



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CONSTITUTIONAL PETITION NO.17 OF 2014

IN THE MATTER OF: THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF THE PREAMBLE TO THE CONSTITUTION OF KENYA 2010

AND ARTICLES 1 (3), 2, 3, 10, 177, 193 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF THE ELECTIONS ACT

AND

IN THE MATTER OF THE CONSTITUTIONALITY OF THE RECRUITMENT EXERCISE

FOR THE SPEAKER OF THE COUNTY ASSEMBLY OF NYAMIRA

BETWEEN

LUKAS OMBOGO NYABURI.....PETITIONER

VERSUS

THE COUNTY ASSEMBLY OF NYAMIRA.....RESPONDENT

RULING

1. By a notice of motion dated the 23rd May 2014 the petitioner herein Lukas Ombogo Nyaburi seeks the following orders:-

1. That pending the hearing and determination of this application inter partes a conservatory order be issued suspending the process of filling the office of speaker of the County Assembly of Nyamira by the Respondent pursuant to the advertisement for the same office carried in the dailies of Saturday May 17,2014 or any other medium with similar content.

2. That upon inter partes hearing and pending the hearing and determination of the substantive petition herein, a conservatory order be issued suspending the process of filling the office of

speaker of the County Assembly of Nyamira by the Respondent pursuant to the advertisement for the same office carried in the dailies of Saturday May 17, 2014 or any other medium with similar content.

3. That an order be issued giving a priority hearing date to the substantive petition herein and directions be issued giving timelines within which the respondents herein will file responses to the petition and within which the parties will file their written submissions in the petition herein to facilitate timely and expeditious determination of the substantive petition herein.

4. That the costs of this application e provided for.

2. The notice of motion is expressed to be brought pursuant to **Article 23** of the **Constitution of Kenya 2010, Rules 13** and **23** of the **Constitution of Kenya [Protection of Rights and Fundamental Freedoms] Practice and Procedure Rules 2013** and is based on the grounds on the face of the application and supported by the affidavit of Lukas Ombogo Nyaburi dated the 23rd May 2013.

3. Briefly what the petitioner is saying is that after the respondent carried out the impeachment of the Speaker of the County Assembly Nyamira County on the 12th May 2013, there was filed in Kisii High Court a Judicial Review application questioning the legality and validity of the said impeachment [**High Court Judicial Review No.8 of 2013**]. The said application was heard and is pending ruling on the 30th May 2014 to determine whether or not to grant leave for judicial review proceedings to quash the decision to impeach the Speaker of the County Assembly Nyamira County and whether the said leave if granted should operate as stay.

4. During the pendency of the decision in JR No.8 of 2014, the Respondent herein advertised for the position of Speaker requiring all applications to reach the Ag Clerk and Secretary to the County Assembly Service Board by 23rd May 2014.

5. The petitioner feels that the said advertisement has plain illegalities that violates the Constitution, the statutory provisions of the Elections Act and the Standing Orders of the County Assembly of Nyamira and that unless the orders sought herein are granted then the said process will be carried out with the result that the rule of law and constitutionalism will suffer irreparably.

6. The application was certified as urgent having been brought under certificate of urgency on the 23rd May 2014. The Petitioner was ordered to serve the papers upon the Respondents forthwith for hearing inter partes on the 26th May 2014.

7. The Respondents filed both a Notice of Preliminary Objection dated 25th May 2014, Grounds of Opposition of the same date and a List of Authorities they intended to rely on.

8. The Petitioner also filed a supplementary affidavit dated the 26th May 2014 bringing to the attention of the court the notices issued by the Respondent to the effect that the election of the Speaker of the County Assembly Nyamira County would be conducted on the 26th May 2014 at 9.30 a.m. The said affidavit which had been filed without leave of the court was formally admitted and deemed as duly filed and served. The respondent was granted leave to file and serve a further affidavit if need be, together with the list of authorities before the application proceeded to hearing.

9. Mr. Ongoya together with Mr. Minda were present for the petitioner/applicant while the Respondent was represented by Mr. Nyachiro and Mr. Begi who were also both present. Parties made oral arguments in support of their respective positions.

10. Mr. Ongoya for the petitioner/applicant submitted that the petitioner is a resident of Nyamira County and has filed the Notice of Motion dated 22nd May 2014 with the primary objective of asserting constitutionalism and the rule of law for the residents of Nyamira. Counsel referred to page 166 of the

petition which carries a copy of the advertisement for the position of Speaker of County Assembly of Nyamira County advertised by the Respondent herein, as per the Standard of Saturday the 17th May 2014.

11. According to the advertisement the qualifications for appointment to the post of Speaker Nyamira County were that a person should be a holder of a degree from a recognized university with at least 5 years work experience preferably in a legislative body amongst others. The question posed by Mr. Ongoya was whether those qualifications have a basis in any law in the county.

12. To Mr. Ongoya the answer is no. Counsel placed reliance on **Article 177** of the **Constitution** on membership of county assembly which includes the Speaker as an ex-officio member. He also referred to **Section 21 (1)** of the **Elections Act** which provides that the Speaker shall be elected by each county assembly from among persons who are qualified to be elected as MCA's but are not such member.

13. Mr. Ongoya also referred to **Section 25** of the **Elections Act 2011** which sets out the qualifications for MCA's. He submitted that the law clearly specifies who is qualified to be Speaker of County Assembly and that the 2 qualifications as set out in the advert of 17th May 2014 are not among those set out under **Section 25** of the **Elections Act**, meaning that the advert referred to is illegal and unconstitutional.

14. He submitted further that this court cannot allow such an illegality to proceed and/or stand as to do so would run counter to the duty of this court which is expected at all times to protect, administer and defend the Constitution with a view to upholding the dignity and respect of the judiciary.

15. Counsel urged this court to allow the prayers sought by the Petitioner as a way of putting to an end blatant violations of the Constitution by the respondent. He submitted that **Article 3** of the **Constitution** calls upon every person to uphold and defend the Constitution. Mr. Ongoya further submitted that though he was aware of the prior proceedings pending before this court for determination, the petitioner had to move the court for the orders sought herein because of flagrant breach of the Constitution and the rule of law by the respondent in floating the advertisement of 17th May 2014.

16. On the supplementary affidavit Mr. Ongoya submitted that the same was filed in response to the respondent's swift measures to defeat the process of this court by calling for election of Speaker.

17. Mr. Ongoya prays that the prayers sought by the petitioner be

granted with one rider that considering the information contained in the supplementary affidavit an order should be issued to injunct any elected person to the office of speaker from taking oath with a view to discharging the functions of Speaker of Nyamira County as this would be the only way of restoring public confidence in the court.

18. Mr. Nyachiro for the Respondent framed four (4) issues for determination:-

1. *Whether petitioner has locus;*
2. *Whether the present petition is an abuse of the court process;*
3. *Whether this court has jurisdiction to determine this matter;*
4. *Whether the instant application is moot.*

19. On issue No.1 Mr. Nyachiro relied on a number of cases on their list of authorities for the proposition that for any party to seek leave of the court he must have sufficient interest in the matter at hand. He argued that an individual can only sue on behalf of the public where he has, in addition to having sufficient interest in the matter at hand, sustained an injury as a result of a public wrong.

20. He submitted that the petitioner has failed to demonstrate that he has sufficient interest in this matter

and that he has suffered an injury as a result of a public wrong. That it is within knowledge that there is pending before this court JR No.8 of 2014. He submits that the petitioner herein is aware of JR NO.8 of 2014 but he (petitioner) has concealed the fact that in JR No.8 of 2014 there was a prayer for conservatory orders which this court declined to grant and therefore this court should not grant him (petitioner) the orders sought.

21. He submitted further that it is not true that the respondent herein is doing what it is doing to defeat the course of justice and that if the petitioner was so aggrieved by the respondent's actions, he should have sought leave to be enjoined in JR No.8 of 2014 but not to come by way of a new petition as parties are barred from coming to court in a piecemeal manner, and by way of a multiplicity of suits.

22. Counsel also submitted that the issues herein would have been sufficiently raised in JR No.8 of 2014 by the applicant therein. He urges this court to find that this matter is not properly before it and that by filing this petition, the petitioner is engaging in abuse of court process, particularly so when there were no orders barring the Respondent from carrying on with its mandate, including advertising for and recruiting a Speaker to fill the vacant office.

23. Mr. Begi also for the Respondent submitted that it took the petitioner seven (7) days to approach this court after the advert referred to at page 166 of the petition was placed in the Standard Newspaper on the 17th May 2014, which would suggest that the petitioner was not keen on pursuing this matter.

24. He contended that the only issue being challenged in the advert is about the qualifications of the Speaker, which according to counsel is no issue at all. He submitted that since the office of Speaker of the County Assembly of Nyamira is vacant, the County Assembly has a duty to appoint a Speaker, so as to comply with **Standing order Number 4 (2)** of the **County Assembly of Nyamira**.

25. He also submitted that **Section 25** of the **Elections Act** refers to qualifications for nomination as an MCA which qualifications are same as those of speaker which include moral and educational qualifications.

26. He further submitted that the requirement to have a degree is not unconstitutional. He also relied on **Standing Order No.4 (2)** for the proposition that no business of the county assembly can be undertaken without a speaker. Reliance was also placed on **Standing Order 27 (3)** which talks of extension of sitting hours including sittings on Saturdays and Sundays and submitted that having meetings on Saturdays or even Sunday is not unconstitutional.

27. Referring to **Section 11** of the **County Government Act** which sanctions the removal of Speaker, counsel submitted that the respondent herein acted within the law in advertising for the appointment of another Speaker after the former Speaker was removed. He also referred to **Section 4** of **Cap 6 National Assembly (Powers & Privileges) Act** which gives immunity to the County Assembly against any civil or criminal proceedings. Further that **Section 12** of the same **Act** provides that the mandate of the county assembly cannot be questioned in the court.

28. On the issue of the application being moot counsel referred to the supplementary affidavit under paragraph 4 thereof which says that proceedings to commence the process of appointing another Speaker was to start at 9.00 a.m. on 26th May 2014 and if that was so then any order to be issued by this court in this matter will be one made in vain. Finally on the issue of qualifications for Speaker he argued that that was an issue of employment and that being so this is a matter for the Industrial Court and that this court has no jurisdiction to hear and determine the same. Mr. Begi finally submitted that the application herein lacks merit and any orders issued will be in vain. He urged the court to dismiss the application with costs.

29. Mr. Ongoya in reply submitted that there is no employer/employee relationship between the parties herein and therefore the dispute herein is not for the Industrial Court. Referring to the Canadian case cited by the Respondent in support of its claims, Mr. Ongoya submitted that the said case is distinguishable and has no relevance to the circumstances of the instant case. He also submitted that the statutory provisions relied upon by the respondents in arguing that this court lacks jurisdiction cannot

override **Article 165 (3) (d)** and **(4)** of the **Constitution** which give this court wide original jurisdiction to hear and determine both civil and criminal matters.

30. Counsel also submitted that costs cannot be the answer to the violations of the Constitution and the rule of law. He urged court to exert its powers to defend the Constitution and not to remedy constitutional violations by way of costs. On **Section 25** of the **Elections Act**, counsel argued that the same was misread by the respondent who is under a duty to demonstrate that the qualifications prescribed by the advertisement are also prescribed by the Constitution and by the Act

31. On **Standing Order 4 (2)**, Mr. Ongoya submitted that if it violates any of the Statutory provisions, those statutory provisions should prevail and lastly on the delay in bringing the application, counsel submitted that the same was caused by the absence of a judge to hear the matter after it was filed and that in any event, the delay was only for 6 days

32. I have carefully read through the pleadings and the authorities cited by the parties herein. I have also had the opportunity of going through the oral submissions by counsel for both parties herein. From the arguments presented to me, the following issues arise for determination by this court:

1. *Whether this court has jurisdiction to hear the petition herein;*
2. *Whether this matter is properly before this court;*
3. *Whether this court should issue the orders sought by the petitioner/applicant.*

33. On the first issue, it has been argued by the respondent that this is a matter touching on employee/employer relationship between the petitioner and the respondent and that as such the same should be heard and determined by the Industrial Court. I do not think so. As rightly submitted by counsel for the petitioner, there exists no such relationship between the parties. The petitioner is said to be an ordinary resident of the County of Nyamira and in that capacity, he cannot be said to be an employee of the respondent. In that case, and all other things being equal, this court would have the jurisdiction to hear and determine the issues raised herein which touch on the Constitution as provided under **Article 165 (3) (d)** thereof.

34. However, I find that the issues raised in the instant case are very similar to those that are awaiting determination in JR No.8 of 2014 - where the respondent herein is also the respondent therein. Pursuant to **Section 6** of the **CPA, Cap 21 Laws of Kenya** “**No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.**”

35. For the above reason, this matter, having been filed after the filing of **JR No.8 of 2014 – Peter M. Kingoina –vs- The County Assembly of Nyamira** – is not properly before this court and the petition herein shall be stayed, pending the hearing and determination of JR No.8 of 2014.

36. As regards the third issue, namely, whether or not this court should issue the prayers sought, it is not in dispute that JR No.8 of 2014 is still pending a determination on the application for leave to initiate JR proceedings in the nature of certiorari and whether such leave shall operate as a stay. It is also not in dispute that one of the prayers in JR No.8 of 2014 is for a conservatory order. Infact after submissions in that matter, counsel for the applicant asked the court for an order for status quo pending the ruling. That prayer which sought to restrain the respondent from taking any further step in filling the office of Speaker was declined.

37. In the circumstances therefore, this court finds and holds that it would be imprudent to grant the orders sought in the instant application because such orders cannot be issued without going into the prayers sought in JR No.8 of 2014. It would have been advisable for the petitioner herein to be enjoined

in JR NO.8 of 2014 and to have his issues ventilated therein.

38. In the premises, I have reached the conclusion that the instant application is an abuse of the court process and is also vexatious. The same lacks merit and is accordingly dismissed with costs to the respondent.

39. Further, I order and direct that the petition herein shall be stayed pending the hearing and determination of JR No.8 of 2014 and/or any other related suits pending before this court or any other court having jurisdiction in Kenya on the same issues or between the same parties.

40. It is so ordered.

Dated and delivered at Kisii this 28th day of May, 2014

R.N. SITATI

JUDGE.

In the presence of:

Mr. Minda (present) for the Petitioner

Mr. Begi (present) for the Respondent

Mr. Edwin Mongare - Court Assistant