



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

MISC JUDICIAL REVIEW APPL NO. 1 OF 2014

IN THE MATTER OF JUDICIAL REVIEW APPLICATION

AND

IN THE MATTER OF APPLICATION FOR ORDERS OF MANDAMUS AND PROHIBITION

AND IN THE MATTER OF ISIOLO COUNTY ASSEMBLY

BETWEEN

REPUBLICAPPLICANT

-VS-

**THE SPEAKER, ISIOLO COUNTY ASSEMBLY.....1st
RESPONDENT**

**THE CLERK, ISIOLO COUNTY ASSEMBLY.....2ND
RESPONDENT**

**COUNTY ASSEMBLY SERVICE BOARD, ISIOLO COUNTY.....
.....3RDRESPONDENTS**

NURA DIBA BILLA.....EX-PARTE APPLICANT

JUDGMENT

1. By a Notice of Motion Application filed in court on 11th March 2014 and brought pursuant to the provisions of Order 53 Rules, 1(1), (2),(3),(4), 2 and 3 of the Civil Procedure Rules and Section 8 and 9 of the Law Reform Act CAP 26 and Articles 10 (2), B and 159, (2), (a), (b), (c), (d) of the Constitution of Kenya, the Applicant has sought the following orders:
 - i. **That Court do grant applicant orders of Mandamus to compel the Respondent to admit the Applicant into the membership and operations of the 3rd Respondent.**
 - ii. **That the Applicant be granted orders of Prohibition to stop the Respondent from allowing and admitting Adan Ali Wako into the membership and operations of the 3rd Respondent.**

iii. That costs be provided for.

2. The application is premised on grounds on the face of the application namely:

- i. The Applicant is a member of the County Assembly of Isiolo elected on the ticket of the Jubilee Coalition Party (URP).**
- ii. The above coalition forms the majority in the Isiolo County Assembly.**
- iii. The same coalition has been represented by the leaders of majority in the Assembly, Adan Ali Wako up to up to 16th December 2013 when the coalition voted him out and elected Applicant, as the Majority Leader vide Isiolo County Assembly Standing Order No. 15 and communication to the 1st Respondent done on 17th December 2013.**
- iv. The Speaker (1st Respondent), has refused to effect change herein by way of replacing the voted out Majority Leader with the Applicant, (sic) he has been allowing the voted out Leader of Majority to attend and represent coalition in the 3rd Respondent's, earn allowance and even act as Leader of Majority contrary to the law and standing orders e.g. on 11th January 2014 the Board (3rd Respondent) met and approved advertisement of positions for the County Assembly. The elected majority was not allowed in the board meeting.**

3. The application is supported by verifying affidavit sworn by the ex-parte Applicant. In brief the ex-parte Applicant deposes that the Majority Leader of Isiolo County Assembly, ADAN ALI was voted out on the 16th December, 2013 and the ex-parte Applicant voted in his place. That despite that election, the Speaker of the County Assembly has declined to effect the change and swear the ex-parte Applicant into membership of the County Assembly Service Board.

4. The application is also based on Statement of Facts dated 30th January, 2014 which restates the facts of the case and the grounds upon which the application is premised, and the orders being sought. These are already on record and I need not state them again.

5. The ex-parte Applicant also relies on a further affidavit dated 10th February, 2014. In that affidavit the ex-parte Applicant has attached a letter stamped with a received stamp of Clerk, Isiolo County Assembly. He contends that the removal of the Majority Leader was by all the Coalition Members and could not be overruled by one party as purported in the letter dated 6th February, 2014 annexed by the 1st Respondent (MT3) in his replying affidavit.

6. The application is opposed. The Respondents have filed Grounds of Opposition in which two grounds are cited namely:

i) The said application is misconceived and lacks merit.

ii) The application is an abuse of process.

7. The 1st Respondent has sworn a replying affidavit on his behalf dated 19th March, 2014. The gist of the affidavit is that the Speaker was not given any official communication of the ouster of the Majority leader. He deposes that the only communication he received was from the alleged ousted Majority Leader; and another communication from URP, a party member of the Jubilee Coalition informing him that the alleged changes in the Leadership was of no consequence. The two communications in form of letters are annexed. The Speaker deposes that he could not have made any announcements from the Speaker's seat as the alleged changes were made when the County Assembly was on recess; and that such announcement could not have been made during

the Special Sittings of the Assembly which took place during recess. He deposes that the application is premature.

8. The counsels for the ex-parte Applicant and the Respondents, Mr. C. Kariuki and Mr. Ingutya respectively, both agreed to file their written submissions and to highlight them before me. That was done. I have considered the submissions by both parties.

9. In the leave stage, I considered the issues whether the application has a prima facie case with arguable grounds, whether the application meets the technical form prescribed in law; whether the Application has the locus standi to institute and maintain the application and whether the application was time barred. I will therefore not deal with these issues in this judgment. The issues for determination are:

I. Whether the application was defective in form

II. Whether the application was premature

III. Whether the ex-parte Applicant has a reasonable cause of action

10. Regarding whether the application was defective in form. The Respondents had contended that the application was defective in form for reason it was not brought in the name of the Republic. This ground was however abandoned by counsel for the Respondents when he conceded that indeed the application was properly brought.

11. The next two issues will be considered together. These are whether the application was premature, and whether the ex-parte Applicant has a reasonable cause of action.

12. The ex-parte Applicant's case is that pursuant to Order 15 Rules (1),(4) and (5) of the Isiolo County interim Standing Orders, the ex-parte Applicant was elected as Majority Leader of the Assembly, replacing the earlier one. The ex-parte Applicant contends that the election was communicated to the 3rd Respondent. He has attached the said communication as 'NDA'. It is dated 17th December 2013 and is duly signed by the Chief Whip and stamped by the Clerk to isiolo County Assembly.

13. The Respondent's counsel Mr. Ingutya made it clear that his clients were not pursuing the issue of the validity of the election held on 16th December, 2013.

14. Mr. Kariuki for the ex-parte Applicant submits that after the election was communicated to the 1st Respondent, he has failed to communicate to the Assembly the decision of the Coalition. Counsel urged that the speaker has failed to communicate same in the last 2 sittings, even when the same was included in the order paper. He contends further that the 1st Respondent had also failed to admit the ex-parte Applicant to the Isiolo County Assembly Service Board.

15. Mr. Ingutya for the Respondents urged that the ex-parte Applicant needed to demonstrate two things. One that the Speaker had a statutory duty to communicate, and two that the omission to act flouted the Standing Orders. Counsel urged that had the speaker moved to comment or issue directions touching on the alleged elections of the ex-parte Applicant he would have in so doing acted ultra vires. The Standing Orders and in particular Standing Order 26(4) stipulates:

“Whenever the County Assembly meets for a special sitting under paragraph (i) to be transacted on the day or days appointed and the business so specified shall be the only business before the County Assembly during the special sitting, following which the County Assembly shall stand adjourned until the day appointed in the County assembly calendar”

16. The two Special Sitzings of the County Assembly were gazetted. The Gazette Notices are annexures NB4 and NB6. The order of the meetings for the sitting of 28th January 2014 is annexure NB5. Agenda 2 of that Order Paper is “*Communication from the Chair*”.
17. Mr. Ingutya urged that pursuant to Standing Order No. 26(4) the Speaker was prohibited from canvassing any issues that were not specified in the Gazette notice. He urged that the change in the Majority Leader was not specified in the Gazette Notice and so could not have been discussed. Mr. Kariuki has not responded to the submissions by Mr. Ingutya.
18. I have perused the Gazette Notices for the Special Sitzings of Isiolo County Assembly for 10th and 28th January 2014. The Notices have specified the purpose of the meeting. The purpose of the meeting for 10th January 2014 was “*on the matter of recent various appointments by the Executive to the County Government*”. The Special Sitting of 28th January 2014 was for “*the tabling of Report of the Joint Committee on the recent appointment by his Excellency the Governor of Isiolo County Government*”.
19. I find that since the appointment of the ex-parte Applicant as the Majority Leader of Isiolo County Assembly and to the membership of the 3rd Respondent on the 16th December, 2013, the Isiolo County Assembly has only had two Special Sitzings on days before this suit was filed. I find that as stipulated under its Standing Order No. 26(4), the only business that could have been transacted during the Special Sitting was only the ones specified in the Gazette Notice calling for the meeting.
20. The “*Order of the Day*” produced by the ex-parte Applicant marked NB5 is not a Gazette Notice of any Special Sitting of the Isiolo County Assembly. It is an Order of meeting. Its author is not indicated. Even if the author was indicated Standing Order 26(4) is very clear as to what informs the Agenda of a Special Sitting. That Order of meeting is not an Agenda for a Special Sitting of the County Assembly. It does not further the ex-parte Applicants case.
21. I find that the ex-parte Applicant has not demonstrated that the 1st Respondent has failed in his statutory duty to communicate the ex-parte Applicants appointment. I find that the ex-parte Application filed this suit before a Regular Session of the Isiolo County Assembly was held. It is during the Regular meeting that the communication of ex-parte Applicant’s appointment could have been communicated by the 1st Respondent.
22. Order 26(4) stipulates that the County Assembly should stand adjourned once the business specified for holding the sitting is discussed, until the day appointed in the county assembly calendar. The ex-parte Applicant has not shown that there was ever a meeting of the County Assembly pursuant to the Assembly’s calendar, after the ex-parte Applicant’s appointment, and before these Judicial Review proceedings were filed.
23. I am satisfied that there is no evidence that a Regular County Assembly Meeting has been held between 16th December, 2013 and 30th January, 2014.
24. The issue is whether the 1st Respondent could have made the communication in issue after this case was filed. Standing order 85 clearly prohibits reference to any matter that is *subjudice*. The 1st Respondent could not have made the communication while this Judicial Review matter was still pending in court.
25. I find that the writ of mandamus does not lie as the 1st Respondent has not failed in the performance of the duty complained of. I find that the writ of Prohibition does not lie as there is no proof that the Respondents will act unlawfully or will reach flawed decision(s) which needs to be prevented. For that reason it was an abuse of the court process to file these proceedings at the time they were file. The application is in the circumstances misconceived and lacks in merit.

26. I have come to the conclusion that the Judicial Review proceedings were filed prematurely. Consequently I find no merit in the Application and order as follows:

- i. **The Notice of Motion application dated 16th March, 2014 be and is hereby dismissed in its entirety.**
- ii. **Due to the importance of this case to public interest I direct that each party will bear its own costs.**

DATED SIGNED AND DELIVERED THIS 30TH DAY OF MAY 2014.

LESIIT J

JUDGE.