



Republic OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

MISC. CIVIL APPLICATION NO. 113 OF 2014

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR ORDERS OF THE
NATURE OF CERTIORARI AND PROHIBITION**

**IN THE MATTER OF ARTICLES 179, 180, 181, 182 AND 183 OF THE CONSTITUTION OF
KENYA**

AND

IN THE MATTER OF THE COUNTY GOVERNMENT ACT NO. 17 OF 2012

BETWEEN

**BERNARD MUIA TOM KIALA
APPLICANT**

VERSUS

THE SPEAKER OF THE COUNTY ASSEMBLY OF MACHAKOS

THE COUNTY ASSEMBLY OF MACHAKOS

THE GOVERNOR, MACHAKOS COUNTY

THE GOVERNMENT OF MACHAKOS COUNTY

**THE COUNTY EXECUTIVE COMMITTEE OF MACHAKOS COUNTY
RESPONDENTS**

R U L I N G

1. The application dated 13th July 2014 seeks the following orders:-

1. "THIS application be certified as urgent and be heard *ex parte* in the first instance.
2. THAT the Applicant herein be granted leave to apply for AN ORDER OF CERTIORARI to remove to this Honourable Court and quash the decision to commence impeachment proceedings by the County Assembly of Machakos to remove the Applicant as the Deputy Governor of Machakos County, and the communication thereof through the Speaker and Clerk of the County Assembly of Machakos.

3. THAT the Applicant herein be granted leave to apply for AN ORDER OF PROHIBITION to restrain, bar, stop and/or prohibit each and all the Respondents from instituting, undertaking or continuing with any proceedings by the process of impeachment or otherwise to remove the Applicant as the Deputy Governor of Machakos County.
4. THAT the Applicant be granted leave to apply for an ORDER OF PROHIBITION restraining, barring, stopping or prohibiting each and all the Respondents from stopping the Applicant from the exercise of his duties and responsibilities and office as the Deputy Governor of Machakos County.
5. THAT the grant of leave do operate as a stay of the decision and actions of the Respondents to institute, undertake or continue with the proceedings for the removal by impeachment or otherwise of the Applicant as the Deputy Governor of Machakos County.
6. The costs of this application be provided for.”

2. On 14th July 2014, I certified the application as urgent and I granted the Applicant leave to commence Judicial Review proceedings as prayed. Pursuant to the proviso under **Order 53 rule 1 (4)** of the **Civil Procedure Rules**, I directed that the prayer seeking orders that the leave so granted do operate as a stay be served for hearing *inter partes*. This ruling is therefore in respect of prayer No. 5 only.

3. The Applicant, **Bernard Muia Tom Kiala** is the Deputy Governor of **Machakos County**. On 10th July 2014, the Clerk to the **County Assembly of Machakos** wrote to the Applicant informing him that the Speaker of the **County Assembly of Machakos** had received a motion supported by a third of the members of the County Assembly seeking the Applicant’s removal from the office of the Deputy Governor of **Machakos County**. The said **Notice of Motion** contained the grounds and particulars for the proposed impeachment. The letter further required the Applicant to appear before the *Ad Hoc* Committee formed for purposes of investigating the **Machakos Deputy Governor**, on Monday 14th July 2014 at the County Assembly offices Committee Room No. 1 at 10.30 a.m.

4. The said **Notice of Motion** is what has triggered the filing of the application herein. According to the statutory statement and verifying affidavit in support of the application, the Applicant was elected as the Deputy Governor of **Machakos County** in the last General Elections, having been nominated as the running mate of the 3rd Respondent, **Dr. Alfred Mutua** who is the Governor of **Machakos County**. It is the Applicant’s averment that the letter dated 10th July 2014 was served on his secretary on Friday the 16th July 2014 at 4.45 p.m. which letter was then sent to the Applicant in **Nairobi** where he was and he received the same at 9.00 p.m.

5. The Applicant contended that it was unfair and oppressive for the 1st and 2nd Respondent to summon him to appear before the *Ad Hoc* Committee on 14th July 2014 at 10.00 a.m. without providing him with sufficient time to prepare a proper and comprehensive response to the allegations made against him. That the intervening days were a Saturday and a Sunday which were not working days and it was not possible for him to access documents and information that he needed for his response.

6. The Applicant raised grounds of lack of jurisdiction, authority, or mandate by the County Assembly to undertake or continue with the process or proceedings to remove him as the Deputy Governor of **Machakos County**.

7. The application is opposed. The 1st Respondent, the Speaker of the County Assembly of **Machakos** and 2nd Respondent, the County Assembly of **Machakos**, filed the grounds of opposition dated 15th July 2014. The 3rd Respondent, the Governor, **Machakos County** filed a **Notice of Preliminary Objection** dated 15th July 2014. The 4th Respondent, the **Government of Machakos County** and the 5th Respondent, the County Executive Committee of **Machakos County** filed the grounds of opposition dated 15th July 2014.

8. The grounds upon which the application is opposed can be condensed as follows:-

- **That the court has no jurisdiction to injunct the parliamentary proceedings.**
- **That the proceedings offend the doctrine of separation of powers.**
- **That the removal of the Deputy Governor is a political question not suitable for resolution by courts of law.**
- **That the issue of removal of the Deputy Governor is an internal matter for the County Assembly regulated and governed by applicable Standing Orders and not amenable to court's jurisdiction.**
- **That the orders of *certiorari* and prohibition are directed to inferior tribunals exercising administrative and *quasi judicial* functions and are never directed to parliamentary processes.**
- **That no cause of action is disclosed against the 3rd Respondent.**

9. During the hearing of the application, this court heard submissions by **Mr Orengo** for the Applicant, **Mr Kilukumi** for the 1st and 2nd Respondent, **Mr Nyamu** for the 3rd Respondent and **Mr B.M. Musau** for the 4th and 5th Respondent. I have considered the submissions made by each of the counsels for the respective parties together with the authorities cited. I have also considered the authorities sourced by the Legal Researcher of the High Court, **Machakos**, Ms. Hannah Githuku.

10. The Respondents have argued that the court has no jurisdiction to restrain, injunct or prohibit Parliamentary proceedings or to inquire into the internal proceedings of Parliament. The court was referred to the following provisions of the law:-

- **Article 196 (3) of the Constitution** which provides for Parliament to enact legislation providing for the powers, privileges and immunities of County Assemblies, their committees and members.
- **Section 17 of the County Government Act** which provides that the law regulating the powers and privileges of Parliament shall with the necessary modifications apply to a County Assembly.
- **Article 175 (a)** which provides that County Governments shall be based on democratic principles and the separation of powers.

11. I will first deal with the issue of the court's jurisdiction. As stated in **The Owners of Motor Vessel "Lillian S." –vs- Caltex Oil Kenya Ltd (1989) KLR 1:-**

"Jurisdiction is everything. Without it, a court has no power to make one step, where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence and a court of law downs its tools in respect of the matter before it, the moment it holds the opinion that it is without jurisdiction."

12. On whether this court has jurisdiction to preside over these proceedings in view of the Parliamentary powers and privileges, the **Supreme Court of Kenya** had this to say on the matter:-

"We are persuaded by the reasoning in the cases we have referred to from other jurisdictions to the effect that Parliament must operate under the Constitution which is the supreme law of the land. The English tradition of Parliamentary supremacy does not commend itself to nascent democracies such as ours. Where the Constitution decrees a specific procedure to be followed in the enactment of legislation, both Houses of Parliament are bound to follow that procedure. If Parliament violates the procedural requirements of the supreme law of the land, it is for the courts of law, not least the Supreme Court to assert the authority and supremacy of the Constitution."

(The Speaker of the Senate and Another –vs- the A.G. & Others Advisory Opinion No. 2 of 2013).

13. On separation of powers, the Court of Appeal in **Mumo Matemu –vs- Trusted Society of Human**

Rights Alliance & 5 Others (2013) eKLR observed as follows:-

“It is not in doubt that the doctrine of separation of powers is a feature of our constitutional design and a pre-commitment in our constitutional edifice. However, separation of powers does not only proscribe organs of government from interfering with the other’s functions. It also entails empowering each organ of government with countervailing powers which provide checks and balances on actions taken by other organs of government. Such powers are, however, not a license to take over functions vested elsewhere. There must be judicial, legislative and executive deference to the repository of the function. We therefore agree with the High Court’s dicta in the petition the subject of this appeal that:-

[separation of powers] must mean that the courts must show deference to the independence of the Legislature as an important institution in the maintenance of our constitutional democracy as well as accord the executive sufficient latitude to implement legislative intent. Yet, as the Respondents also concede, the Courts have an interpretive role – including the last word in determining the constitutionality of all governmental actions...”

14. **Article 165 (6) of the Constitution** provides for the supervisory jurisdiction of the High Court. **Article 165 (6)** provides as follows:-

“The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or *quasi-judicial* function, but not over a superior court.”

15. The Applicants complaint is that he was not accorded sufficient opportunity to defend himself before the *Ad Hoc* Committee which amounts to a violation of the rules of natural justice and the right to a fair hearing. This complaint therefore relates to the process adopted by the County Assembly. This court in the exercise of its Judicial Review jurisdiction has the mandate to interrogate the process applied by the County Assembly. I am persuaded by the dictum of the three judge bench decision in the case of **Martin Nyaga Wambora –vs- Speaker County Assembly of Embu** where it was declared as follows:-

“The proceedings for the impeachment of a Governor under Article 181 of the Constitution are *quasi judicial* in nature and are therefore subject to the jurisdiction of the High Court...”

16. With the foregoing, I find that the County Assembly was acting as a *quasi- judicial* body when it commenced the impeachment proceedings and is therefore amenable to Judicial Review.

17. Having satisfied myself that this court has the jurisdiction to hear this matter, I now turn to the question as to whether the County Assembly has the mandate to commence impeachment proceedings against the Deputy Governor.

18. The Applicants have argued that the County Assembly has no mandate to remove the Deputy Governor from office. The motion to remove the Deputy Governor was stated to be in accordance with **Article 181 of the Constitution, section 32 and 33 of the County Government Act and Order No. 61** as read with **Order No. 60 of the Machakos County Assembly Standing Orders.**

19. **Article 181 (1) of the Constitution** provides for the removal of a governor from office and stipulates as follows:-

“A County Governor may be removed from office on any of the following grounds-

- a. **gross violation of this Constitution or any other law;**
- b. **where there are serious reasons for believing that the county governor has committed a**

- crime under national or international law;
- c. abuse of office or gross misconduct; or
- d. physical or mental incapacity to perform the functions of office of county governor.

2. parliament shall enact legislation providing for the procedure of removal of a county governor on any of the grounds specified in clause (1).”

20. **Section 32** of the **County Government Act** provides for the functions of the Deputy Governor. **Section 32 (2)** specifically provides as follows:-

“The deputy governor shall deputize for the governor in the execution of the governor’s functions.”

21. **Section 33 (1)** of the **County Government Act** provides for the removal of a governor as follows:-

“A member of the county assembly may by notice to the speaker, supported by at least a third of all the members, move a motion for the removal of the governor under Article 181 of the Constitution.”

22. **Standing Order No. 60** provides for the procedure for the removal of Governor by impeachment. **Standing Order No. 61** provides the procedure for the removal of the Deputy Governor and states as follows:-

“The Standing Orders relating to removal of Governor shall apply, with the necessary modifications, to the removal of the Deputy Governor.”

23. Save for the **Standing Orders**, the above provisions of the law do not expressly provide for the removal of the Deputy Governor. However, it is observed that the functions of the Deputy Governor are basically to deputize the Governor in the execution of his mandate as well as performing other functions that may be assigned to the Deputy Governor by the Governor. I am persuaded by the reasoning of the three judge bench in the case of **Hon. Dorothy N. Muchungu –vs- Speaker County Government of Embu & Others - Kerugoya HC Constitutional Petition 5 of 2014**, where they stated that:- “a wholistic reading of the **Constitution** reveals that it has provided for a mechanism of removal from office of officers who exercise sovereign power on behalf of the people of Kenya and the Deputy Governor is not exempted.”

24. I now proceed to look at the other provisions of the Constitution relating to the office of the Deputy Governor.

25. Under **Article 180 (5)** of the **Constitution**, a Deputy Governor is nominated by the Governor. The Deputy Governor must possess the same qualifications as the Governor.

26. Under **Article 180 (6)** of the **Constitution**, the person so nominated by the Governor as a Deputy Governor shall be declared elected by the **IEBC** to the office of Deputy Governor if the nominating Governor is elected into office. It therefore follows the Governor and Deputy Governor are elected on one ticket.

27. **Article 180 (7)** refers to the office of the Governor and Deputy Governor stating that none can hold office for more than two terms.

28. **Article 179 2 (a)** provides that both the Governor and Deputy Governor are members of the County Executive Committee.

29. **Article 179 (4)** of the **Constitution** provides as follows:-

“The county governor and the deputy county governor are the chief executive and

deputy chief executive of the county respectively.”

30. **Article 179 (5)** provides:-

“When the county governor is absent, the deputy county governor shall act as the county governor.”

31. As noted above, the **Constitution** therefore mentions the office of the Governor together with the office of the Deputy Governor save for **Article 182 (2)** which provides for the removal of the County Governor. I am therefore in agreement with the holding by the judges in the case of **Hon Dorothy N. Muchungu case** (*supra*), that the procedure for removal of the Governor is the same one that applies with the necessary modifications to the Deputy Governor.

32. In arriving at the above conclusion, I am fortified by the provisions of **section 33 (10)** of the **County Government Act** which sets out how a vacancy in the office of the Governor or Deputy Governor shall be filled. **Section 33 (10)** provides:-

“A vacancy in the office of the governor or deputy governor arising under this section shall be filled in the manner provided for by Article 182 of the Constitution.”

33. The Standing Orders are provided for under **Article 124** of the **Constitution** which provides as follows:-

“Each house of parliament may establish committees, and shall make standing orders for the orderly conduct of its proceedings, including the proceedings of its committees.”

34. **Section 14** of the **County Government Act** also provides for the making of Standing Orders. **Section 14 (1)** stipulates as follows:-

- a. **“A County Assembly may make standing orders consistent with the Constitution and this Act regulating the procedure of the county assembly including, in particular, orders for the proper conduct of proceedings; and**
- b. **subject to Standing Orders made under paragraph (a), may establish committees in such manner and for such general or special purposes as it considers fit, and regulate the procedure of any committee so established.”**

The Standing Orders are therefore provided for by the law.

35. Having considered the foregoing provisions of the law, I am satisfied that the Deputy Governor is not insulated from impeachment. The County Assembly has the mandate to commence the impeachment proceedings. The Deputy Governor is therefore not being subjected to an unlawful process.

36. On the issue of impeachment being a political matter, the Respondents have contended that this case is not a suitable one for resolution by courts. They have argued that the impeachment is a political process and therefore not justiciable. On this issue, I identify with the sentiments of the five judge bench in the case of **Hon. Lady Justice Jeanne W. Gacheche & 6 Others -V- Judges & Magistrate’s Vetting Board & 2 Others** (2012) e KLR where they stated as follows:-

“In our view, the issues of justiciability and the political question doctrine are not jurisdictional issues, but substantive issues that can only be determined once a Court is seized of a matter and has heard and considered the arguments on the merits. For the LSK to raise these issues at this stage is, with respect to put the cart before the horse.”

37. The justiciability of the case cannot therefore be determined at this preliminary stage of this case.
38. On whether any cause of action has been disclosed against the 3rd Respondent, the Governor, **Machakos County**, the answer is found in **Article 179 (4)** of the **Constitution** which provides that the County Governor is the Chief Executive of the County. The 3rd Respondent is therefore properly before the court.
39. The Applicant seeks that the grant of leave to apply for orders of **Certiorari** and **prohibition** do operate as a stay of the proceedings for the removal by impeachment or otherwise of the Applicant as the Deputy Governor of **Machakos County**.
40. The scope of Judicial Review is narrow. Judicial Review is concerned with the decision making process and not with the merits of the case itself. An order of *certiorari* can quash a decision already made and will issue if the decision is made without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons (**R –vs- Kenya National Examinations Council Ex parte Gathenji & Others – Civil Appeal No. 266 of 1996**).
41. An order of prohibition on the other hand restrains the abuse or excess use of power (See, for example **Meixner & Another –vs- Attorney General 2005 2 KLR**; **KNEC –vs- R 1997 e KLR**.)
42. The test to be applied in deciding whether or not to grant leave is whether the Applicant has an arguable case. Granting of leave is a matter of the court’s discretion. The court is however not called upon at this stage to go into the matter in depth or to decide with finality. The court ought to be careful in what it states lest it touches on the merits of the substantive application. The objective of a stay is to ensure that the substantive application is not rendered nugatory or reduced to an academic exercise. (See **Meixner Case** (supra) and **James Mburu T/a Jambo Merchants –vs- Sub County Public Health Officer, Kiambu County**).
43. Bearing the foregoing principles in mind, I now turn to the analysis of the facts herein.
44. **Standing Order 60**, provides that upon the expiry of the seven (7) days, the motion shall be placed on the order paper and shall be disposed of within 3 days. Under **section 33 (2)** of the **County Government Act** and the **Standing Orders**, if the motion is supported by at least 2/3 of the members of the County Assembly, the Speaker of the County Assembly shall inform the Speaker of the Senate of the resolution within two days. A hearing is provided for at the Senate level under **section 33 (3)** of the County Government Act.
45. The issue raised regarding the denial of a fair hearing contrary to the principles of natural justice must therefore be looked at against the provisions of the law and the time lines given by the law.
46. The Applicant’s uncontroverted evidence is that he received the motion on Friday night and was required to attend the proceedings of the *Ad Hoc* Committee the following Monday at 10.30 a.m. It is noted that the two days in between fell on a weekend hence the Applicant complains, and rightly so in my view, about lack of access to documents and information. The Applicant however chose not to appear before the *Ad Hoc* Committee and came to court. The question that is not answered by the Applicant’s affidavit is why he did not appear before the said committee and request for more time. As stated by the Court of Appeal in **Union Insurance Company of Kenya Limited –vs- Ramzan Abdul Dhanji Nairobi Civil Application No. 179 of 1998** the Court of Appeal held, inter alia, as follows:-
- “The law is that parties must be given a reasonable opportunity of being heard and once that opportunity is given and is not utilized, then the only point on which the party not utilizing the opportunity can be heard is why he did not utilize it”.**
47. Taking the circumstances of this case into account, my firm view is that if an inquiry by the court is demanded every time allegations are leveled, it would clog the court system (See **Peter O. Ngoge –vs- Francis Ole Kaparo & 4 Others (2007) eKLR**).

48. I identify with the sentiments expressed in **Republic –vs- Aga khan & 20 Others HC Misc. Appl. 12/2002**, where the court in considering the applicability of the rules of natural justice held *inter alia* as follows:-

“On the allegation that there was breach of the rules of natural justice, it is not in every situation that the other side must be heard. There are situations where a hearing would be unnecessary and even in some cases obstructive. Each case must be put on the scales by the court and there cannot be general requirement for hearing in all situations. There will be for example situations when the need for expedition in decision making far outweighs the need to hear the other side and in such situations, the court has to strike a balance.”

49. The requirements of natural justice therefore depend on the nature of the inquiry, the rules under which the administrative and quasi judicial bodies are making decisions and the subject of the matter. Each application therefore depends on the circumstances of each case.

50. As stated in **Halsbury’s Laws of England 4th Edition Reissue Vol. 1** regarding the applicability of rules of natural justice:-

“The rule generally applies, at least with full force, only to conduct leading directly to a final act or decision, and not to the making of a preliminary decision or to an investigation designed to obtain information for the purpose of a report or a recommendation on which a subsequent decision may be founded.”

51. The Applicant herein has only been notified of the impending impeachment proceedings. The Applicant has also been called before the *Ad Hoc* Committee to respond to the allegations leveled against him. The process is at a preliminary stage. What will happen at the County Assembly is a matter of conjecture and speculation. The application is therefore premature. There is no decision that has been made that is capable of being quashed. Orders of prohibition cannot also issue to restrain the County Assembly from undertaking the proceedings in the circumstances of this case.

52. Did the Respondents subject the Applicant to two parallel processes thereby rendering the same oppressive, punitive and malicious?

53. The **Standing Orders** made pursuant to **section 14** of the **County Government Act** regulates the procedure for the conduct of the business of the Assembly. Under **Standing Order No. 63**, a person being proposed for removal from the office is entitled to appear before the relevant committee of the Assembly and is entitled to legal representation.

54. Since the **Standing Orders** provide for appearance before the Assembly and before the Committee within the same strict time lines aforesated, I find no merit in the complaint that the Applicant is being subjected to a duo process.

55. For all the reasons stated above, this court’s conclusion is that the application has not met the threshold for the grant of **prayer No. 5**. Consequently, I decline to order that the leave granted herein do operate as a stay. Costs in cause.

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this 21st day of July 2014.

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B. THURANIRA JADEN

JUDGE