



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

PETITION NO.5 OF 2015

IN THE MATTER OF: ARTICLES 10(1), 19(1), 20(1), 21(1), 22(1),
47(1), 75 & 165 OF THE CONSTITUTION, 2010

AND

IN THE MATTER OF: VIOLATION AND/OR INFRINGEMENT ON THE
FUNDAMENTAL RIGHTS OF THE PETITIONER

AND

IN THE MATTER OF: SECTION 15 OF THE STANDING ORDERS OF THE ASSEMBLY

AND

IN THE MATTER OF: KISII COUNTY ASSEMBLY, KISII COUNTY

AND

IN THE MATTER OF: THE LEADER OF THE MAJORITY OF THE COUNTY ASSEMBLY, KISII COUNTY

AND

IN THE MATTER OF: THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS
& FUNDAMENTAL FREEDOM) PRACTICE AND PROCEDURE RULES, 2013

HON. PROTUS ARAMBA MOINDI.....PETITIONER/APPLICANT

AND

THE SPEAKER OF THE COUNTY ASSEMBLY -KISII COUNTY....1ST RESPONDENT

THE COUNTY ASSEMBLY – KISII COUNTY.....2ND RESPONDENT

HON. PIUS ABUKI BWONGERI.....3RD RESPONDENT

RULING

By a Notice of Motion under **Rules 19, 23, 24** and **26** of the **Constitution of Kenya 2010**, **Articles 1, 2(2), 10(1), (c), 20(1)** and **22(1)** of the **Constitution** and **Section 10** of the **County Government Act** filed under certificate of urgency the petitioner moved the court for the ORDERS THAT:-

1. *The application herein be certified urgent and the same be heard ex-parte in the first instance.*

2. Pending the hearing and determination of the instant application, the honourable court be pleased to grant an interim order of injunction, restraining the 1st and 2nd Respondents either by themselves, agents, servants and/or employees, from preventing, barring, restricting and/or interfering with the petitioner's/applicant's performance, discharge and/or execution of his duties as the Leader of Majority, Kisii County Assembly, whatsoever and/or howsoever.

3. Pending the hearing and determination of the instant application, the honourable court be pleased to grant an Interim Order of Injunction restraining the 1st and 2nd respondents either by themselves, agents, servants and/or employees, from appointing and/or constituting the 3rd respondent and/or any other person as the Leader of Majority, Kisii County Assembly, without due regard to the provisions of **Section 15 of the County Assembly Standing Orders**.

4. Pending the hearing and determination of the instant application, the Honourable court be pleased to grant an Interim Order of Injunction restraining the 3rd Respondent from assuming, taking over and/or discharging the duties of the office of the Leader of Majority, Kisii County Assembly and/or purporting to holding himself as the Leader of Majority, Kisii County Assembly, in any manner, howsoever and/or whatsoever.

5. Pending the hearing and determination of the instant application, the honourable court be pleased to grant an Interim Conservatory Order to protect, preserve and/or conserve the status of the petitioner/applicant as the Leader of Majority, Kisii County Assembly.

6. The Honourable Court be pleased to grant an Order of Temporary Injunction, prohibiting and/or restraining the 1st and 2nd Respondents either by themselves, agents, servants and/or employees, from preventing, barring, restricting and/or interfering with the petitioner's/applicant's performance, discharge and/or execution of his duties as the Lead of Majority, Kisii County Assembly, whatsoever and/or howsoever, pending the hearing and determination of this petition.

7. The Honourable Court be pleased to grant an Order of Temporary Injunction, prohibiting and/or restraining the 1st and 2nd respondents either by themselves, agents, servants and/or employees, from appointing and/or constituting the 3rd respondent and/or any other person as the Leader of Majority, Kisii County Assembly, without due regard to the provisions of **Section 15 of the County Assembly Standing Orders**, pending the hearing and determination of this petition.

8. The Honourable Court be pleased to grant an Order of Temporary Injunction, prohibiting and/or restraining the 3rd respondent from assuming, taking over and/or discharging the duties of the office of the Leader of Majority, Kisii County Assembly and/or purporting to holding himself as the Leader of Majority, Kisii County Assembly, in any manner, howsoever and/or whatsoever, pending the hearing and determination of this petition.

9. The honourable court be pleased to grant Conservatory Order, to protect, preserve and/or conserve the status of the petitioner/applicant as the Leader of Majority, Kisii County Assembly, pending the hearing and determination of this petition.

10. The Conservatory Orders, if any, granted by this Honourable Court to be implemented and/or enforced by the O.C.P.D., Kisii Central Police Division and/or such other officer as the honourable court may decree.

11. Costs of this application be borne by the Respondents jointly and/or severally.

12. Such further and/or other orders be made as the court may deem fit and expedient.

The petition was grounded upon the grounds on the face thereof and supported by the affidavit of PROTUS ARAMBA MOINDI in which he deponed that after 2013 general elections wherein he was elected member of the Kisii County Assembly, he was subsequently elected the Leader of Majority of the 2nd Respondent by Cord Coalition and the said decision and or minutes relating to his election were duly transmitted and forwarded to the 2nd Respondent through the office of the party's chief whip.

Upon his election he took up the said office and has been executing his duties among others being the Vice Chairperson of the County Assembly Service Board which Board is instrumental in the affairs of the 2nd Respondent.

It was further deponed that in the performance of the duties of the office of the Majority Leader, the relationship between the same and the 1st Respondent became frosty owing to a number of issues including but not limited to the conduct of the affairs of the County Assembly Service Board.

On 27th November 2014, the 1st Respondent while in the course of making announcement and or communication from the chair, purported to communicate the removal of the petitioner from the office of the Leader of Majority on the basis of an alleged letter from the chair of Orange Democratic Movement Kisii County of which the 1st Respondent is the vice Chairperson but without cross checking the allegations and or contents of the letter under reference with the party's chief whip as is by law required.

It was deponed that the petitioner therefore raised the issue of the said letter with the Chairman of the party and the alleged author thereof who denied the same and disowned the signature thereon. He further raised the issue with the party which

confirmed his status as the Leader of the Majority.

It was the petitioner's case that the 1st respondent being aware of the status of the office of the Leader of Majority chose to play partisan and parochial clanism while discharging and or executing official and constitutional duties without regard to the standing orders of the 3rd respondent. It was further deponed that the action of the 1st respondent herein amounted to a breach and or violation of the constitution.

It was further deponed that the 1st respondent had unilaterally and fraudulently appointed the 3rd respondent as the Leader of the Majority thereby subjecting the petitioner to inhuman treatment, violating his constitutional and fundamental rights of which he is likely to suffer irreparable loss and prejudice.

In reply to the said application the 1st respondent filed a replying affidavit in which he deponed that on 27th November 2014 while presiding at the Kisii County Assembly as a matter of procedure, he read a communication from the Chair as required by law which was a letter written by Orange Democratic Movement party signed by one David M. Okach notifying the assembly of the changes made in the Leadership of the party and that he was not under any obligation to conduct verification of the same.

It was further deponed that the said David M. Okach on 18th April 2013 and 27th June 2013 had communicated to the Clerk of the Assembly regarding the leadership arrangements made by the Orange Democratic Party as the Chairman of ODM Kisii County and therefore the same could not deny under oath that he has never been the chairperson of the party.

It was contended by the 1st respondent that this court lacks jurisdiction to hear and determine the issues of dispute between members of the political party or parties which is an issue for determination by Political Parties Disputes Tribunal. It was deponed that the petitioner's removal as the Leader of Majority in Kisii County Assembly was as a result of party disloyalty.

It was further deponed that through the separation of powers the proceedings of the Legislature are immune to the judicial proceedings and therefore the court cannot interfere or issue any orders that are likely to interfere with the operations as provided for under **Section 4** as read with **Section 12** of the **National Assembly Powers and privileges Act**.

The 3rd respondent in reply to the application filed grounds of opposition and replying affidavit. In the grounds it was stated that:-

- 1. The invitation of the court to intervene in matters relating to the removal of the Leader of majority which is regulated by the Political Parties Act and the Assembly's Standing Orders is an abuse of the court process.*
- 2. The purported contravention do not justify the alleged constitutional violation.*
- 3. The application undermines and contravenes the doctrine of separation of powers.*

It was deponed in support of the said grounds that the decision to nominate the applicant as the leader of the majority was communicated by the Branch Chairman Mr. David M. Okach in accordance with the constitution of the party and that the applicant was subsequently removed by the party after he fell out with the party leadership and the 3rd respondent nominated in his place.

It was stated that the removal of the applicant has nothing to do with his personal or fundamental right since the position of Leader of majority is merely honorary and therefore the applicant will suffer no irreparable loss.

The application was placed before me under certificate of urgency and the same was duly certified as urgent and temporary conservatory order issued barring the respondents jointly and or severally from interfering with the petitioner from performing his duties as the leader of the majority party Kisii County Assembly pending interpartes hearing.

When the matter came up for interpartes hearing before me, Mr. Oguttu appeared for the applicant while Mr. Nyambati appeared for the 1st and 2nd respondents and Mr. Bosire for the 3rd respondent.

SUBMISSIONS

It was submitted by the applicant that once he was elected to the office of the Leader of Majority, he can only be removed from the said position pursuant to an election by member of the party or a coalition of political parties with majority in the County Assembly as per the provision of **Section 15** of the **Standing Orders** of the County Assembly and not through a communication from the chair.

It was submitted that the said communication from the chair was therefore reckless and amounted to taking the mandate of the members of the largest party or coalition of parties and that the 1st respondent as the head of the 2nd respondent was bound by the constitution, the County Government's Act and the relevant standing orders which he could not disregard.

It was submitted the 1st respondent was bound by the provisions of **Articles 20 (1)** and **75** of the **Constitution** on the conduct of public officers. On the issue of the jurisdiction of the court it was submitted that the 2nd respondent is a County Assembly and therefore the action of the same have certain statutory privileges which do not accrue to the holders of public officers who

disregard the law.

It was further submitted that the doctrine of separation of powers is only applicable in exercise of legislative powers but does not remove the powers of the court from looking at the constitutionality of any decision that ensues in the course of the legislative duties. In support thereof reference was made to **Article 165 (3) (b) and (d) (ii)** on the question of inconsistency or contravention of the constitution as was settled in the case of **Nick Githinji Ndichu -vs- Clerk Kiambu County Assembly & another Petition No.11 of 2014 Industrial Court at Nairobi, Petition Nos.628 and 630 of 2014 Coalition for Reform & Democracy (CORD) & 2 others -vs- Republic of Kenya & others** and **Court of Appeal at Nairobi Civil Application NO. NAI.2 of 2015 – The Hon. Attorney General & another -vs- Coalition for Reforms & Democracy (CORD) & others** where the court issued conservatory orders.

On behalf of the 1st and 2nd respondents Mr. Nyambati submitted that the dispute was between members of a party (ODM) and therefore under the provision of **Section 40(2)** of the **Political Parties Act** the Political Parties Dispute Tribunal should handle the dispute. It was further submitted that under the powers and privileges of 1st and 2nd respondent, no decision of the Assembly, should be challenged in court. It was submitted that the communication from chair forms part of the proceedings of the Assembly.

It was submitted that the removal of the applicant was through the party machinery and when the same is communicated from the chair it forms part of the proceedings of the Assembly and therefore it can not be reversed by court. In support thereof the case of **Judicial Review App. No.1 of 2014 -the High Court at Migori Republic and County Assembly of Migori & others Ex-part Johnson Omolo Owiro** and **Judicial Review No.1 of 2014 in the High Court of Kenya at Meru Republic -vs- The Speaker Isiolo County Assembly & others Ex-parte Nura Diba Billa** were submitted.

It was finally submitted that the orders issued by the court was not pleaded for by the applicant and that the applicant had not met the principles of **Giella -vs- Cassman Brown** for the grant of injunction.

Mr. Bosire for the 3rd Respondent submitted that the applicant had not satisfied for the grant of conservatory orders as set out in the case of **Giella -vs- Cassman Brown** and that the party having made the decision and communicated it to the members and that the person who wrote the said letter has denied the same, it was therefore submitted that the issue was not constitutional issue.

It was submitted that the application should be rejected as the legislative functions of the assembly can not be challenged in court and that the position of the leader of majority is an honorary position and therefore the applicant can be compensated by way of damages.

In reply to the said submissions Mr. Oguttu for the applicant submitted that there was no dispute between the petitioner and the party since all the party machinery had confirmed that he was the leader of majority and therefore there was no dispute to be referred to the tribunal. It was submitted that the removal of a leader of majority once elected is through a vote by majority of members of the largest party or coalition of parties as per **Section 15 (4)** of the **Standing Orders**.

ISSUES

From the pleadings and submissions the following issues have been identified by the court for determination:-

- a. *Whether this court has jurisdiction to determine the matters herein;*
- b. *Whether the applicant has met the conditions for grant of interim orders pending the determination of the petition.*

On the issue of jurisdiction, the respondents have submitted that the issue before the court is in respect of the powers and privileges of the County Assembly and is therefore not subject to the jurisdiction of the court. It has further been stated that the dispute is between a member and the party which is subject to the jurisdiction of political parties dispute tribunal and therefore the question for this court to answer is whether it has jurisdiction in respect of dispute arising from action of the Speaker of County Assembly on the basis of the doctrine of separation of powers.

The jurisdiction of this court has been donated by **Article 165 (3)** of the **Constitution** which empowers the court to inquire into the Legality or Constitutionality of any act done or said to be done pursuant to the constitution or under the law. This jurisdiction has been stated by courts as follows:-

a. In **Kerugoya High Court Petition No.3 of 2014 – Hon. Martin Ngaga Wambura & 4 others -vs- The Speaker of the Senate** the court had this to say on the issue:-

“We have considered all the above submissions and it is our view that Section 165 (3) (d) I - iii of the Constitution this court has jurisdiction to hear any matter relating to any question with respect to the interpretation of the constitution..... this court is actually aware that the three arms of Government (sic) that is to say the executive, the legislature, the judiciary have their respective mandates clearly set out in the constitution and that as far as possible each arm of Government must desist from encroaching on the function of the other arm of Government, infact the court's position has always been that it can only interfere with the exercise of the legislative and executive mandate if it is alleged and demonstrated that they have threatened to act or have acted in contravention of the spirit and letter of constitution. What we are required to consider at

this stage is whether unless the court grant the conservatory order there is areal damage that the applicant will suffer prejudice as a result of the alleged violation or threatened violation of the constitution, our answer to the above is in the affirmative.”

b. NYERI Civil Appeal NO.21 of 2014 Martin Nyaga Wambura & 3 others -vs- The Speaker of the Senate & 6 others the Court of Appeal had this to say:-

“Our reading of the constitution reveals that the role of the High Court for purpose of removal of a governor from office is inter alia supervisory in nature to ensure that the procedure and the threshold provided for in the constitution and the County Government Act are followed, if the process for removal of a governor is unconstitutional, wrong unprocedural or illegal it can not be said that the court has no jurisdiction to address the grievance arising therefrom.”

c. In Nairobi High Court Petition No.84 of 2014 International Legal Consultancy Group -vs The Senate the court had this to say:

“The doctrine of separation of powers is whoever not an end in itself but a system of checks and balances. The court as the final arbiter under the constitution is obliged to adjudicate any dispute between various arms of State and determine the contours of separation having regard to the constitutional function of each organ. This matter is one that clearly falls within the ambit of the court's jurisdiction under Article 165 (3) (2)” (Emphasis added)

d. Samson Viti Musembi & 6 others -vs- Makueni County Assembly & 2 others MSA Petition No.18 of 2014 reported in 2014 e KLR Muriithi J on the principles of separation of power stated as follows:-

“As I understand it, the doctrine of separation of powers in relation to the legislature and the judiciary provides that the legislature and the judiciary should respect each others sphere of competence with the court respecting the legislative mandate of parliament and parliament the adjudicative role of the courts. In the circumstances, the court may only interfere with legislative matters including the selection of members of committee through which the legislative agenda is carried out where it is shown that the Assembly has acted, is acting or has threatened to act in contravention of the constitution which the judiciary must defend in accordance with its delegated sovereign judicial mandate of the people of Kenya.”

From these line of authorities I find and hold that this court has jurisdiction to adjudicate and determine the matters herein. For the avoidance of doubt I must state that when the Speaker of the County Assembly (the 1st Respondent) read the communication from Chair he was not performing the Legislative function of the County Assembly for which the court might be reluctant to intervene but purely Administrative function which affected or was likely to affect the rights of the applicant wherein the court has jurisdiction over.

From the material placed before the court I find that there is no dispute between members of political party or a member and a political party for which the jurisdiction of the political parties tribunal can be invoked. Further even if it was a dispute between the party and its members the orders sought by the applicant can only be granted by this court. In this I find support in the Court of Appeal at Nyeri decision in Civil Appeal NO.14 of 2013 – Nderitu Gachagwa -vs- Thuo Mathenge in which the court had this to say:-

“...The petitioner herein was clearly seeking multiple remedies. He filed his petition early prior to the gazettment of the result, primarily to challenge the right of the applicant to be gazetted – to seek an injunction to restrain the 3rd respondent from gazetting the appellant. In such a situation he had no alternative but to file the petition before the result were gazetted as the whole objective of his petition would have been defeated. In any event the 3rd Respondent had no jurisdiction to grant an injunction”

It therefore follows that even if the matters were to be found to be a dispute between a member and his political party, the political parties tribunal does not have jurisdiction to grant any of the prayers sought by the applicant and therefore this court has jurisdiction to determine the issues as presented by the petitioner.

On the issue as to whether the court's jurisdiction is ousted by virtue of privileges immunities and powers of the Assembly, the issue has been well stated in the case of Peter O. Ngogo -vs- Francis Ole Kaparo & 4 others NRB HC Misc. Applic. No.22 of 2004 as follows:-

“We must however not miss the chance to state that all organs of state namely the Legislature, Executive and the Judiciary are all subject to the constitution. The High Court has powers to strike out laws or legislation passed by parliament which are in conflict with the constitution. The same applies to any privileges immunities or powers claimed by parliament which are in conflict with the constitution.” Emphasis added.

In Habre International Co. Ltd. -vs- Kassam & others [1999] 1 E.A 125 Mulenga JSC had this to say:-

“the tendency to interpret the law in a manner that would divest courts of law of jurisdiction too readily unless the legal provision in question is straight forward and clear is to be discouraged since it would be better to err

in favour of upholding jurisdiction than to turn a litigant away from the seat of justice without being heard; the jurisdiction of courts of law must be guarded jealously and should not be dispensed with too lightly and the interest of justice and the rule of law demands this.”

I wish to associate myself fully with the above position and states that this court has jurisdiction to inquire and determine issues raised in the County Assembly where there is an allegation of violation of rights or illegality.

Has the applicant therefore met the condition for grant of conservatory orders pending the determination of the petition? In **Judicial Service Commission -vs- Speaker of The National Assembly & Another [2013] e KLR** Odunga J expressed himself as follows:-

“Conservatory orders in my view are not ordinary civil law remedies but are remedies provided for under the constitution, the supreme law of the land. They are not remedies between one individual and against another but are meant to keep the subject matter of the dispute in situ. Therefore such remedies are remedies in error as opposed to remedies in personal. In the words they are remedies in respect of particular side of affairs as opposed to injunction orders which may only attach to a particular person.”

The Supreme Court in **Gitirau Peter Munya -vs Dickson Mwenda Kithinji & 2 others [2014] e KLR** had this to say:-

“Conservatory orders bear a more decided public law connotation for these are orders to facilitate ordered functioning within public agencies, as well as uphold adjudicatory authority of the court. In public interest, conservatory orders, therefore not, unlike interlocutory injunctions likened to such private party issues as the prospects of irreparable harm” occurring during the pendency of the case for orders to stay. Conservatory orders consequently should be granted on the inherent merits of the case bearing in mind the public interest, the constitutional value and the proportionate magnitudes and priority levels attributable to the relevant causes.”

The dispute herein is the applicant's exercise of the functions of the leader of majority in Kisii County Assembly an office to which he was elected by his party ODM. There is an allegation that he had been removed from the said position by his party which allegation has been denied by the said party's leadership both at County Level and Nationally including one David Okachi who has sworn an affidavit denying writing the letter which the 1st respondent communicated to the members from the chair.

There is also the fundamental issue as to whether having been elected leader of majority, the applicant can be removed by any other means rather than as provided for under **Section 15** of the **Standing Orders of the County Assembly**?

Without going through the merits of the petition, it is clear that the applicant has indeed proved a *prima facie* case with probability of success for which he is entitled to grant of orders sought herein as this petition raises the fundamental issues of the conduct of political parties leaders and affairs in the County Assembly.

I therefore grant a conservatory order protecting, preserving and conserving the status of the petitioner/applicant as the Leader of Majority Kisii County Assembly pending the final determination of the petition herein with costs being in the cause.

Delivered, dated and signed at Kisii this 18th day of March, 2015

J. WAKIAGA

JUDGE

In the presence of:-

Mr. Soire for Oguttu for Petitioner/Applicant

Mr. Bosire for Nyambati for 1st & 2nd Respondents

Mr. Bosire for 3rd Respondent