



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CONSTITUTIONAL PETITION NO. 18 OF 2014

**IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010 ARTICLES 1, 2, 19, 22, 27, 28,
33, 50 AND 73 (1) AND (2), 185**

**IN THE MATTER OF PARAGRAPH 15 (1), 35, 38, 45, 47, 51, 52, 54, 79, 155 AND 172 OF THE
INTERIM COUNTY ASSEMBLY STANDING ORDERS**

BETWEEN

HON. SAMSON VATI MUSEMBI 1ST PETITIONER
HON. PAUL MALINDA 2ND PETITIONER
HON. COSMAS M. NZILILI 3RD PETITIONER
HON. DR. MARTIN MASILA..... 4TH PETITIONER
HON. KELI C. MUSYOKA 5TH PETITIONER
HON. SHADRACK M. NZAMU 6TH PETITIONER
HON. JOHN MWENZE 7TH PETITIONER

VERSUS

THE MAKUENI COUNTY ASSEMBLY 1ST RESPONDENT
THE CLERK, MAKUENI COUNTY ASSEMBLY 2ND RESPONDENT
THE SPEAKER, MAKUENI COUNTY ASSEMBLY 3RD RESPONDENT

RULING

Introduction

0. The petitioners who are members of the County Assembly for Makueni County sued the County

Assembly, its Clerk and Speaker and upon an urgent Chamber Summons under The Constitution of Kenya (Supervisory Jurisdiction and protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules 2006 [the correct form is a Notice of Motion under *The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013* which came into force on 28th June 2013 repealing the 2006 Rules] in the petition obtained injunctive relief in terms that:

“A Temporary injunction be and is hereby issued for 14 days restraining the Respondents and the Makueni county Assembly in general from carrying out any elections of the Chairmen and Vice Chairmen of the committees.”

0. The ex parte order was granted in terms of prayer (b) of the Notice of Motion dated 4th April 2014 which was in the following terms:
 - a. That this application be certified as urgent and requiring to be placed before the Judge immediately for the granting of ex parte orders in the first instance.
 - b. **A Temporary injunction be and is hereby issued restraining the Respondents and the Makueni county Assembly in general from carrying out any elections of the Chairmen and Vice Chairmen of the committees.**
 - c. That the status quo be maintained and the assembly do continue operating with the house committees as constituted before or prior to 2nd April 2014 pending the hearing and determination of this application and/or further orders of the court.
 - d. A declaration that the proceedings of the house on the 2nd April 2014 and any subsequent consequential events including any reconstituted committees and the chairman and vice chairman elected pursuant thereto are unconstitutional and hence null and void.
 - e. A declaration that the Respondents and the Makueni County Assembly in general have acted in violation of the petitioners' rights and that the proceedings leading to such vacancies and alleged reconstituting of the new committees have on the face of it violated the petitioners' constitutional rights hence unconstitutional.
 - f. Any other or further orders that this Honourable Court may deem fit and fair to grant.”
0. The application was based on grounds set out in the application and primarily at paragraphs 14-16 as follows:
 14. The house is simply discriminating against the petitioners contrary to Article 217 which provides on the Equality and freedom from discrimination. It provides that every person is equal before the law and has the right to equal protection and equal benefit of the law. Equality includes the full and equal enjoyment of all rights and fundamental freedoms. The petitioners have been openly discriminated against on the distribution of the committees for instance:
 - a. Samson Musembi Vaati the 1st petitioner has no committee at all. He was before the purported amendment the chairman of the land, urban planning and environmental management committee.
 - b. The other petitioners including **Hon. Samson Vaati Musembi, Hon. Paul Mlinda, Hon. Cosmos M.Nzilili, Hon. Dr. Martin Msila, Hon. Keli C. Musyoka, Hon. Shadrack M. Nzmu and Hon. John Mwenze** have only one committee each as evident from the list attached. It is evident from the list that of some members for instance Hon. Bernard Musau has 8 committees, Hon. Francis Mutuku who happens to be the leader of majority has 10 committees among other.
 15. The Petitioners were not at all given any notice or any reason why they were removed from the said committees. The only reason they are aware of is that they are being victimized for the removal from office of the Deputy Speaker and even then they were denied any chance to contribute to the purported debate which never was.
 16. The Petitioners being elected members have the right to equal treatment, including the right to equal opportunities in the house committees and in political, economic, cultural and social spheres

and should not be discriminated directly or indirectly against on any ground, including race, sex pregnancy, marital status.

The application before the Court

0. Before hearing *inter partes* of the petitioners' application dated 4th April 2014, the Respondents, being aggrieved by the order granted therein, filed an application by Notice of Motion dated 7th April 2014 for the setting aside of the ex parte order of the court, seeking the following principal order:

THAT this Honourable Court be pleased to discharge or vary or set aside the Interim Orders granted by this Honourable Court on 4th April 2014 and direct that the elections of Chairman and Vice Chairmen the county Assembly of Makueni be held as on 9.4.2014 at 2.30 pm at the County Assembly of Makueni premises pending hearing and final determination of this application and Petition filed by the petitioners.

0. This application was based on grounds set out in the application, principally:
 - a. THAT the Petitioners also failed to disclose to this Honourable Court that they have been and still are active members of various Committees of the Assembly and by stopping the elections of Chairmen and Vice Chairmen of various Committees, they are curtailing the three folds roles of the Assembly being legislative, representative of the people and oversight role and other functions of the Assembly.
 - b. THAT the Petitioners have selectively failed to disclose the Minutes of the Selection Committee and other documents in order to obtain these injunctive orders that are injuring the functions of the Assembly.
 - c. That the reconstitution of the Committee is complete as approved by the Assembly save for the election of the Chairmen and Vice Chairmen of the said Committees and the Committees cannot function without the Chairmen and Vice Chairmen.
 - d. THAT the Sectorial Committees and Budget Committee urgently need to submit crucial Reports which have stringent deadlines in regards to the County Fiscal Strategy Paper as provided by the Public finance Management Act 2012, County Government Act 2012 and the Interim County Assembly Standing orders County of Makueni.
0. The Respondents' application was supported by the supporting affidavit and supplementary affidavit of Eunice M'Mbone Nyong'a the Principal Legal Counsel for the County Assembly respectively sworn on 7th April and 10th April, 2014. For the Petitioners, a replying affidavit sworn by the 1st Petitioner on 9th April 2014 was filed.

Brief facts

0. The brief facts of the case are that the Assembly upon a report by its Selections Committee voted for the reconstitution of the select committees of the Assembly. The reconstitution of the Committee removed the petitioners from the positions they held as members of some committees of the Assembly. The petitioners filed the constitutional application alleging *inter alia* breach of the constitutional provisions on equality under Article 27 of the Constitution with respect to the petitioners who were previously members and chairmen of several committees who lost their positions and had their membership reduced to a lesser number of committees. The petitioners obtained ex parte orders restraining the Assembly from proceeding with the election of chairpersons and vice-chairs of the reconstituted Committees and, being aggrieved by the decision and citing paralysis of the business of the Assembly including the urgent consideration and approval of the County Budget proposals, the respondent County Assembly filed a Notice of Motion seeking the setting aside of the ex parte order of the court.
0. The respondent's said Notice of Motion was subsequently heard *inter partes* on the 10th April 2014 when counsel for the parties – Mrs. Kipsang for the respondents/applicant and Mr. Munialo

for the Petitioners – made oral submissions and ruling was reserved for the 15th April 2014.

Issues

0. The question before the court is whether the court will set aside the injunction order granted ex parte when the petitioners approached the court under certificate of urgency seeking to stop the proceedings of the Makueni County Assembly for the election of chairmen and vice-chairmen of the reconstituted select committees of the Assembly.
0. There were counter-accusations about the counsel for the petitioner being a spouse to the County Assembly's deputy Speaker whose earlier removal had allegedly provoked the petition in this proceeding, and the deponent of the replying affidavit for the County Assembly being a spouse of the counsel on record for the Assembly. I have disregarded the objections, in the interests of substantial justice to deal with the real dispute between the parties. I have also taken into account the objection, as urged by the counsel for petitioner that the petition had nothing to do with the removal of his deputy speaker spouse, and the reciprocal one by counsel for the respondent that the deponent spouse of the counsel for the Assembly was only employed on the 1st April 2014 and could not influence prior pre-qualification of counsel on record for the respondent and, additionally, that the information set out in the replying affidavit were official records of the Assembly to which any official of the Assembly could depose.

The Law

0. There is no doubt that the court has discretion under the rules to set aside an order made ex parte. It was held by the Court of Appeal in *R v. Attorney General & Another* (2006) 1 KLR 219 that ex parte orders are in their nature **provisional** and may be set aside by the court that granted them or any other court with jurisdiction in its place.
0. The parties submitted on the basis of the prima facie case test in *Giella v. Cassman Brown* (1973) EA 358. At the interlocutory stage, however, the court does not undertake a final determination of the rights of the parties. See *Mbuthia v. Jimba Credit Corporation Ltd* (1988) KLR 1. The court need only assess whether having regard to the respective parties' cases the applicant has demonstrated an arguable case fit to go for trial on the merits. The important considerations therefore are whether the injury complained of may adequately be compensated by an award of damages and, if in doubt, where the balance of convenience lies.
0. The counsel for the petitioners offered two principal reasons for the maintenance of the injunction against the County Assembly: that the petitioner's right to represent their constituency in terms of Article 185 of the Constitution would be hindered as the Assembly performs its legislative business through committees; and that the allocation of committee membership was discriminatory within the meaning of Article 27 of the Constitution with the effect of denying the petitioners opportunity to earn committee sitting allowances. While the latter reason is purely pecuniary and therefore quantifiable in damages, the loss of capacity to represent one's constituency may be an irreparable damage indeed not only to the petitioners but their constituents whom they represent in the Assembly. I therefore entertain considerable doubt as to whether that aspect of the loss is remediable by damages and, according to the authorities (see also *American Cyanamid v. Ethicon* (1975) AC 396 HL), I must consider where the balance of convenience lies.
0. On the balance of convenience, the matter of the legislative business of the County Assembly commands greater weight on the scales between the Assembly and its individual members whose concerns are their propensity to earn allowances from committee sittings and thereby afford housing and motor vehicle loans. There is also greater damage in halting the business of the Assembly which at present includes the finalization of consideration and approval of the annual budget for the entire 47-ward county than may be suffered by the individual wards represented by the 7 petitioners and by the petitioners themselves. In taking this view, I am encouraged by the fact that the petitioner members of the Assembly may, in accordance with Standing Order 176, still represent their constituencies by contributions before the relevant committees and also at the plenary deliberations of the full House.
0. Counsel for the petitioners submitted that the County Assembly may without reconstituting the committees proceed to consider the urgent matters of the Assembly with the committee

membership as they were before the impugned reconstitution, or constitute itself as a committee of the whole house to consider the urgent budget issue. If such orders were to be made, the court would have, with respect to the first option effectively granted without full trial the orders sought by the petitioners in the motion and the petition, and as regards the second option, interfered with the legislative workings of the Assembly and directed it how to exercise its legislative mandate. That cannot be function of the Court.

0. 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 other's sphere of competence with the court respecting the legislative mandate of Parliament and Parliament the adjudication role of the Courts. In the circumstances, the court may only interfere with legislative matters including the selection of members of committees 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. See Article 1 (3) of the Constitution of Kenya. To hold that the Assembly has violated the constitution is a determination which, in my view ought to be made upon full consideration of the dispute on the merits and this is not possible at the interlocutory stage of the proceedings.
0. Moreover, on the relations between Parliament [and for this matter County Assembly] and Judiciary, **The Commonwealth (Latimer House) Principles on the Accountability of and the Relationship Between the Three Branches of Government, 2004** provides as follows:

“Relations between parliament and the judiciary should be governed by respect for parliament’s primary responsibility for law making on the one hand and for the judiciary’s responsibility for the interpretation and application of the law on the other hand.

Judiciaries and parliaments should fulfill their respective but critical roles in the promotion of the rule of law in a complementary and constructive manner.’

0. In the spirit of constructive engagement, the County Assembly is advised to consider a review of the composition of the committees in the light of the complaints raised in this petition, especially to comply with section 14 (4) of the County Governments Act No.17 of 2012, which provides that:

“(4) The county assembly shall in establishing committees under this section ensure that each member of the county assembly is appointed to at least one committee.”

In default of amicable settlement of the matter, the Petition herein shall proceed to hearing on the basis of directions given hereunder.

Findings

0. Without prejudice to the determination of the court upon full trial, I find that the substantial part of the petitioner's claims may adequately be compensated by an award of damages and that the remainder of the claim may be addressed by contributions in committee without being members thereof and in plenary sessions. I also find plausible the explanation by the respondent that the reconstitution of the committee membership was undertaken having regard to the constitutional and standing orders requirements of Order 154 and 155 thereof. The final determination of the issue must await full hearing.
0. I do not find, therefore, any justification at this interlocutory stage of the proceedings to interfere with the business of the County Assembly in the selection of members of Committees (and in accordance with the Speaker's discretion under Standing Order 160 (1) the election of chairpersons and vice-chairs thereof) through which it conducts its legislative role.
0. For the reasons set out above, I grant an order for the setting aside of the ex parte order made on the 4th April, 2014 as prayed in the respondent's Notice of Motion dated 7th April 2014. The costs of the application will be costs in the cause. I consider that there is merit in having the full petition heard on priority basis so that the respective rights of the parties may finally be

determined. I accordingly make further order that the suit be fixed for hearing on priority basis.

Dated, Signed and delivered on the 15th April 2014.

EDWARD M. MURIITHI

JUDGE

In the presence of: -

Mr. Munialo for the Petitioners

Mrs. Kipsang for the Respondents

Mr. Ibrahim - Court Assistant