mothoa had earlier deliberated on the same issues and failed to make any findings and that the current Committee was thus an abuse of process and double trial and that the said honourable Shafi Mohammed Mothoa would be impartial.

During the hearing of the application, Mr. Otieno for the applicant emphasized that the applicant was not accorded a fair hearing. According to counsel the letter inviting the applicant was dated 3rd May 2015 but was actually received by him on 4th November 2015 requiring to appear before the Committee on 6th November 2015 which was a very short period. The items which the applicant was required to respond to and the information he was to provide, including bank statements for the years 2013/2014, was not easy to get. Counsel submitted that as a result, the applicant asked for time to prepare because he had also been transferred to another department. He also asked to be given more information but he was not. Counsel emphasized that even during his appearance before the committee on 5th November 2015, the applicant was not given copies of the documents under reference. According to counsel, the applicant was merely referred to contents of the documents. Counsel asked why the applicant was being pressurized to

divulge a lot of information within a very short period on documents which were not in his custody.

Counsel submitted that the notice to appear was suspect and meant to fix the applicant because it was dated many months before he was actually given the letter on 4th November requiring him to appear before the Committee on the 6th November, just two days after he received the letter.

Counsel also raised the issue that the letter was written even before the Committee was constituted. Therefore in counsel's view, the legality of the Committee was in question. Counsel emphasized that the respondent had not tendered the evidence which would support the appointment of the Committee. According to counsel, the membership of the Committee was to date not within the knowledge of the applicant.

Counsel stated that the Committee enjoyed powers of the High Court and as such the applicant had a right to be told who the members were. Also on quorum, counsel said that the quorum of the Committee was in doubt. Counsel submitted that though the applicant appeared before the committee, it was under the compulsion. Counsel submitted lastly, that the applicant was not accorded his right to be heard under Article 50 of the Constitution.

Mr. Asiimwe for the respondent, submitted that the applicant's counsel was attempting to amend the application through the further affidavit. Counsel stated that the applicant was now stating that he was given opportunity and appeared before the committee, while previously he said he was not. He stated the Constitution permitted the County Assembly to appoint Committees to enquire and table the report. This is what had happened in accordance with section 14 of the Garissa County Government Act. Counsel emphasized that the adhoc Committee had no powers to make any decision until its report was approved by the House or County Assembly. Counsel clarified that the letter to the applicant was dated 3rd May 2015 which was a mistake of typing, as according to him the letter was issued on 3rd November 2015. He stated that letters with similar contents had been sent to other invitees.

Counsel emphasized that Article 10 and 185 and 47 as well as 73 of the Constitution of Kenya 2010, required Public Officers to be accountable to the Kenyan population. There were also limitations on enjoyment of Fundamental rights under Article 4 of the Constitution. Each case depended on its own merits. Counsel sought to rely on the case of ***Lewis -vs- Heffer*** which emphasized that a person rights could be limited where there were two tire processes. Counsel submitted that the present situation were similar.

Counsel also submitted that the applicant appeared before the committee on 5th November 2015 because of his own request. He was not forced by the committee to appear earlier than 6th of November 2015, and in any case the applicant did not seek more time.

Counsel also stated that the Evidence Act (cap.80) under Section 107 provides that he who alleges has a burden of proving the same. He relied on a case of ***Miller -vs- Minister of Pension [1947] ALLER an English*** case which dealt with two issues of burden of proof and standard of proof. Counsel urged this court to adopt the reasoning in that case.

Counsel emphasized that the applicant had appeared before the Committee and given his own side of the story. He did not state anywhere that he was not comfortable with the composition of the committee. Infact, at line 13 of the Hansard report, he was clearly recorded as having stated that he was comfortable with the composition of the Committee. He could not thus come to this court and complain.

With regard to the legality and quorum of the Committee, counsel argued that the allegations of the applicant had no legal basis as the County Assembly had the mandate to appoint any number to an adhoc Committee members. Counsel urged the court to be guided by the case of ***Richard Mbwongo -vs- Narok County Government*** which was cited in a case of ***Republic -vs- Laikipia East Constituency*** Fund – Nyeri H. C. Judicial Review No. 3 of 2014 where in it was held that persons serving in public bodies were employees of Kenyans through their employer and were thus accountable to the people of Kenya.

Counsel also asked this court to go by the reasoning in the Uganda case of ***Rosemary Naruanda -vs- Uganda Aids Commission UGHC 39 of 2010,*** wherein the court stated that for the courts to be engaged in investigation of administrative actions, there ought to be illegality, irrationality and procedural impropriety. Counsel emphasized that the burden was on the applicant to establish these factors. According to counsel, the applicant appeared before the Committee and did not establish any of the above in the present application.

Mr. Ismael also for the respondent, submitted that the applicant was misleading the court and was dishonest when he stated that he was not given a chance to be heard. As a state officer under Chapter 6 of the Constitution, his reputation or integrity was brought into question. Counsel urged that the court should disbelieve the affidavit of the applicant.

Counsel submitted that the Committee was formed on 29th October 2015, through a resolution of the House. According to counsel, there was no way that a Committee could be formed irregularly as the said Committee would still have to report to the House. Counsel submitted also that the applicant would not suffer any prejudice as the Committee was still compiling its report. He submitted that the applicant was driven by mere apprehension in coming to this court rather than a fact of him being adversely mentioned in the report. According to counsel, the applicant was speculative.

Counsel submitted that the exercise of Constitutional and Statutory powers by an institution such as the County Assembly should not be interfered with by Courts of Law. Counsel sought to rely on the case of ***Martin Bikuri -vs- Speaker of County Assembly of Meru*** requesting for conservatory orders, wherein the Judge relied on the advisory opinion of the Supreme Court in Supreme Court Case ***No. 2 of 2013 Peter Munya –vs- Dickson Mwenda Kithinji*** wherein the Supreme Court stated that it would not interfere with procedure of other Arms of Government as long as they act in accordance with the law of the Constitution.

In response Mr. Otieno submitted that the Articles of the Constitution referred to by counsel for the respondent on accountability were not denied by the applicant. With regard to section 107 of the Evidence Act (cap.80), counsel submitted that it was important for the respondent to show that they supplied the applicant with relevant documents in sufficient time. According to counsel the respondents had not done so.

On the legality of the Committee, counsel submitted that the record of the Hansard was such that one could not be expected to have confidence in the Committee. Counsel emphasized that the only forum in which the applicant could tender evidence was the committee and not the house. Counsel emphasized that in the Replying Affidavit, it was clearly stated that the applicant was alleged to have misappropriated funds and therefore the Assembly would likely go by the committee's report.

I have considered the application, documents filed, the submissions of counsels on both sides, as well as the authorities cited to me. This application was filed in proceedings which were commenced through a petition. The petition was filed later than the application. It was filed on 25th November 2015 while the application was filed on 23rd November 2015. The petition being still on record, I take it to be the main cause herein. The present application cannot therefore be determined in isolation to the petition.

The petition has the Clerk of County Assembly of Garissa as 1st respondent and the Speaker of Garissa County Assembly as 2nd Respondent. The application herein, on the other hand, has Garissa County Assembly as the respondent.

Both sides were represented by very able counsel. However no one has raised any issue regarding the date of filing the application, vis vis, the date of filing the petition or the parties involved respectively, especially the respondent.

I take it that both sides being represented by competent lawyers, were not prejudice by the variance of the respondent as they must have known what they were arguing and the consequences of the positions that they took. I find and hold that, in the circumstances of this case, though there is variance in the

application, with regard to the date of filing and the respondent named, visa vis the petition, none of the parties has been prejudiced. As such, I invoke Article 159(2)(d) of the Constitution of Kenya 2010 to cure the apparent technical defects in the application.

Coming to the merits of the application, it is an application for injunctive orders and an application to order the re-opening of the Committee report hearing for the applicant to be heard a fresh by the ad hoc Committee.

Prayer 2 is for injunctive orders, while the cases cited by the respondent's counsel are mainly on conservatory rather than injunctive orders.

In considering the granting of an injunction at a preliminary stage, courts have held that an interlocutory injunction will not be granted unless the applicant has a prima facie case with probability of success. Secondly, an injunction will not normally be granted unless the applicant will otherwise suffer irreparable loss and damage unless the injunction sought is granted. Thirdly if the court is in doubt, it will determine the matter on the balance of convenience. See the case of ***Giella –vs- Cassman Brown [1973]EA 358***.

I observe that though prayer 2 is for injunctive orders, the prayer is for the grant of temporary injunctive orders only till the hearing and determination of the application. The Notice of Motion having been heard, and this present ruling being the determination of the application, the said prayer is spent. I thus have no reason to consider its merits. I find that the prayer is spent now.

I now turn to prayer 3 of the application requiring re-opening the adhoc Committee proceedings to give the applicant a chance to be reheard.

It is admitted that the applicant has been a Public Officer working in the County Government of Garissa. It has been admitted that he was addressed through a letter dated 3rd May 2015 but which was handed over to him on 4th of November 2015 to appear on 6th November 2015 before an adhoc Committee to answer questions on alleged embezzlement of funds while on duty. He appeared before the Committee on 5th November 2015.

He stated that he telephoned the Chairman of the Committee to ask for more time which was declined, and that was the reason why he appeared on 5th November 2015.

The applicant maintains that he was asked by the Committee to answer questions and he did so. However he was referred to documents which he was not given access to. He also complained that he wrote his written submissions under compulsion.

The respondent's counsel stated that the applicant was given time to make oral submissions and also made written submissions. I note that the written submissions were dated 4th of November 2015, therefore they cannot be said to have been written after the applicant made oral submissions on the 5th of November 2015.

Having said so, this court cannot grant prayer 3. Doing so with amount to making a substantive decision which will determine the main cause, which can only be done when the whole petition is heard. In the petition the applicant asks questions for interpretation by the court whose interpretation will be rendered nugatory or academic, if at this preliminary stage, the court grants prayer 3 of the application. At the risk of repetition, I will reproduce the request in the petition for interpretation which are as follows:-

a. Whether the petitioner is under a duty to account for funds and revenue collected in view of the separation of powers under the constitution.
b. Whether the petitioners right to fair hearing was violated.
c. Whether the respondents are in law entitled to take any disciplinary action on the petitioner based on the report or findings on which the petitioner never had an opportunity to ventilate.

In my view, in coming to court under prayer 3 or requesting for the grant of prayer 3, when there is a live and pending petition, whose prayers will become academic when prayer 3 is granted, the applicant has put the cart before the horse. Justice will not be seen to be done if I grant prayer 3. I cannot thus grant this prayer. It is in appropriate and misplaced, and meant to determine a substantive cause at preliminary stage which is not acceptable. I decline to grant prayer 3. I thus dismiss the application. If there are any interim orders granted, same have lapsed.

As for costs, since the petition herein is yet to be heard, I will order that costs be in the cause.

Dated and delivered at Garissa this 25th February 2016.

GEORGE DULU

JUDGE