



**REPUBLIC OF KENYA**

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

**JUDICIAL REVIEW NO. 8 'B' OF 2014**

**REPUBLIC.....APPLICANT**

**VERSUS**

**CLERK COUNTY ASSEMBLY OF BARINGO.....RESPONDENT**

**WILLIAM KAMKET.....EX PARTE APPLICANT**

**JUDGMENT**

1. The *ex parte* applicant is the speaker of the Baringo County Assembly. On 4<sup>th</sup> November 2014, the assembly passed a motion to suspend him from office. The *ex parte* applicant is aggrieved by that decision. He prays for an order of *prohibition* to restrain the respondent from implementing the motion or decision. He also craves an order of *certiorari* to bring into the High Court and to quash that decision. Lastly, he prays for costs.

2. On 6<sup>th</sup> November 2014 the *ex parte* applicant sought leave to apply for the writs of *certiorari* and *prohibition* against the present respondent and three others. Leave was granted *only* as against the present respondent. The Court (Githua J.) was of the considered opinion that the other intended respondents acted in “*their private capacity as members of the county assembly and [were] not amenable to judicial review*”.

3. The substantive notice of motion is dated 25<sup>th</sup> November 2014. The gravamen of the motion is that the actions by the assembly were unconstitutional or unlawful; and, that the decision offended the County Government Act and the Standing Orders of the assembly. It was also pleaded that the speaker is not a member of the assembly; that there is no specific provision or Standing Order that provides for his suspension; that the rules only provide for a vote of no confidence; that his rights to a fair hearing or fair administrative action were violated; that he had no notice of the proceedings; that the quorum was not met; that the motion was not in the *Order Paper*; and, lastly, that the proceedings of the assembly “*as can be discerned from the Hansard [were] unintelligible or conducted in non-parliamentary language*”.

4. Those matters are deposed to at length in an affidavit sworn on 25<sup>th</sup> November 2014. At paragraphs 4 and 5 he avers that the proceedings before the assembly were fuelled by political differences between him “*and the movers and shakers of the Rift Valley politics*”. He deposed that he had nothing to do with cattle rustling in the *Kapedo* area. He contended that his “*only crime [was] being a member of KANU and a Pokot*”.

5. The *ex parte* applicant also relied on his *Statement of Facts* and an earlier deposition sworn in support

of the application for leave. That affidavit was sworn on 6<sup>th</sup> November 2014. Initially, the respondent informed the Court that he would not file a replying affidavit. On 16<sup>th</sup> February 2015, and without any leave, the respondent, Joseph Koech, filed a replying affidavit sworn on even date. The *ex parte* applicant objected to it. But it was a case of the kettle calling the pot black: the *ex parte* applicant had in turn filed, without leave, a replying affidavit sworn on 24<sup>th</sup> February 2015.

6. I have exercised my discretion to admit all those depositions. For starters, they are all on the record. Secondly, the Court must pay heed to the overriding objective to do justice to the parties. Article 159 of the Constitution and sections 1A, 1B and 3A of the Civil Procedure Act all frown upon technicalities of procedure and other manouvres by litigants that pollute the streams of justice. See Harit Sheth T/a Harit Sheth Advocate Vs Shamas Charania Court of appeal at Nairobi Civil Application No 68 of 2008 [2010] eKLR.

7. The notice of motion is contested by the respondent. The case for the respondent is that the speaker is a member of the assembly; that he abused his office and the Constitution; that the assembly properly moved and passed the motion to temporarily suspend him from office; and, that the present motion is ill founded. Those matters are buttressed by the deposition of Joseph Koech sworn on 16<sup>th</sup> February 2015, and which I have admitted into evidence. I will set out *in extenso* paragraphs 4 to 14 of the affidavit-

*“4. That I confirm that the ex-parte applicant being a member of the County Assembly under Article 177(d) and Article 178 of the Constitution of Kenya 2010, Section 7 of the County Government Act subject to all the House proceedings as provided for by Law.*

*5. That on 4<sup>th</sup> November 2014, a motion to suspend the applicant was moved under Article 177 (d) of the Constitution of Kenya 2010, chapter 6 article 73, 74 and 75 of the Constitution of Kenya 2010, section 44 (4) (d), (f) and (g) and the Baringo County Standing order No. 50(e).*

*6. That I do confirm that the county assembly while taking the decision to suspend the applicant followed the law and procedure.*

*7. That the county assembly had the requisite quorum at the time of taking the said decision as required by law.*

*8. That the motion for the suspension of the applicant was undertaken as a procedural disciplinary measure on the speaker who is one of the members of the county assembly pursuant to the provisions of the Constitution and County Standing Order No. 50(e).*

*9. That the motion for the suspension of the ex parte applicant under the provisions of the Standing Order No.50(e) and No. 107(2)(a), is among the motions which may be brought by a member without notice or having the same appear in the Order Paper nor requiring any debate.*

*10. That the suspension of the applicant by the County Assembly members was unanimous, legal and procedural. No notice was required under Section 11 of the County Government Act of 2012 as the proceedings were not for his removal or impeachment but rather for his suspension until he clears his name.*

*11. That the ex-parte applicant having been named as a man of questionable reputation and integrity due to his public conduct and utterances is in breach of chapter 6 of the Constitution of Kenya 2010 and therefore it will be immoral and unconstitutional to allow him back to the assembly in his capacity as the Baringo County speaker before first clearing his name.*

*12. That from the foregoing, it is only just and fair for the applicant to be suspended pursuant to the provisions of chapter 6 Article 73, 74 and 75 of the Constitution of Kenya 2010 and Order 50(e) of the Baringo county Standing order until his name is cleared.*

13. *That the applicants unbecoming conduct and reckless utterances has compromised his integrity as a leader, the public interest and also demeaned the office of the Baringo County Speaker contrary to the provisions of chapter 6 Article 75 (1) and (2) of the Constitution of Kenya 2010.*

14. *That the applicants conduct is fundamentally in breach of his obligations arising from his contract of service to the County Government of Baringo and contrary to the provisions of Section 44(3), (4) (d), (f) and (g) of the Employment Act 2007 as read with chapter 6 Article 75(1) and (2) of the Constitution of Kenya 2010.”*

8. In reply to that affidavit, the *ex parte* applicant filed, without leave, the affidavit I referred to sworn on 24<sup>th</sup> February 2015. I also admitted it into evidence for the reasons I set out earlier; and, to ensure equality of the parties. He deposed as follows at paragraphs 8 to 17-

*“8. That the criminal case No. 7031 of 2014 at the Eldoret Magistrate Court against me, and which is the basis of my suspension from the post of speaker was slated for hearing on the 13<sup>th</sup> January 2015 and the 20<sup>th</sup> of February 2015 but on both occasions, the prosecution was not ready to proceed.*

*9. That on the 20<sup>th</sup> of February 2015 the prosecution was given a last adjournment of 19<sup>th</sup> of March 2015.*

*10. That if the criminal case against me and my co-accused persons was the basis of my suspension, how come the 2<sup>nd</sup> and 3<sup>rd</sup> accused persons; who are Members of Baringo County Assembly have not been suspended.*

*11. That I was not given any hearing by the County Assembly of Baringo County, nor have there been any independent investigations by any of the committees of the Assembly.*

*12. That the whole exercise or the criminal prosecution and suspension is a charade orchestrated by my political opponents in the United Republican Party.*

*13. That the referral of the police file to the Director of Public Prosecutions after and not before plea and my arrest at the Jomo Kenyatta International Airport on the 29<sup>th</sup> day of October 2014 and subsequent transfer and arraignment in Eldoret Law Courts instead of Kabarnet raise suspicions.*

*14. That on the 10<sup>th</sup> of February 2015, I was served at night in Nairobi, through my email address, with a notice to appear before the assembly to respond to various allegations contained in the notice.*

*15. That I could not find time to be in Kabarnet through whatever means to respond to the allegations.*

*16. That on the 11<sup>th</sup> day of February 2015, the members of the assembly debated and voted on a removal motion against me, an act done in my absence and which I survived by one vote.*

*17. That the whole exercise of my arrest and prosecution and suspension is a charade organized and executed by the current Member of Parliament for Tiaty constituency and the same is aimed at removing me from the post of speaker of Baringo County Assembly.”*

9. Both parties have filed detailed written submissions. Those by the *ex parte* applicant are dated 31<sup>st</sup> January 2015; those by the respondent were filed on 17<sup>th</sup> February 2015. The *ex parte* applicant countered the respondent’s submissions on 25<sup>th</sup> February 2015. On 8<sup>th</sup> April 2015, learned counsel for the parties addressed me on the questions germane to the notice of motion. I have considered the pleadings, depositions, the annexed documents, precedents and the rival submissions.

10. From the pleadings, depositions and submissions, the following three issues arise for determination. First, is the speaker a member of the Baringo County Assembly? Secondly, was the suspension of the *ex-parte* applicant from the assembly illegal; and, thirdly, who should be condemned to pay costs.

11. These proceedings pose *political questions* for answer by a court of law. To quote the dissenting opinion in Baker v Carr 369 U.S. 186, this Court is being led into a *political thicket*. There are accusations and counter accusations. To the *ex parte* applicant, the motion of suspension and his pending criminal case at Eldoret Chief Magistrates Court are “*a charade orchestrated by [his] political opponents in the United Republican Party*”. He points a finger at the Member of Parliament for *Tiaty* constituency who he says is hell bent on removing him from the position of speaker of Baringo County Assembly. He denies engaging in cattle rustling around *Kapedo*. He says his “only crime is being a member of KANU and a *Pokot*”.

12. The respondent on the other hand claims the speaker has been making “*reckless utterances*”; that he has abused his office or breached chapter 6 or Articles 73, 74 and 75 of the Constitution of Kenya. It is also claimed that he has violated his employment contract with the assembly. Subsequent to these proceedings, and on the 11<sup>th</sup> February 2015, the members of the assembly debated and voted on a removal motion against the speaker. The motion was lost by one vote. Those matters are not relevant here. They are the subject of separate proceedings at the High Court, Nakuru, in Employment and Labour Relations Court Judicial Review 1 of 2015. Those are the political undercurrents informing these proceedings.

13. The proceedings are by way of *judicial review*. As a general proposition, judicial review is *not* concerned with the *merits* but with the decision making *process*. In order to succeed in an application for judicial review, the applicant has to show that the impugned decision is tainted with *illegality, irrationality or procedural impropriety*. Those terms were explained well by Odunga J in Republic v Inspector General of Police ex-parte Patrick Nderitu Nairobi, High Court Judicial Review 130 of 2013 [2015] eKLR-

*“Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality. Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards. Procedural impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative instrument by which such authority exercises jurisdiction to make a decision.”*

14. There are a plethora of precedents on that subject. See generally Pastoli v Kabale District Local Government Council and Others [2008] 2 EA 300, (A persuasive but non-binding Ugandan decision), Council of Civil Unions v Minister for the Civil Service [1985] AC 2, An Application by Bukoba Gymkhana Club [1963] EA 478 at 479 and The Commissioner of Lands v Kunste Hotel Limited, Nairobi, Court of Appeal, Civil Appeal 234 of 1995 [1997] eKLR.

15. The *ex-parte* applicant’s case is that he is *not* a member of the assembly. I *disagree* with that submission. Our constitution speaks strongly and pointedly to devolution of power. Articles 1, 6 and 10 of the Constitution of the Republic are *express* on the matter. Two levels of government have been created to *disperse* power away from the centre. The lynchpin of the second level of Government is the County Assembly. Article 177(1) of the Constitution provides as follows-

“A county assembly consists of-

(a) *Members elected by the registered voters of the wards, each ward constituting a single member*

constituency, on the same day as a general election of Members of Parliament, being the second Tuesday in August, in every fifth year;

(b) The number of special seat members necessary to ensure that no more than two thirds of the membership of the assembly are of the same gender;

(c) The number of members of marginalised groups, including persons with disabilities and the youth, prescribed by an Act of Parliament; and,

(d) The Speaker, who is an *ex officio* member”.

16. Section 7(b) of the County Government Act (No. 17 of 2012) on the other hand provides as follows-

“In addition to the members who are elected under Article 177(a), or nominated under Article 177(1)(b) of the Constitution, a county assembly shall comprise -

(a) Six nominated members as contemplated in Article 177(1)(c) of the Constitution; and,

(b) The Speaker, who is an *ex officio* member elected in accordance with Article 178 of the Constitution”.

17. I have then studied the original copy of the Standing Orders of the Baringo County Assembly. They were adopted on 18<sup>th</sup> March 2014. Standing Order 2 defines a member as “a member of the County Assembly of Baringo elected or nominated in accordance with Article 177 (1) of the Constitution”. There is clearly no conflict between the definitions of a member in the Constitution, the County Government Act or the Standing Orders of the local assembly.

18. Article 1 of the Constitution of Kenya decrees that all *sovereign power* belongs to the people of Kenya; and may be exercised *either* directly or *through* their elected representatives. The legislative power is delegated to both Houses of Parliament at the national level; and, to the County Assemblies at the county level. In terms of *power dynamics* in the county assembly, the popularly elected members occupy a higher platform than the speaker. The reason is self-evident: The people have *directly* bestowed upon them *local legislative authority*. The members in turn elect the speaker to preside over the conduct of debate and other proceedings in the assembly. They can remove the speaker from office so long as they comply with Articles 47 and 178 of the national Constitution and Standing Orders 61 and 66 of the Baringo Assembly. It would then be to turn logic onto its head to say that the speaker of the assembly is perched high above the assembly and not amenable to the ordinary rules of the very assembly he presides over. He is an *ex officio* member. By dint of Article 178 (1) of the Constitution, the speaker is elected from among persons who are *not* members of the County Assembly.

19. The answer to the first issue is thus in the *affirmative*: the speaker of the Baringo County Assembly is, for all intents and purposes, a member of that assembly, albeit *ex officio*.

20. The next key question is whether he can be *suspended* from the assembly. Standing order 50 (e) of the County Assembly of Baringo provides for *suspension* of a member from the House *without* notice. Under Standing Order 107, a member may be suspended from the House after being named or shamed for gross misconduct. Under Standing Order 109, the maximum period of suspension is *twenty eight days*. I have already found that the speaker is an *ex officio* member of the assembly. By virtue of being the speaker, he enjoys certain benefits and privileges like other elected members. They include loans and grants.

21. The Standing Orders of the county are meticulous. But they have no *express* provision stating that the speaker can be *suspended*. Although I have found the speaker is an *ex officio* member of the assembly, a keen reading of Standing Order 50(e) gives me the clear impression that it can *only* apply to the ordinary or elected members of the assembly. The nature of motions under Standing Order 50 that can be moved without notice largely relate to ordinary business or conduct of members in the course of debate. Standing Order 50 (e) that allows for suspension of a *member* must be seen in that context. For avoidance of doubt,

the motions that can be moved without notice in the Baringo County Assembly are-

- a) Motion by way of amendment to a question already proposed from the Chair;
- b) Motion for the adjournment of the House or of a debate;
- c) Motion that the House do dissolve itself into a Committee of the whole House;
- d) Motion moved when the House is in Committee;
- e) Motion for the suspension of a member;
- f) Motion made in accordance with the Standing Orders governing the procedure as to Bills;
- g) Motion for the agreement of the House with a Committee of the whole House in a resolution reported, or for the re-committal thereof or for the postponement of the further consideration thereof;
- h) Motion raising a question of privilege;
- i) Motion for the orders of the County Assembly under these Standing Orders;
- j) Motion made under Standing Order 230 (exemption of business from Standing Orders);
- k) Motion made for the limitation of a debate under Standing Order 96 (Limitation of debate.);
- l) Motion made for the postponement of discharge of, or giving precedence to an order of the day; and,
- m) Motion for the extension of sitting time of the House.”

22. It is important to distinguish *suspension* from *removal* of the speaker. The speaker is the *fulcrum* around which business is transacted in the assembly. He is *pivotal* in ensuring that members conduct orderly business; and they follow the Standing Orders and the Constitution. The speaker is a creature of the Constitution under Article 178. Article 178 (3) mandated Parliament to make a law to provide for the *election* and *removal* of a speaker. That law is the County Government Act (No. 17 of 2012).

23. Under section 11 of the Act, four conditions must be met before *removal* of a speaker from office. First, there must be a formal notice to the clerk of the assembly stating the grounds of removal and signed by at least a third of the members; secondly, the resolution must be passed by seventy five percent of the members; thirdly, the speaker must be accorded opportunity to respond; and fourthly, that the proceedings be presided by a member elected under section 9(4) of the Act. Standing Order 61 of the assembly is word for word with section 11 of the Act.

24. Both Article 178 of the Constitution and section 11 of the Act make *no* reference to *suspension* of a speaker. In the event of *removal* of the speaker, there would be no vacuum: Article 178(2)(b) of the Constitution provides that in the absence of the speaker of the county assembly, a sitting shall be presided over by any other elected member. A similar provision is found in section 9 (4) of the County Government Act and Standing Order 61 of the assembly. I stated that the Standing Orders of Baringo County are very detailed. They run into a booklet of 173 pages. If Standing Order 50 (e) relating to *suspension* of a member was meant to extend to the speaker, nothing would have been easier than to say so.

25. Quite clearly, *removal* of a speaker must follow a fair administrative action. The rules of natural justice must apply. The office is ring-fenced by requiring disclosure of grounds or reasons for removal, service of notice and a very high threshold to carry the motion. The elements of a fair hearing were well

stated in *Halsbury's Laws of England*, 5<sup>th</sup> Edition, 2010, Vol. 61 at para. 639 –

*“The rule that no person is to be condemned unless that person has been given prior notice of the allegations against him and a fair opportunity to be heard (the audi alteram partem rule) is a fundamental principle of justice. This rule has been refined and adapted to govern the proceedings of bodies other than judicial tribunals; and a duty to act in conformity with the rule has been imposed by the common law on administrative bodies not required by statute or contract to conduct themselves in a manner analogous to a court.”*

26. See also *Onyango Oloo vs. Attorney General* [1986-1989] EA 456, *Kenya Revenue Authority v Menginya Salim Murgani* Civil Appeal No. 108 of 2009, *Florence Moschion v Director of Public Prosecutions & 5 others* Nairobi High Court Petition 341 of 2012 [2013] eKLR, *Ezra Kaibuta v Attorney General*, Nairobi High Court petition 13 of 2013 [2013] eKLR, *Isabel Njoroge v PS Ministry of State for Provincial Administration & 4 others*, Nairobi ELC 745 of 2013 [2014] eKLR, *Republic v Registrar of Societies ex parte Joseph M'bataru* Nairobi High Court JR 451 of 2013 [2014] eKLR.

27. On 4<sup>th</sup> November 2014, the assembly did *not* move to *remove* the speaker from office. What the assembly did on 4<sup>th</sup> November 2014 was to *temporarily suspend* the speaker. It is very doubtful that a speaker (whose office is secured by requirement of such a high threshold of votes for removal) can be casually suspended *without notice* or a hearing. It matters little even if such a vote is carried by a super majority. I stated earlier that our Constitution speaks strongly and pointedly to devolution of power. I think Standing Order 50 (e), in so far as it purports to extend to the speaker, would be the antithesis of strong devolved institutions envisaged by the supreme law of the land.

28. The *ex parte* applicant states there was no quorum and that the proceedings were “unintelligible”. I have seen the attendance register annexed to the affidavit of Joseph Koech sworn on 16<sup>th</sup> February 2015. There were *fourty three* members in the assembly out of *fourty nine*. There is no doubt that an overwhelming majority of the members were present. I agree with the *ex parte* applicant that attendance is *not* synonymous with voting. But the onus fell upon the *ex parte* applicant to prove that there was no requisite quorum. On the face of it, the register of members points to a sufficient quorum in the chamber. But it is now all water under the bridge as I have found the assembly had *no* power to *suspend* the speaker *without notice or a hearing*.

29. For the same reason, I decline the invitation to find out whether the copy of the *Hansard* annexed to the *ex parte* applicant's affidavit of 6<sup>th</sup> November 2014 demonstrates that the proceedings were “*unintelligible or conducted in non-parliamentary language*”. I have also perused the *Order Paper* for that afternoon. The business of *suspension* was *not* on the *Order Paper*. I cannot blame the assembly for it. Like I stated, under Standing Order 50 (e) of the assembly, a motion for *suspension of a member* could be moved without notice. But the assembly was *mistaken* in its *belief* that the speaker could be *suspended*.

30. The answer to the second issue I set out for determination is thus in the *affirmative*: the suspension of the *ex-parte* applicant from the assembly was highly irregular and tainted by *procedural impropriety*. I find that the assembly could not *temporarily suspend* the speaker. Suspension in any case could only run for *twenty eight days* from 4<sup>th</sup> November 2014. The futility of the suspension is that it cannot run *ad infinitum*; or until the *ex parte* applicant clears his name; or until the criminal case against him is concluded.

31. But all is not lost for the members of the County Assembly of Baringo: if they feel strongly that the *ex parte* applicant has abused his office; or he has contravened the Constitution, the Act or his contract of employment, the members are at liberty to *remove* the speaker from office. However, the members *must* comply with Articles 47 and 178 of the Constitution, section 11 of the County Government Act (No. 17 of 2012) and Standing Orders 61 and 66 of the Baringo County Assembly.

32. In so far as the impugned motion was for *suspension of the speaker*, the assembly acted *irregularly*. The prayer for *prohibition* is thus well merited. From the materials before me the respondent acted

*without* jurisdiction. That conduct warrants removal of the decision to this Court for *quashing*. The prayer for *certiorari* is equally well founded.

32. In the result, I grant an order of *prohibition* restraining the respondent from implementing the motion or decision made on 4<sup>th</sup> November 2014 to *suspend* the *ex parte* applicant from office. I also issue an order of *certiorari* bringing into the High Court and *quashing* that decision. That leaves the question of costs. This is a matter of public interest. The order that commends itself to me is that each party shall bear its own costs.

34. Lastly, I must say the following, albeit *obiter dicta*. I mentioned earlier that this Court was led into a *political thicket*. I also said that that all *sovereign power* belongs to the people of Kenya. Although my findings are in favour of the *ex parte* applicant, he has to mend his ways. I do *not* in any manner *validate* his actions that have piqued his members so much as to move to uproot him. The *ex parte* applicant has the arduous task of regaining the confidence of the assembly. Unless he can do so, it will be futile to *pretend* that he has political authority over the assembly merely by the *fiat* of a court decree.

**DATED, SIGNED and DELIVERED** at **ELDORET** this 26<sup>th</sup> day of May 2015.

**GEORGE KANYI KIMONDO**

**JUDGE**

**Judgment read in open Court in the presence of:-**

Mr. Kenei for Mr. Kipkoech for the *ex parte* applicant instructed by Gordon Ogola, Kipkoech & Company Advocates.

Mr Yego for Mrs. Manyarkiy for the respondent instructed by Manyarkiy & Company Advocates.

Mr. J. Kemboi, Court clerk.