



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET
JUDICIAL REVIEW NO. 8 OF 2014

REPUBLIC.....APPLICANT

-VERSUS-

CLERK COUNTY ASSEMBLY OF BARINGO.....1ST RESPONDENT

HON. WESLEY LEKAKIMON.....2ND RESPONDENT

HON. KIPLIMO.....3RD RESPONDENT

HON. CHEPSONGOL.....4TH RESPONDENT

RULING

1. By way of a Chamber Summons application dated 6th November, 2014 filed under a certificate of urgency on even date, the Applicant **William Kamket** moved this court seeking leave to institute judicial review proceedings for orders of certiorari to quash the decision of the County Assembly of Baringo (hereinafter referred as the County Assembly) made on 4th November, 2014 suspending him from the office of Speaker of the County Assembly and for orders of prohibition to restrain the Respondents from implementing the said decision.

The Applicant also sought orders that leave if granted do operate as stay so that he would continue to execute his functions as the duly elected speaker of the County Assembly pending the hearing and determination of the Notice of Motion.

He also prayed that costs of the application be borne by the Respondents.

2. The application was premised on ten grounds which the Applicant replicated in his verifying affidavit sworn on 6th November, 2014 which can be condensed into two main grounds, namely:-

a. That in making the decision to suspend the Applicant from the office of Speaker of the County Assembly, the Respondents acted illegally as the law does not provide for suspension of the Speaker of a County Assembly but only provides for passing of a vote of no confidence; that the motion leading to his suspension was not on the order paper and was passed without the requisite quorum.

b. That the impugned decision which also stripped the Applicant of his privileges as Speaker was made without having given him any notice or an opportunity to be heard.

It may be important to point out at this stage that the application was made against the Clerk of the County Assembly of Baringo; Hon. Wesley Lekakimon; Hon. Kiplimo and Hon. Chepsongol who were named as the 1st to 4th Respondents.

3. On the date the application was filed and after hearing brief submissions by Learned Counsel Mr. Mwangi who appeared for the Applicant, I granted the Applicant leave to commence judicial review proceedings for orders of Certiorari and Prohibition as prayed but only against the 1st Respondent as in my view, the 2nd to 4th Respondents had been sued in their capacity as individual members of the County Assembly and were not amenable to judicial review.

On the prayer that leave granted operates as stay, I directed in terms of the proviso to **Order 53 rule 4 of the Civil Procedure Rules 2010**, that the prayer be canvassed interparties on a subsequent date.

4. Upon being served with the application, the 1st Respondent (hereinafter the Respondent) filed two replying affidavits on 12th November, 2014 in opposition to the Applicant's prayer that leave operates as stay.

The affidavits were sworn by the Respondent and Hon. Wesley Lekakimon on 11th November, 2014.

5. The gist of the Respondent's case as can be discerned from the two replying affidavits is that the decision to suspend the Applicant from office was a procedural disciplinary measure which was made legally in accordance with the provisions of the **Constitution of Kenya 2010, Section 44 of the Employment Act** and the **Baringo County Assembly Standing Order No. 50(e) and (h)**; that in making the decision, the County Assembly had the requisite quorum and that the standing orders under which the motion leading to his suspension was moved did not require the Applicant to be served with a notice before the motion was moved or passed.

In addition, the Respondent contended that given the gravity of the charges currently facing the Applicant in Eldoret Chief Magistrate's Criminal Case Number 7031 of 2014, as the Applicant is a state officer, allowing him to continue serving as Speaker of the County Assembly before he was cleared of the criminal allegations against him would contravene **Article 75** of the **Constitution of Kenya 2010**.

6. When the matter came up for hearing interparties on 12th November, 2014, Mr. Ikua learned counsel for the Applicant expounded on the grounds upon which the application was premised. He emphasized that stay ought to be granted as the decision to be challenged in the substantive motion was taken illegally as **Article 178(3) of the Constitution, Section 11 of the County Government Act** and the **Baringo County Assembly Standing Order No. 61** only provided for the removal of a County Assembly Speaker and not his suspension; that the Applicant was an ex-official member of the County Assembly and not an ordinary member and that therefore standing order No. 50 was not applicable to him. He urged the court to find that the Applicant had demonstrated that he had an arguable case and that he was thus entitled to orders of stay as sought.

In support of his submissions, counsel relied on the authority of **Car Importers Association of Kenya -vs- Kenya Bureau of Standards and 5 others (2014) eKLR**.

7. On her part, Mrs. Manyarkiy, learned counsel for the Respondent opposed the prayer that leave granted operates as stay. In her submissions, counsel reiterated the depositions in the Replying Affidavits. In disputing the claim that the Applicant was not an ordinary member of the County Assembly, Counsel asserted that there was no distinction in law between an ordinary member and an ex-official member of the County Assembly; that all were members of the County Assembly and were subject to the County Assembly Standing Orders including Standing Order No. 50 which sanctioned suspension of members and stripping them of their privileges without notice.

8. Lastly, counsel submitted that in deciding whether or not leave should operate as stay, the court should not only consider whether or not the Applicant has an arguable case but should also look at the wider

interests of the people of Baringo. She urged the court to find that the prayer by the Applicant was not merited and ought to be dismissed.

9. I have carefully considered the application, the affidavits filed in this matter and the rival submissions made by counsel for both parties. I find that the only issue for determination by this court at this stage is whether leave granted on 6th November 2014 should operate as stay as sought in prayer 4.

In considering this issue, I wish to point out at the outset that under **Order 53 Rule 1(4)** of the **Civil Procedure Rules 2010**, the court has wide and unfettered discretion in deciding whether or not to order stay in any case pursuant to grant of leave. **Order 53 Rule 1(4)** provides as follows;

“The grant of leave under this rule to apply for an order of prohibition or an order of certiorari shall, if the judge so directs, operate as a stay of the proceedings in question until the determination of the application, or until the judge orders otherwise”.

10. This discretion must however be exercised judicially with the aim of doing justice depending on the facts and circumstances of each case and on the basis of established legal principles.

The principles which guide the court in the exercise of its aforesaid judicial discretion are now settled. Those principles have been developed by the courts over the years and include a consideration of whether an applicant has established an arguable case worth investigation at the substantive stage; whether or not the grant of stay in terms sought is efficacious taking into account the circumstances of the case and whether refusal to grant stay would have the effect of rendering the applicant’s main application for judicial review nugatory. Where however the impugned decision has already been implemented, leave granted should not operate as stay or where orders of stay would have the effect of compelling a public body to act – ***See :Car Importers Association of Kenya -vs- Kenya Bureau of Standards and 5 others (2014) eKLR, Charles Nyamwange Otemwa& 2 others -vs- Registrar General and 5 others Exparte Republic [2013] eKLR; Jared Benon Kangwana -vs- Attorney General Nairobi HCCC No. 446 of 1995; George Philip M. Wekulo -vs- The Law Society of Kenya & Another Kakamega HC MISCAPPN NO.29 of 2005 and Taib A. Taib -vs- The Minister for Local Government &others Mombasa HC Misc. Appn No. 158 of 2006.***

11. Having laid down the principles that the court must bear in mind in deciding whether or not to grant stay, the only question that this court must now answer is whether the Applicant deserves the exercise of this court’s discretion in his favour in granting the stay sought.

12. In a bid to demonstrate that the Applicant had an arguable case and deserved orders of stay, Mr. Ikua strongly submitted that the decision to suspend the Applicant from office was illegal as it had no basis in law and that it was based on the wrong assumption that the Applicant was an ordinary member of the County Assembly and was therefore subject to the Assembly’s standing orders while he was not such a member. These contentions were strenuously disputed by Mrs. Manyarkiy for the Respondent.

13. My take on these competing arguments is that whether or not the decision to suspend the Applicant was lawful or illegal or whether he was an ordinary member of the County Assembly or not are questions that go to the heart of the intended judicial review proceedings. They are issues that relates to the merits of the substantive motion which must be canvassed, interrogated and determined in the substantive motion and not at this preliminary stage. It is important to point out at this juncture that in deciding whether leave should operate as stay or not, the court should always be careful not to make substantive findings on issues that go to the merits of the main judicial review proceedings in order not to prejudice the hearing of those proceedings.

14. Having said that, I wholly concur with Mr. Ikua that the Applicant has demonstrated that he has an arguable case in the main judicial review proceedings. That is the basis upon which I granted him leave to institute judicial review proceedings. But it is common knowledge that an arguable case is not one that must eventually succeed. It is therefore apparent that other considerations must come into play in determining whether leave granted in this case should operate as stay besides the fact that the Applicant

has an arguable case. In my view, the only way that this court can fairly exercise its discretion in the resolution of the prayer sought by the Applicant is by considering what prejudice if any the protagonists in the dispute subject matter of these proceedings are likely to suffer depending on the outcome of the substantive motion.

15. This requires the court to perform a delicate balancing act between the competing interests of the Applicant, an individual whose main complaint is that he has been illegally suspended and stripped of the privileges attendant to the office of speaker of the County Assembly and those of the County Assembly which represents the interests of the people of Baringo being the legislative organ of the County Government of Baringo.

16. Given the wording of prayer 4, if the court were to grant orders of stay as sought, they would have the effect of reversing the decision to suspend the Applicant so that he would resume execution of his functions as the duly elected speaker of the County Assembly until the hearing and determination of the substantive motion.

If stay orders are granted and the Applicant ultimately succeeds in the main application, none of the parties would suffer any prejudice. But in the event that the court were to eventually make a finding that the Applicant had been lawfully suspended from office and he loses in the substantive motion, the County Assembly is likely to suffer much prejudice in the sense that all the decisions or actions undertaken by the Applicant as the speaker of the assembly from the time the stay orders were granted to the time the main application was determined, would be tainted with illegality. And if those decisions or actions are incapable of being reversed, the County Assembly and through it the people of Baringo County would suffer irreparable harm.

17. On the other hand, if stay is not granted, the Applicant will stand suspended until the substantive motion is determined which means that the only prejudice he is likely to suffer is lack of enjoyment of the privileges attendant to the office of speaker. If those privileges have a monetary value, the same would be quantifiable and the Applicant would be in a position to recover their monetary value from the County Assembly in the event that he succeeds in the main motion.

18. It should be remembered that what the Applicant is facing is a temporary suspension not removal from office. This means that during the pendency of the substantive motion, he will still be the substantive holder of the office of speaker of the County Assembly. I would probably have looked at this matter differently had the Applicant's complaint been that he had been irregularly and unlawfully removed from office which would have incorporated a measure of finality in the decision under challenge.

19. I have also given considerable thought to the submissions made on behalf of the Applicant that if the stay orders are not granted, the operations of the County Assembly would be adversely affected. I am unable to agree with those submissions because in my view, the **Constitution of Kenya 2010** and the **County Government Act** have put in place a mechanism to ensure that the operations of County Assemblies continue to run smoothly in the absence of their Speaker. This mechanism is contained in **Article 178(2)** of the **Constitution** and **Section 9(4)** of the **County Government Act**.

Article 178(2) states as follows;

“A sitting of the county assembly shall be presided over by-

a. The speaker of the assembly; or

b. In the absence of the speaker, another member of the assembly elected by the assembly.

Section 9(4) of the County Government Act is in the following terms;-

(4) At any time in the absence of the speaker of the county assembly or in matters that directly

affect the speaker, the county assembly shall elect a member to act as speaker as contemplated under Article 178(2) (b) of the Constitution.

(5) Unless otherwise removed, the first member elected under subsection (4), shall, in the absence of the Speaker, preside over the sittings of the assembly for the term of the county assembly.

20. It is clear from a reading of the above provisions of the Constitution and the law that in the event that the court declines to grant the orders of stay, the operations of the County Assembly will not grind to a halt or be adversely affected. The County Assembly will be at liberty to elect one of their own to act as speaker who will continue running the business of the Assembly pending the hearing and determination of the judicial review proceedings.

21. In view of the foregoing, I find that the scales of justice weigh more heavily in this case against granting the interim orders sought by the Applicant than in granting them. Consequently, I am unable to exercise my discretion in favour of the Applicant. I therefore decline to order that the leave granted herein operates as stay in terms sought in prayer 4 of the chamber summons dated 6th November 2014. But doing the best that I can in the circumstances of this case, I direct that once the substantive motion is filed, its hearing be expedited so that it can be heard and determined within the shortest time possible.

22. Costs of this application will be costs in the cause.

C.W GITHUA

JUDGE

DATED, SIGNED AND DELIVERED AT ELDORET THIS 20TH DAY OF NOVEMBER, 2014 in the presence of:-

Mr. Gachoka holding brief for M/s Ikua Mwangi for the Applicant

Mrs. Manyarikiy for the Respondent

Mwende Court Clerk