



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
NAIROBI MILIMANI COURT
(CONSTITUTIONAL AND HUMAN RIGHTS DIVISION)

PETITION NO. 418 OF 2014

THE SECRETARY ISIOLO COUNTY ASSEMBLY.....1st PETITIONER

THE DEPUTY SPEAKER ISIOLO COUNTY ASSEMBLY.....2nd PETITIONER

THE CHIEF WHIP (MAJORITY) ISIOLO COUNTY ASSEMBLY.....3rd PETITIONER

VERSUS

THE SPEAKER (MOHAMMED TUBI) ISIOLO COUNTY ASSEMBLY.....RESPONDENT

RULING

A. Introduction

1. The matter raises the novel question as to the High Court's power in relation to the removal of a Speaker of a County Assembly for alleged conduct unbecoming of a Public or State Officer.
2. The Petition dated 18th August, 2014 is therefore predicated on Chapter Six of the Constitution and the declarations therein sought are that the Speaker of the Isiolo County Assembly is not fit to hold office and that he should for that reason be removed from office.
3. Together with the Petition, the Petitioners who are the County Secretary of Isiolo County, the Deputy Speaker of Isiolo County Assembly and the Majority Chief Whip of Isiolo County Assembly, filed a Notice of Motion, later amended, and which seeks the following orders:

"That this Application be certified urgent and deemed appropriate to be heard during Vacation and service of the same be dispensed with in the first instance;

- i. That pending the hearing of this application inter partes, this Honourable Court be pleased to issue a temporary Order suspending the Respondent from office and therefore, prohibiting him from performing the duties of Speaker to the Isiolo County Assembly or any other duties or functions performed by him by virtue of his position as the Speaker;**

ii. That at the inter partes hearing of this Application, this Honourable Court be pleased to issue an interlocutory Order prohibiting him from performing the duties of Speaker to the Isiolo County Assembly or any other duties or functions performed by him by virtue of his position as Speaker pending the hearing and termination of the Petition filed herein;

iii. That upon the Orders of this Honourable Court issuing as prayed, the same be served on the Isiolo County Commandant to ensure peaceful compliance; and

iv. That costs hereof be in the result of the Petition.(sic)"

B. Factual background

4. From the Petition and the Amended Notice of Motion certain facts need to be placed on record. They are the following:

i. The Respondent, Mohammed Tubi, was lawfully elected as the Speaker of the Isiolo County Assembly pursuant to the provisions of Article 178(1) of the Constitution;

ii. He served as such without acrimony until June 2014 when by a Notice dated 11th June, 2014 addressed to the Clerk, Isiolo County Assembly, signed by one Nura Diba Billa and supported by nine other members, an intention to remove the Respondent was given:

iii. At a meeting held on 24th June 2014, Members of the Assembly affiliated to the Jubilee Coalition passed a resolution to remove the Leader of the Majority. That resolution was communicated to the Leader of the Majority on the same day;

iv. By letter dated 3rd July, 2014, addressed to the Clerk, Isiolo County Assembly, Francis Ole Kaparo, Chairman of the United Republican Party wrote to the Clerk, Isiolo County Assembly endorsing the decision to remove the Leader of the Majority;

v. As the in-fighting within the County Assembly escalated, the Respondent instituted Petition No. 15 of 2014 at the High Court in Meru seeking reinstatement to office after his removal by the Assembly on 15th June, 2014;

vi. The High Court at Meru reinstated the Respondent and an Application for Stay Orders against that decision was not granted by the Court of Appeal at Nyeri on 23rd June, 2014 and instead the Court of Appeal sent the Parties back to the High Court at Meru for hearing of the dispute on the merits. That matter is still pending.

vii. The Respondent is in office and this Petition and Amended Notice of Motion were filed on 21st August, 2014 and the record indicates that I admitted it to be heard during the August Court vacation and declined to grant any interim Orders on 21st August, 2014 and 22nd August 2014. This ruling is therefore, premised on submissions made at the inter-partes hearing on 26th August, 2014.

C. Submissions and case for the Applicants

5. Mr. Erick Mutua and Mr. Arthur Ingutya appeared for the Applicants and based on the supporting Affidavits by one, Paul Meto, Majority Chief Whip of Isiolo County Assembly and annexures thereto, their case in as far as the Motion is concerned is set out here below: Firstly, that the Respondent, since assuming office of Speaker, has conducted himself in a manner inconsistent with the Constitution, the County Governments Act and the Standing Orders of the Assembly. That for that reason, in the Notice of Intention to remove him, Members set out a number of grounds of removal to include:

i. He is incompetent and has no grasp of Standing Orders; has not constituted a House Business

Committee; he participates in debates instead of moderating them; he has failed to give direction to the House when required to do so;

ii. He has failed to implement the Constitutional requirement for public participation in matters before the Assembly;

iii. He lacks integrity in that he participated in shortlisting and interviewing candidates for the position of Clerk to the Assembly whereas his nephew was a candidate;

iv. He shows no respect for the House and lacks decorum as he often openly smokes freely during sessions and removes his shoes during House Business;

v. He exhibits a cavalier attitude in his work, to the detriment of the people of Isiolo County;

vi. He refused to preside over debate on the Budget proposals for the year 2014/2015 and only agreed to do so at the last minute after the intervention of the County Clerk, Minority Leader and others but thereafter refused to append his signature to the requisition for funds thus jeopardizing the welfare of the people of Isiolo County;

vii. He cancelled, unilaterally, the advertisement for key positions in the Assembly and re-advertised the positions with the sole intention of hiring people in his favour and has subjected the Assembly and other members of the public to a non-transparent process. That curiously, the position secured for his nephew was not re-advertised;

viii. While the Leader of the Majority was lawfully removed, he has continued to recognize him as such and allows him to sit in the County Assembly Service Board which fact raises doubts as to the legitimacy of the proceedings and decisions of the said Board;

ix. He has intimidated and threatened members of the Assembly and has shown disrespect to them and threatens them with expulsion at the slightest instance; and

x. His actions have brought the office of Speaker into disrespect, left the Assembly a divided house and hampered any meaningful business in the Assembly and the County of Isiolo.

6. For the above reasons, it is the Applicants' prayer that pending the hearing of the Petition, and to stem further breaches of Chapter Six of the Constitution, the Respondent should be suspended from office. That in the event that the Petition should fail, then he should be reinstated to his office with full benefits but in the meantime, the drastic action sought is necessary to save the County Government and Assembly of Isiolo from total collapse, a situation that may not otherwise be remedied.

7. In submissions, Counsel for the Applicants in answering the Court's question as to jurisdiction, argued that whereas there is procedure for removal of the Speaker under Section 11 of the County Governments Act, the removal in the present Petition is not under that section but under Articles 165 and 268 of the Constitution which clothe this Court with unfettered jurisdiction to determine disputes and grant redress where the Constitution has been violated. That in the instant case, where a Public Officer has breached the Constitution then he is unfit to hold office and should be removed.

Submissions and case for the Respondents

8. On his part, the Respondent opposes the Application for the reasons that firstly, **Petition No. 15 of 2014** is pending in Meru and this Petition is a duplication of that other Petition.

9. In any event, that because both Petitions have the effect of removing the Respondent from office; one by impeachment in the Assembly and the other by a Court Order, this one should not be entertained at all.

10. Secondly, that since both the High Court at Meru and the Court of Appeal have declined to sustain

- his alleged impeachment, then he is lawfully in office and this Court has no jurisdiction to sit on appeal in a decision of the same Court.
- 11.Thirdly, that contrary to the allegations by the Applicants, the Respondent had not blocked the tabling of Budget Estimates but what happened was that some Members of the County Assembly, including the Applicants, deliberately absented themselves from the House on the material day and on many occasions ensured that there was no requisite quorum for the Budget Estimates to be presented and debated. In any event, that he later managed to rally the Assembly to pass the County Appropriation Bill (No.2) 2014 on 26th June, 2014.
 - 12.Fourthly, that he has not been engaged in the recruitment of any staff of the County Assembly and has not flouted any provision of Chapter Six of the Constitution as alleged or at all.
 - 13.Sixthly, that the jurisdiction to determine whether any Public or State Officer has met the threshold set out in Chapter Six aforesaid is not vested on this Court but on the relevant office. It is unclear what that office is.
 - 14.Lastly, that regarding the alleged removal of the Leader of the Majority, while indeed the said Officer was removed by the Assembly, he was subsequently reinstated by the High Court at Meru in **Civil Case No.17 of 2014**, and so he had no option other than to work with him.
 - 15.Mr. Kisaka, Learned Counsel for the Respondent in his submissions added that "the Court can suspend an officer **who has violated Chapter six of the Constitution. But it has not been established that the Speaker has violated the Chapter**".
 - 16.Further, that whereas the Application seeks temporary Orders of removal of the Speaker, the Orders that ought to be sought are conservatory Orders and to that extent, the Application is a non-starter because it presupposes that the subject is guilty of the allegations made against him.
 - 17.Lastly, that the proper forum for ventilating allegations now made should be in **Petition No. 15 of 2014** at the High Court in Meru and in any event, the Respondent is lawfully in office by Orders made by that Court and no contrary Orders should be issued against him.
 - 18.For the above reasons, the Respondent seeks that the Application should be dismissed as an abuse of Court process.

D. Determination

- 19.Whereas this Application seeks Orders of suspension of the Respondent for alleged violation of Chapter six of the Constitution, Parties hardly made much effort to address the issue of the jurisdiction of this Court in granting or nor granting such peculiar Orders. No authority was cited to support both positions and on my part, that issue must be addressed from the outset because if prima facie, jurisdiction is lacking, then the Court must down its tools and do nothing else as Nyarangi J. A. once said (see **The Owners Motor vessel "Lillian S" vs Caltex Oil (K) Ltd T19891 KLR I**).
- 20.But where should a Court get jurisdiction from? In **S. K. Macharia vs. KCB & 2 Others ,Civil Application No.2 of 2011**, the Supreme Court answered that question as follows:

"A court's jurisdiction flows from either the Constitution or Legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law...."

- 21.In exercising jurisdiction at this stage therefore, this Court must only be satisfied on a prima facie level that it is seized of such jurisdiction. In that regard, Mumbi Ngugi, J. was confronted with a similar issue in **Benson Riitho Muriithi vs. J. W. Wakhungu And Anor, Petition No. 19 of 2014**. In that case, the question was whether the High Court was seized with jurisdiction in a matter involving the integrity of a Public Officer under Chapter Six of the Constitution. She framed the contested issue as follows:

"The Petitioner contends that Article 165 (3) (d) of the Constitution grants the High Court jurisdiction to hear any question respecting the interpretation of the

Constitution including the determination of whether anything said to be done under the authority of the Constitution or of any law is inconsistent with the Constitution. On their part, the Respondents take the position that the issues raised by the Petitioner regarding the integrity of the interested Party do not fall within the jurisdiction of this Court; and that there are procedures provided by law which the Petitioner has not invoked before coming to this Court.

The Respondents allege that issues of integrity fall for determination under the provisions of the Leadership and Integrity Act and The Ethics and the Anti-Corruption Commission Act. Counsel for the Respondents has called in aid Article 79 of the Constitution which provides for the establishment of the Ethics and Anti-corruption Commission and the case of Michael Wachira Nderitu & Others V Mary Wambui Munene & Others [20131 eKLR for the proposition that where mechanisms and procedures have been established by Statute, in this case the Leadership and Integrity Act and the Ethics and Anti-corruption Commission Act, to address questions touching on the Integrity of a public officer, the Court has no jurisdiction to deal with the matter.

On his part, the Interested Party questions the jurisdiction of the Court on two fronts. First, he contends that the Petition fails to raise instances of constitutional violation warranting the intervention of the Court, charging that the prayers sought are advisory in nature and thus fall outside the jurisdiction of this Court. Like the Respondents, the Interested Party argues, further, that the issues raised in this Petition fall for determination under the provisions of the Leadership and Integrity Act and the Ethics and Anti-Corruption Commission Act; that the Petitioner should have made a complaint to the 1st Respondent who would have referred the matter to the Commission, and if the 1st Respondent failed to Act on the recommendations of the Commission, then the Commission should have come to Court pursuant to the provisions of section4(5) of the Leadership and Integrity Act."

22. In resolving the above controversy, the Learned Judge held that:

"(3) Subject to Clause (5), the High Court shall have-

- a) Unlimited original jurisdiction in criminal and civil matters;**
- b) Jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;**
- c) Jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of person from office, other than a tribunal appointed under Article 144;**
- d) Jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of -**
 - i. The question whether any law is inconsistent with or in contravention of this Constitution;**
 - ii. The question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this constitution;**
 - iii. Any matter relating to Constitutional powers of State Organs in respect of County Governments and any matter relating to the Constitutional relationship between the levels of Government; and...**

There is, I believe no serious dispute with regard to the unlimited jurisdiction of the Court as provided under the above Article, which gives the High Court jurisdiction to hear and determine the issues raised in this Petition touching on the integrity of the Interested Party..."

I adopt the same reasoning and will take the view that to the extent that what is being challenged is the alleged conduct of the Respondent in the specific context of Chapter Six of the Constitution, then reading Article 165(3) and Article 268 of the Constitution, this court has jurisdiction to interrogate those matters.

23. Having addressed jurisdiction, the second issue is whether this Court is barred from entertaining the present Petition because of the existence of **Petition No. 15 of 2014** at the High Court of Meru. In that regard, I have read only some pleadings exhibited by the Parties as regards that case. I gather that it challenges the manner in which the Respondent was impeached by the County Assembly. In the Petition therefore, it was alleged that the Respondent's fundamental rights and freedoms were thereby violated and the Standing Orders of the Assembly were also violated. The Notice of Motion dated 16th June 2014 was specifically premised on Article 165(b) of the Constitution (which grants the High Court supervisory powers) and Article 23(1) (2) (which grants subordinate Courts jurisdiction to hear cases of violation of fundamental rights).
24. The present Petition is premised on alleged violation of Chapter Six of the Constitution and the jurisdiction of the High Court has been directly and originally invoked.
25. To my mind, whereas it is obvious that the ultimate effect of both actions is the removal of the Speaker, prima facie, I am not able to hold that the two Petitions are the same and I am certain that each can proceed on its own merits and there would be no conflict of decisions at all.
26. The third and more difficult issue is whether this Court, even if it is generally seized with sufficient facts and the requisite law, can actually order the suspension of the Speaker as in the Applicant's prayer. Mr. Kisaka in submissions conceded that the Court could grant such an order but was not seized of sufficient facts to do so. What is the correct legal position?
27. In our current Constitutional dispensation, new areas of conflict are emerging and the Courts must find ways of dealing with them but within the confines of jurisdiction. In that regard, like Mumbi Ngugi J. in **Benson Riitho Muriithi (supra)**, I have found no precedent on the question before me. It seems to be a novel issue, but the issue of removal of public officers for want of compliance with Chapter six of the Constitution is not.
28. In saying so, I have read a number of decisions on the subject, and they include:
 - i. **Michael Wacharia Nderitu & Others vs Mary Wambui Munene & Others [2013] KLR** where the Court declined to determine the suitability of a candidate to vie for election on the basis that such a function lies elsewhere;
 - ii. **International Centre for Policy conflict and Others vs. Hon. Uhuru Muigai Kenyatta 6b Anor, Petition No. 552 of 2012** where the Court, while acknowledging the unlimited jurisdiction of the High Court stated that where Parliament has specifically and expressly prescribed procedures for handling grievances raised by the Petitioner, then the Court should be slow to intervene;
 - iii. **Angaya Lubwayo vs. Gerald Otieno Kajwang, Petition No. 120 of 2013** where this Court proceeded to determine the suitability of a senatorial candidate on integrity issues because the Independent Electoral and Boundaries Commission had declined to do so;
 - iv. **Trusted Society of Human Rights Alliance vs. the AG & Others, Petition No. 229 of 2012**, where the Court found that where a nominee to public office had unresolved integrity issues, then he could not assume office;
 - v. **Benson Riitho (supra)**, where the same position was repeated save that the Court declined to delve into issues of the integrity or character of the subject of those proceedings.

In addition, it behoves me at this stage to point out that Article 79 of the Constitution

provides that:

"Parliament shall enact legislation to establish an independent ethics and anti-corruption commission, which shall be and have the status and powers of a commission under Chapter Fifteen, for purposes of ensuring compliance with, and enforcement of, the provisions of this Chapter."

29. The Commission envisaged under the said Article is the Ethics and Anti-Corruption Commission whose functions are set out in Section 11 of the Ethics and Anti-corruption Commission Act. Those functions inter-alia include:

- i. Receiving complaints on the breach of the code of ethics by public officers;
- ii. Investigating and recommending to the Director of Public Prosecution the prosecution of any acts of corruption or violation of codes of ethics or other matters prescribed under the Act or any other law enacted pursuant to Chapter Six of the Constitution;
- iii. Recommend appropriate action to be taken against State officers or public officers alleged to have engaged in unethical conduct.

30. Further to the above, S.3 of the Leadership and Integrity Act obligates State Officers **"in the case of County Governments, [to respect the values, principles and requirements of the Constitution] and the objectives of devolution provided for under Article 174 of the Constitution"**.

31. It is also instructive that Section 4 of the above Act grants the Commission the mandate to seek the assistance of any State organ in ensuring the compliance with and enforcement of Chapter Six of the Constitution and where such an organ fails to assist the Commission, then the latter may apply to the High court when requiring such an entity to comply.

32. The effect of all these provisions is that whereas the High Court undoubtedly has original jurisdiction in all matters, Civil, Criminal and Constitutional, there is another mechanism created by law in dealing with issues of integrity or lack thereof.

33. But that is not the end of the matter because the Petitioners are saying that Isiolo County business has been brought to a halt and the Respondent is the Chief Architect of that situation and ought to be suspended even as the Court interrogates whether he should be removed by an Order of this Court for alleged violation of Chapter Six of the constitution. Article 258 of the Constitution has been cited in that regard and article 258(1) provides as follows:

"(1) Every person has the right to institute court proceedings, claiming that this constitution has been contravened, or is threatened with contraventions"

34. Read with Article 165(3) (d) (ii) on the powers of this Court in determining whether **"anything done under authority of this Constitution or of any law is inconsistent with, or in contravention of this Constitution"**, no specific remedy is granted by the Constitution where a Party has **"instituted proceedings, claiming that this Constitution has been contravened or is threatened with contravention."** This is the opposite of claims for alleged breaches of the Bill of Rights where Article 23(3) states that:

"a court may grant appropriate relief, including:

- a) **A declaration of rights;**
- b) **An injunction;**
- c) **A conservator order;**

d) A declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;

e) An order for compensation; and

f) An order of judicial review."

35. Even in the above provision, the remedies are not exhaustive hence the use of the words "**including**" The provision therefore grants the High Court unlimited opportunities to grant "**appropriate relief**" depending on the circumstances of the case and the applicable law.

36. In that regard, "**suspension**" is generally a term used in labour law and in **Manamela Nnana Ida vs. Department of Co-operative Governance, Labour Court of South Africa Case No.J. 1886/2013** Snyman, A.J, stated as follows:

"Where an employee is suspended, an employee is not disciplined. The only instance where suspension is discipline of an employee is where the suspension is imposed as a disciplinary sanction following disciplinary proceedings. Where suspension is imposed as a precautionary measure, this is a prelude to disciplinary action and not disciplinary action itself. This kind of suspension is known as precautionary suspension. These proceedings thus concern the concept of precautionary suspension and where suspension is dealt with in this judgment, it only relates to the concept of precautionary suspension."

37. Further, the Constitutional Court of South Africa in addressing the relationship between statute, common Law and the Constitution in contracts of employment stated as follows in **Old mutual Assurance Co. SA vs. Gumbi [2007] 8 BLLR 699(SCA)** :

"This Court has recently held that the common-law contract of employment has been developed in accordance with the Constitution to include a right to a pre-dismissal hearing (Old Mutual Life Assurance Co SA Ltd v Gumbi). This means that every employee now has a common-law contractual claim - not merely a statutory unfair labour practice right - to pre-dismissal hearings."

38. Lest it be mistaken that I am addressing the issue before me as if it were a labour dispute, all I am trying to show is that even suspension in normal labour matters would require a pre-dismissal hearing. Obviously, in a matter involving removal from a Constitutional office, the threshold is even higher.

39. Turning back to the case before me in light of the Law as expressed above, Parties merely tabled before me complaints against each other and I am not satisfied that at this stage, I should invoke the draconian powers of this Court before hearing the Parties further. I was initially tempted to conclude that the matters raised are serious enough to warrant that the Respondent should be asked to leave office pending investigations by either the Court or the Ethics and Anti-Corruption Commission but on reflection, such an order may not meet the expectations of Justice.

40. I am of course alive to the stalemate at the Isiolo County and the Respondent among others is deeply involved in that stalemate. However, I require to hear all parties on the substance of their cases before I can issue or decline to issue any drastic orders.

41. In the end, and noting my sentiments above and the serious allegations against the Respondent, the proper order to make is that while dismissing the Application, the Petition herein shall be fixed for hearing on substantive arguments for a holistic and final decision of this Court on the merits of the respective cases therein.

42. Costs shall abide the hearing of the Petition.

43. Orders accordingly.

Dated, Delivered and Signed at Nairobi this 30th Day of September 2014.

ISAAC LENAOLA

JUDGE

In the Presence of:

Mr. Ngatia and Mr. Ingutia for Petitioners

Mr. Kisaka for Respondents