



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT BUSIA**  
**JUDICIAL REVIEW NO. 1 OF 2016**

REPUBLIC-----APPLICANT

VERSUS

LEADER OF MAJORITY COUNTY ASSEMBLY BUSIA ----1<sup>ST</sup> RESPONDENT

LEADER OF MINORITY COUNTY ASSEMBLY BUSIA ---- 2<sup>ND</sup> RESPONDENT

SPEAKER – COUNTY ASSEMBLY OF BUSIA-----3<sup>RD</sup> RESPONDENT

CLERK – COUNTY ASSEMBLY OF BUSIA----- 4<sup>TH</sup> RESPONDENT

AND

GODFREY EGESA ODONGO -----1<sup>ST</sup> INTERESTED PARTY

DICK SIMON OMUKANGA ----- 2<sup>ND</sup> INTERESTED PARTY

FRED MUSIRIMBA ----- 3<sup>RD</sup> INTERESTED PARTY

GODFREY MAREBA ----- 4<sup>TH</sup> INTERESTED PARTY

PHILIP EMASET ----- 5<sup>TH</sup> INTERESTED PARTY

GEORGE BUSERA ----- 6<sup>TH</sup> INTERESTED PARTY

ROSE IDEWA ----- 7<sup>TH</sup> INTERESTED PARTY

**RULING**

1. The Exparte Applicants argue that the issues raised in this Judicial Review are dissimilar to those in Busia Civil Suit No. 1 of 2016 Godfrey Egesa Odongo & 8 others Vs The Leader of Majority County Assembly Busia (hereinafter “**The Civil Suit**”). But if this Court were to find that the matters in issue in the two proceedings are substantially the same, then it must hold that these latter proceedings are an abuse of Court process. The consequence of which will be that the Application before court shall be dismissed.
2. That application brought by way of a Chamber Summons dated 3<sup>rd</sup> February 2016 is for prayers that:-

2. **That this leave do operate as a stay of the appointment, constitution and installation of the Busia County Assembly Budget and Appropriation Committee in office from 21.1.2016 and made up of:**

1. **Hon. John Obwogo** Chairman
2. **Hon. Ali Nur** Vice Chairman
3. **Hon. Joy Wanga** Member
4. **Hon. Patrick Sewe** Member
5. **Hon. Godfrey Odongo** Member
6. **Hon. Dick Omukanga** HSC Member
7. **Hon. Rose Idewa** Member
8. **Hon. Fred Musirimba** Member
9. **Hon. Philip Emaset** Member

3. **That there be suspension of the sittings of the Busia County Assembly from convening, discussing tabling, amending or adopting the Budget and Appropriation Committee Report dated January 2016 and signed by Hon. Godfrey Odongo as Chairman on 18.1.2016.**

The stay having been sought simultaneously with the Application for Leave to commence Judicial Review Proceedings.

3. Some short background is necessary. The 7 Ex-parte Applicants are either Elected or Nominated Members of the Busia County Assembly. The seven alongside, Joy Wanga and John Obwogo, commenced the Civil Suit on 22<sup>nd</sup> January 2016 against the four Respondents herein. In that suit, the (Who shall be referred to as Plaintiffs for the purpose of the Civil Suit) sought the following prayers:-

- a. **A declaration that the special session of the Busia County Government Assembly held on 21.1.2016 be and are hereby annulled.**
- b. **A temporary injunction do issue restraining the Defendants from calling, holding, debating and or adopting the Supplementary Budget Report 2015/2016 pending the hearing and determination of this application interpartes.**
- c. **A permanent injunction do issue restraining the Defendants from calling, holding and or adopting the Supplementary Budget Report 2015/2016 without following the Busia County standing order and/or the County Governments Act (No. 17) 2012.**
- d. **A temporary injunction restraining 1<sup>st</sup> and 2<sup>nd</sup> Defendants from withdrawing the Plaintiffs from the Budget Appropriation Committee of the Busia County Assembly pending the hearing and determination of this case.**
- e. **A permanent injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> Defendants from reconstituting the Budget and Appropriation Committee of the Busia County Assembly without following the Party's constitution.**
- f. **Costs of this suit.**

4. Contemporaneously with filing that suit, the Plaintiffs filed a Notice of Motion dated 22<sup>nd</sup> January 2016 under the provision of Order 40 Rule 1 and 2 of The Civil Procedure Rules seeking the following Injunctive Orders:-

- ii. **That pending the hearing of this application inter parties, the Defendants be restrained from calling, holding, debating and or adopting the Busia County Supplementary budget Report 2015/2016.**
- iii. **That pending the hearing and determination of this suit, the Defendants be restrained form calling, holding, debating and or adopting the Busia County Supplementary Budget Report 2015/16.**
- iv. **That pending the hearing of this application inter-parties, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants be restrained from withdrawing the Plaintiffs' names from the Budget and Appropriation**

**Committee of the Busia County Assembly.**

- v. **That pending the hearing and determination of this case, 1<sup>st</sup> and 2<sup>nd</sup> Defendants be restrained from withdrawing the Plaintiffs' names from the Budget and Appropriation Committee of the Busia County Assembly.**
5. That Notice of Motion came up for hearing on 28<sup>th</sup> January 2016, and on the same day, I declined to grant the Interim orders sought.
6. On 3<sup>rd</sup> February 2016, the Ex-parte Applicants filed these Judicial Review proceedings at the High Court at Kisumu. Note that the Civil suit had been filed at the High Court at Busia. Counsel for the Exparte Applicants appeared before Maina, J at Kisumu on 3.2.2016 seeking that leave be granted to the Exparte Applicants (call them Interested Parties) to apply for an order of Certiorari to quash the Decision of the Respondents made on 21<sup>st</sup> January 2016 disbanding the Busia County Assembly Budget and Appropriation Committee and terminating the Interested Parties' membership therein. The Interested Parties also sought that the leave do operate as stay in terms of prayer (2) and (3) set out in paragraph 2 of this Decision. The Learned Judge granted leave but ordered that the Application for stay be heard inter-parties before the Judge at Busia. That is how this Court became seized on the matter at hand.
7. Are these 2 proceedings really different in substance? The Plaintiffs' cause of action in the Civil Suit is revealed in paragraph 7, 8, 9, 10, 11, 12, 13 and 14 of the Plaint. Necessarily, the contents of those paragraphs need to be reproduced in full:-
7. **On the 21<sup>st</sup> of January 2016, the Defendant at the special sitting of the Busia County Assembly tabled a Budget Committee Report/Supplementary Budget report for the year 2015/2016 for debate and adoption of the Assembly.**
8. **It is the Plaintiffs' claim that the said special sitting of the Busia County Assembly was convened without the issuance of the Mandatory Notice contrary to Section 21(1) (2) (3) and 4 of the County Governments Act (No. 17 of 2012) and Standing Order No. 187 of the Busia County Assembly.**
9. **It is the Plaintiffs' further averment that the Supplementary Budget Report was devoid of a quorum adopting it and no minutes of the Budget Committee were tabled together with the Report thus rendering it null and void.**
10. **At its sitting on the 21<sup>st</sup> January 2016, the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> Defendants moved for debate and adoption of the Supplementary Budget Report without circulating the minutes to the members but faced with opposition from the Plaintiffs, adjourned the sitting to 22.1.2016 at 10.00 a.m. as communicated through a short telephone message**
11. **By reason of the matter complained of, the Plaintiff's have lost the benefit presenting their views, opinions and proposals of the electorate to the County assembly, and extend their professional knowledge, experience or specialized knowledge to the issues of discussion in the County Assembly.**
12. **The Plaintiff's aver that the total conduct of the 1<sup>st</sup>, 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> Defendants in tabling the Supplementary Budget Report 2015/2016 is both irregular, illegal and in breach of the Busia County Standing Orders and County Governments Act (no. 17)of 2012.**
13. **Despite the Plaintiffs having demanded the cancellation of the special sitting of the Assembly the Defendants have proceeded to convene the meeting with the intention of muzzling the Plaintiffs, and have failed, neglected and/or refused to honour their obligation under Standing Orders and the County Governments Act (No. 17) Laws of Kenya.**
14. **The 1<sup>st</sup> and 2<sup>nd</sup> Defendants by virtue of their offices on 21.1.2016 purported to terminate the services of the plaintiffs and constituted a new Budget and Appropriation Committee.**
8. From the Pleadings, the Plaintiffs complain about the manner in which the special sitting of the Busia County Assembly of 21<sup>st</sup> January 2016 was convened and conducted. Secondly the Plaintiffs are aggrieved about the manner in which the Leaders of the Majority and Minority of the Busia County Assembly purported to withdraw the Plaintiffs from the membership of The Budget and Appropriation Committee.
9. In respect to the meeting, the Plaintiffs averred that the Special sitting was convened without

issuance of the Mandatory Notices contrary to Section 21(1)(2) (3) and (4) of The County Government Act and Standing Order No. 187 of The Standing Orders of the Busia County Assembly. Further that the Supplementary Budget Report was not properly adopted by the Committee for want of a quorum and it was therefore null and void. Lastly, that the Debate of the Report was moved before the Assembly without prior circulation of the Minutes to members.

10. In making his arguments before Court in the Civil Suit, Mr. Kasamani sought to demonstrate why the Plaintiffs thought that they had been improperly removed from the Committee. Counsel argued that the Leaders of the Majority and Minority did not comply with Standing Order No. 157 in de-whipping the Plaintiffs. Standing Order No. 157 provides as follows:-

1. **The County Assembly party that nominated a Member to a Select Committee may give notice in writing, to the Speaker that the Member is to be discharged from a select Committee.**
2. **The Speaker shall verify the notice received under paragraph (1) with the relevant County Assembly Party leader.**
3. **The discharge of a Member shall take effect upon receipt by the Speaker of a confirmation under paragraph (2)**

11. That, in essence, is the substance of the issues raised in the Civil Suit. What are the issues in these Judicial Review Proceedings? For an answer, I would turn to the Statement of Facts and the Verifying Affidavit of 3<sup>rd</sup> February 2016 in Support of the Application. In paragraph 5 and 6 of the verifying Affidavit the Ex-parte Applicants aver that:-

**(5) That on the 21<sup>st</sup> January 2016, the Clerk to the County Assembly together with the County Speaker called a special Assembly sitting, the Agenda being to debate and pass the Supplementary Budget for the years 2015/2016.**

**(6) That the said special sitting was neither circulated nor was notice given pursuant to standing order 28 of Busia County Assembly standing orders, which requires the Speaker “by notice in the Kenya Gazette and the County Gazette, notify the members of the place, date and time appointed for the special sitting of the County Assembly”.**

12. The Ex-parte Applicants further state as follows in paragraph 9 of their verifying Affidavit:

9. **That after the members left the chamber, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents without reference to the Cord District Party Offices or UDF Party office under the Jubilee Coalition ordered us to vacate our positions as members of the Budget Committee, in effect de-whipping all of us.**

The grievance in respect to removal of Ex-parte Applicants from the Committee is emphasized, once again, as a Ground in the Statement of Facts as follows:-

**“The act of removing the Interested Parties from the Busia County Assembly Budget and Appropriation Committee is ultra vires the powers of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents”.**

13. That the issue of “de-whipping” is the Central issue in the Judicial Review proceedings becomes even more clear from the nature of leave sought. The substantive order sought herein, and which was granted, was for leave to apply for an order of Certiorari to quash the Decision of the Respondents made on 21<sup>st</sup> January 2016 disbanding the Busia County Assembly Budget and Appropriation Committee and terminating the Interested Parties membership. How does this central issue compare with prayers (d) and (e) of the Civil Suit which reads as follows:-

**d) A temporary injunction restraining 1<sup>st</sup> and 2<sup>nd</sup> Defendants from withdrawing the Plaintiffs from the Budget Appropriation Committee of the Busia County Assembly pending the hearing and determination of this case.**

**e) A permanent injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> defendants from reconstituting the Budget and Appropriation Committee of the Busia County Assembly without following the Party's constitution.**

- 14.If the Plaintiffs were to succeed in prayers (d) and (e ) of the Civil Suit, then the effect would be that the Interested Parties would continue to be members of the Budget and Appropriation Committee. As a natural consequence the decision of the Respondents to remove them from the Committee would be reversed. That was one of the designs of the Civil Suit. And it is exactly the same result the order of the Certiorari for which leave was granted herein would achieve.
- 15.The argument by Counsel of the Exparte Applicants is that a different element of the Judicial Review is that it seeks to reverse the mischief that was not stopped by the Civil Suit. I am afraid that the pleadings in the Civil Suit do not bear out the argument of Counsel. In paragraph 14 of the Plaint, the Plaintiffs averred

**“14. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants by virtue of their offices on 21.1.2016 purported to terminate the services of the Plaintiffs and constituted a new Budget and Appropriation Committee.” (My emphasis)**

The mischief complained of by the Plaintiffs was their removal as members of The Budget and Appropriation Committee. In their own Pleadings they state that the removal (or in their own words “termination”) happened on 21<sup>st</sup> January 2016. That would mean that by the time the Civil Suit was filed on 22<sup>nd</sup> January 2016, the mischief had happened. Clearly, an intention of the Civil Suit was to reverse the mischief. And indeed one of the substantive prayers in the Civil Suit bespeaks a mandatory injunction to restrain the Leaders of the Majority and Minority from reconstituting the Committee.

- 16.If, for some reason, the Civil Suit was no longer an efficacious option then the Ex-parte Applicants should have withdrawn it before commencing the Judicial Review proceedings. And they would be required to make a full discourse of this when they appeared before Maina, J at the Exparte proceedings. But as they had chosen to commence the Judicial Review proceedings when the Civil Suit was still pending then the principle of full and fair material disclosure at Exparte Proceedings required the Exparte Applicants to make a full disclosure to the Judge of the existence of the Civil Suit and their failed attempt to obtain injunction orders therein. (The much heralded decision of **R vs Kensington Income Tax Commissioners [1917] 1K.B. 486**) The failure to make that disclosure must be frowned upon.
- 17.The Decision I reach is that the matters in issue in the Civil Suit are substantially the same as those raised herein. I agree with Counsel for the Respondents that there is duplicity! The fact that the issues have been revamped and redressed as Public Law issues does nothing to differentiate them. The attempt by the Ex-parte Applicants to obtain the stay orders is an attempt to get what they failed to do in their application for injunction in the Civil Suit. That is an abuse of Court process. In addition, that the Exparte Applicants sought the stay in proceedings filed away from the Busia High Court which declined to grant the injunction is telling of the Bona fides of the proceedings.
- 18.For the above reasons only, the Application for prayers (2) and (3) of the Chamber Summons of 3<sup>rd</sup> February 2016 should be rejected at this stage. To discuss the other grounds raised in support of the Application would be to lend credibility to these proceedings. The result is that the Application for stay sought in the Chamber Summons of 3<sup>rd</sup> February 2016 is hereby dismissed with costs.

**Dated, signed and delivered at Busia this 15<sup>th</sup> day of February 2016.**

**F. TUIYOTT**

**J U D G E**

In the presence of

Orwasa- C/Assistant

Kasamani - for Applicant

J.O. Juma - for Respondent

.....for Interested Parties