Ali & 2 others v Speaker County Assembly of Garissa & another (Constitutional Petition E019 of 2023) [2024] KEHC 792 (KLR) (2 February 2024) (Ruling)

Neutral citation: [2024] KEHC 792 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT GARISSA

CONSTITUTIONAL PETITION E019 OF 2023

JN ONYIEGO, J

FEBRUARY 2, 2024

IN THE MATTER OF SUSPENSION OF MEMBERS OF THE COUNTY ASSEMBLY OF GARISSA

BETWEEN

BETWEEN

ABDIRAHMAN MOHAMED ALI ..... 1ST PETITIONER

OMAR ABDI HASSAN ..... 2ND PETITIONER

ABUBAKAR MOHAMMED KHALIF ..... 3RD PETITIONER

AND

SPEAKER COUNTY ASSEMBLY OF GARISSA ..... 1ST RESPONDENT

COUNTY ASSEMBLY OF GARISSA ..... 2ND RESPONDENT

RULING

1. The genesis of the petition herein and by extension the application dated 30th November2023 which is the subject of this ruling, is the suspension of the applicants by the 1st respondent from the remainder of the Garissa County Assembly Second Session. Previously, the 1st respondent had ordered for the removal and /or ouster of the applicants from being holders of various positions within the County Assembly of Garissa County allegedly on instructions from their party.

2. Aggrieved by the said changes, the applicants moved this court vide Garissa high court Judicial Review case No. E008 of 2023 dated 14.09.2023 and filed on 15.09.2023 seeking orders inter alia; a declaration that their a foresaid ouster and or removal was unconstitutional hence sought immediate reinstatement pending hearing and determination of the pending substantive motion.

3. Upon considering the application ex parte, Chigiti J granted the orders thus reinstating and allowing the applicants/petitioners to continue holding their previous positions pending the hearing and determination of their application/petition.

4. Despite being served with Justice Chigiti's orders, the 1st respondent declined to act on the same thus prompting the petitioners/applicants to file an application dated 21.09.2023 under the said JR file citing the 1st and 2nd respondents for contempt of court orders.

5. Upon attending Assembly sessions on 25.10.2023, the 1st respondent made a ruling suspending the petitioners/applicants from the remainder of the Garissa County Assembly Second Session pursuant to alleged gross misconduct during the County Assembly proceedings the previous week.

6. It is the said ruling that precipitated the filing of the applicant's current application dated 30.11.2023 through the firm of Nelly Njenga & Co. Advocates seeking the following orders:

    i. Spent.

    ii. This Honourable Court do issue a conservatory order staying and/or setting aside the 1st respondent's ruling of 25.10.2023 suspending the 1st and 2nd petitioners from the remainder of the Garissa County Assembly Second Session pending the hearing and determination of the petitioner's application.

    iii. This Honourable Court do issue a conservatory order staying and /or setting aside the 1st respondent's ruling of 25.10.2023 suspending the 1st, 2nd and 3rd petitioners from the remainder of the Garissa County Assembly Second Session pending the hearing and determination of the petitioner's petition.

Applicants' case

7. The applicants' application is anchored on the grounds set out on the face of it and further amplified by the content contained in the affidavit of Omar Abdi Hassan the second applicant herein sworn on 30th November 2023 on his own behalf and that of the 1st and 3rd applicant. It was averred that on 25th October 2023, the 1st respondent without any color of right suspended the three of them from the remainder of the County Assembly second session. That as a consequence, they have been denied their allowances and right of representation of their electorate as MCAs until 13th February 2024.

8. It was deposed that by suspending them, they stood to miss crucial debates affecting their wards in the wake of heavy floods and insecurity which was affecting their wards. That their suspension was malicious and vindictive with the sole purpose of silencing them from exercising their oversight role seeking accountability from the 1st respondent's office.

9. It was further deposed that the 1st respondent's act was in excess of his powers and authority hence unconstitutional and a violation of their legitimate expectation on the right to fair administrative action. Lastly, he averred that the suspension was not only in contravention of Section 15 of the County Assembly powers and Privileges Act, but also, the Garissa County Assembly standing orders.

Respondents' response

10. In response, the respondents filed a replying affidavit sworn on 15.12.2023 deponed by Hon. Abdi Idle Gure, the 1st respondent herein together with a preliminary objection dated 15.12.2023 citing the following grounds:

i. This Honourable Court lacks jurisdiction to hear and determine this matter in view of the provisions of article 196(3) of *the constitution* of Kenya as read with sections 10 and 11(2) of the *County Assemblies Powers and Privileges Act* No. 6 of 2017.

ii. The proceedings herein offend the doctrine of separation of powers as envisaged under article 175(a) of *the constitution* as the orders sought by the petitioners seek this Honourable Court to interfere with the internal operations and management of the County Assembly.

iii. For the following reasons, the petitioners' petition and application is incompetent and legally untenable and ought to be struck out with costs.

11. In their replying affidavit, the 1st respondent reiterated the content of the said preliminary objection. He averred that on 19.10.2023 at around 11.40 a.m., as he was chairing a meeting of the County Assembly Business Committee with the applicants in attendance, they violently disrupted the sitting of the committee by spraying pepper in the chamber and thereafter, assaulting other members. That in the process of the said chaos, the applicants extensively damaged the properties of the Assembly including tables, chairs, and microphones and as if that was not enough, followed him to his chambers with the intention to attack him.

12. It was further deposed that, the applicants proceeded to park their vehicles at the entrance of the House such that no member or staff could access the chambers. That the matter was reported to police via O.B No. 41/19/10/2023 and as a result, on 25.10.2023, pursuant to Standing Orders No. 104 and 108 of Garissa County Assembly, he suspended the applicants from the service of the County Assembly for the remainder of the current session of the House.

13. It was urged that the applicants did not disclose to the court the circumstances under which they were suspended from the Assembly and as such, they were culpable of non-disclosure. That the grave non – disclosure is a deliberate attempt by the applicants to mislead this Honourable Court into believing that they were suspended from the House arbitrarily and without factual basis.

14. He stated that Section 14 of the County Government vests the 2nd respondent power to make Standing Orders regulating the procedure of the County Assembly including and in particular, orders for the proper conduct of Assembly's proceedings. Further, that the Standing Orders prescribed various procedures relating to the proceedings of the House and in particular Part XVII of the said Standing Orders comprising of Standing Orders 95 to 109 which comprehensively provides for the manner of maintaining order in the County Assembly.

15. That the decision to suspend the petitioners was not ultravires to *the constitution* and in violation of the applicants' rights. That his decision was intended to maintain order in the house following the unprecedented conduct of the applicants. This court was therefore urged not to issue the orders sought as the applicants had approached this Honourable Court with unclean hands.

16. The court directed that the preliminary objection and the application dated 30.11.2023 be canvassed together by way of written submission.

Applicants' /petitioners' submissions

17. The applicants/petitioners via their written submissions dated 27.12.2023 in support of the application dated 30.11.2023 and in opposing the respondents' preliminary objection dated 15.12.2023 coined the following issues for determination:

i. SWhether this Honourable Court has the requisite jurisdiction to hear and determine this matter.

ii. Whether the proceedings herein offend the doctrine of separation of powers;

iii. Whether the petitioners are entitled to the conservatory orders sought herein.

18. On the first issue, it was contended that Article 2(1) of *the constitution* being the supreme law, binds all persons and all state organs at both levels of the government. That the application and petition due for determination is on the basis of the infringement of rights and freedoms guaranteed therein. It was argued that the jurisdiction of the Honourable Court is drawn from *the constitution* vide Article 165(3)(b) which provides that the High Court has jurisdiction to determine questions whether a right or fundamental freedom in the Bill of Rights has been denied, infringed, violated or threatened. The petitioners relied on the case of Samuel Kamau Macharia & Another v Kenya Commercial Bank & 2 Others [2012] eKLR to express the position that a court's jurisdiction flows from either *the constitution* or legislation or both.

19. That in issuing the order which suspended the petitioners/applicants from the County Assembly on 25.10.2023, the speaker exercised his constitutional role to preside over the County Assembly but the same was exercised in contravention of the statutory provisions in the *County Assemblies Powers and Privileges Act* as well Garissa County Assembly Standing Orders. That the illegal and arbitrary suspension of the petitioners by the 1st respondent violated Article 47(1) of *the constitution* as the 1st respondent failed to uphold the rule of law which restricts the arbitrary exercise of power by subjecting such power to well defined and established laws.

20. That due to the fact that the 1st respondent failed to establish or constitute the Committee of Powers and Privileges to make an inquiry into the alleged breaches of privilege, the petitioners' right to fair hearing as envisaged under Article 50 of *the constitution* was therefore breached.

21. Regarding the question whether the proceedings herein offend the doctrine of separation of powers, the applicants/petitioners contended that the high court has unlimited powers to inquire into parliamentary proceedings. To buttress that argument, reliance was placed in the case of Justus Kariuki Mate & Another v Martin Wambora & Another (2017) eKLR and in Coalition for Reform and Democracy (CORD) & 2 Others v Republic of Kenya & 10 Others [2015] eKLR where the High Court examined the extent to which a court may inquire into the conduct of parliamentary proceedings. In the said cases, both Courts held that under article 165 (3)(d) of *the constitution*, the High Court is clothed with powers to determine the constitutionality of a given act; as such, the doctrine of separation of powers does not preclude it from examining acts of the legislature or the executive.

22. The applicants/petitioners further contended that the ruling by the 1st respondent suspending them from the remainder of the session was in contravention of *the constitution*. That this Court does not only have the requisite jurisdiction to hear and determine the matter herein but also exercise its constitutional function within the doctrine of separation of powers. In urging this court not to rely on the doctrine of separation of powers, the petitioners invited this court to rely on the finding in the case of Hassan Halane v Ahmed Ibrahim Abass v Speaker County Assembly of Garissa [2019] eKLR where the court was of the view that, there is nothing like the supremacy of parliament outside *the constitution*. That every organ of state performing constitutional functions must perform it in conformity with constitution and where the state fails to do so, the court as the ultimate guardian of *the constitution* will point out the transgression.

23. On the issue whether the applicants are entitled to conservatory orders, counsel urged that the applicants had established a primafacie case which raises arguable facts for determination. It was urged that the principles of granting conservatory orders have been canvassed in various cases inter alia;

Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others [2014] eKLR where the court held that conservatory orders facilitate functioning within public agencies as well as uphold the adjudicatory authority of the court in the public interest.

24. That having established that the 1st respondent owed the petitioners a duty of fair administrative action but rather chose to infringe on the said right, a prima facie case was thus established. In buttressing the same, reliance was placed on the case of Mirugi Kariuki v Attorney General Civil Appeal No. 70 of 1991 EA 156, (1992) KLR 8, where the Court held that it is wrong for the court to attempt an assessment of the sufficiency of an applicant's interest without regard to the nature of his complaint. Additionally, reliance was placed on the case of Re Bivac International SA (Bureau Veritas) (2005) 2 EA 43 where the court while expounding on what a prima facie case or arguable case is, stated that such decision is not arrived at by tossing a coin or waving a magic hand or raising a green flag but instead a Court must undertake an intellectual exercise and consider without making findings, the scope of the remedy sought, the grounds and the possible principles of law involved.

25. Learned counsel opined that it is in the public interest that *the constitution* and the law be not only respected but also followed and therefore, an allegation that *the constitution* would be violated or is threatened should not hold.

26. The court was urged to find that the 1st and 2nd respondents having failed to adhere to this most sacred tenet of sovereignty of the people by arbitrarily removing the petitioners from the County Assembly, the people of Sankuri, Damajale and Galbet wards were as a result muzzled. That the same would be a travesty of justice by allowing the 1st and 2nd respondents' actions go unchecked. This court was therefore urged to issue the orders sought as no prejudice would be occasioned on the respondents should the same issue. Additionally, that the petitioners and their constituents stand to suffer irreparable harm if the said orders are not issued.

Respondents' submissions

27. The respondents on the other hand via submissions dated 02.01.2024 principally reiterated the content contained in the affidavit in reply. It was submitted in respect of the preliminary objection that this Honourable Court lacks jurisdiction to hear and determine this matter in view of the provision of Article 196(3) of *the constitution* as read with sections 10 and 11(2) of the County Assembly's Powers and Privileges Act No. 6 of 2017. That the proceedings herein offend the doctrine of separation of powers as envisaged under article 175(a) of *the constitution* as the orders sought seeks to interfere with the internal operations and management of the County Assembly. It was urged that given that jurisdiction flows from either constitution or legislation or both in reference to the holding in the case of Samuel Macharia & Another v Kenya Commercial Bank Limited & 2 Others [supra] , the orders sought herein ought not to issue.

28. It was further urged that in compliance with Article 196(3) of *the constitution*, parliament enacted the *County Assemblies Powers and Privileges Act* which gave effect to the said articles as the same provided for the powers, privileges and immunities of County Assemblies, their committees and members. This court was referred to section 10 and 11(2) of the *County Assemblies Powers and Privileges Act* to argue that the applicants therefore, cannot challenge the decision of the speaker made on the floor of the house during a sitting of the Assembly.

29. It was thus contended that the orders sought in the application and the petition violate the principle of separation of powers as they seek for the Honourable Court to interfere with the internal management of the Assembly. Reliance was placed on the cases of Dominic Ndonye Maithya & 3 Others v Machakos County Assembly Speaker & 2 Others (2017) eKLR and Republic v National Assembly Committee

of Privileges & 2 Others ex parte Ababu Namwamba [2016] eKLR where both Courts declined to interfere with the internal business of the legislature.

30. In reference to the application by the applicants, the 1st and 2nd respondents coined two issues for determination to wit: Whether the applicants are not entitled to the conservatory orders sought on account of concealment of material facts from the court; Whether the applicants have laid a basis in law for the grant of conservatory orders.

31. It was contended that the application and the petition did not disclose to the court the circumstances under which the applicants/petitioners were suspended from the Assembly. That they were culpable of non-disclosure of material facts hence approaching the court with dirty hands. In support of that submission, counsel placed reliance in the case of Republic v Director of Public Prosecutions & 2 Others ex parte Edwin Harold Dayan Dande & 3 Others [2018] eKLR, where Mativo J (as he was then) pronounced himself that a person who approaches the court or a tribunal for grant of relief, equitable or otherwise, is under a solemn obligation to candidly disclose at the earliest opportunity possible all the material facts which have a bearing on the adjudication of the issues raised in the case. The 1st and 2nd respondents urged this court not to grant the conservatory orders on account of non-disclosure of material facts.

32. On the second issue, it was contended that the applicants did not lay any basis for the court to grant the orders sought. That the suspension was strictly in accordance with the provisions of the Garissa County Assembly Standing Orders and specifically Part XVII of the said Standing Orders comprising of Standing Orders 95 to 109 which provides for the manner of maintaining order in the County Assembly.

33. It was contended that before granting conservatory orders, the court must first consider whether the applicants have demonstrated through their pleadings a prima facie case based on a real danger which is imminent, true, factual not fictitious and/or not imaginary. Reliance to that end was placed on the case of Anarita Karimi Njeru v attorney General (1979) KLR and Mumo Matemu v Trusted Soci.ety of Human Rights Alliance & 5 Others Civil Appeal No. 290 of 2012 (2013) eKLR where it was held that a petitioner who alleges that his rights have been violated is under obligation to state his complaint.

34. It was urged that the applicants herein did not live upto the expectation as they provided little or no particulars as to the alleged infringement of the rights and the manner in which the alleged rights were infringed. It was reiterated that the 1st respondent did not act ultra vires as he only exercised his rights in regards to the provisions of section 14 of the County Government Act which vests the 2nd respondent power to make Standing Orders regulating the procedure of the County Assembly.

35. On the degree of irretrievability, the 1st and 2nd respondents urged that the court should consider the need to conserve the status quo and preserve the subject matter so that the petition is not rendered nugatory if conservatory orders are not granted. Reliance was placed on the case of Muslims for Human Rights (MUHURI) & 2 Others v Attorney General & 2 Others [2011] eKLR where the court held that one of the considerations by the court when considering whether to grant or refuse a conservatory order is whether if the order is not given, the application and claim will be rendered nugatory.

36. That the contentious issue in this petition is whether the suspension of the applicants was in violation of *the constitution*. That respectfully, the 1st respondent acted within the law in suspending the applicants as the same was provided for by the law. The court was urged that there was no imminent threat to warrant the grant of the conservatory orders as the court had been invited to unnecessarily intervene in the internal management of the Assembly.

37. On public interest, the respondents relied on the case of Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others [supra] where it was held that conservatory orders bear more decided public – law connotation: for these orders are to facilitate functioning within public agencies as well as to uphold the adjudicatory authority of the court, in the public interest. That the public interest in this matter is to ensure that state officers respect the rule of law and promote public confidence in the integrity of the office they hold. It was reiterated that the applicants conduct on 19.10.2023 caused panic within and out of the County Assembly and it would be against the principle of public interest to grant the conservatory orders sought herein.

38. The respondents urged this Honourable Court to uphold the preliminary objection and declare the petition and the application incompetent and legally untenable as the same ought to be struck out with costs. In the same breadth, counsel urged that should the court find that it has jurisdiction to determine this matter, then the sought orders ought not issue in the circumstances herein.

Analysis and Determination

39. I have considered the preliminary objection raised by the respondents and the prayers sought by the applicants/petitioners in their application. Considering that this court's jurisdiction has been opposed, it would only be prudent to determine the same first.

40. From the pleadings, it is apparent that this court's jurisdiction to hear this matter has been put to question hence if the prayer is upheld, the court will down its tools and move no further step. It is trite that the validity of any preliminary objection is gauged against the requirement that it must raise pure issues of law capable of disposing a dispute with finality. It is therefore, incumbent upon the court seized of the matter to ascertain that a preliminary objection is not caught up within the realm of factual issues that would necessitate the calling of evidence.

41. In Civil Suit No. 85 of 1992, Oraro v Mbaja [2005] 1 KLR 141, Ojwang J, as he then was, cited with approval the position in Mukisa Biscuit v West End Distributors Ltd (1996) E.A.by stating that;

> " ...I think the principle is abundantly clear. A "preliminary objection", correctly understood, is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed".

42. The applicants urged that the 1st respondent failed to uphold the rule of law which restricts the arbitrary exercise of power by subjecting such power to well defined and established laws. That in as much as the 1st respondent asserted that his decision was pursuant to the Garissa County Assembly's standing orders, he failed to establish or constitute the Committee of Powers and Privileges under the *County Assemblies powers and privileges Act* to make an inquiry into the alleged breaches of privilege, which is contrary to the Act. In other words, it was alleged that the 1st respondent did not follow the laid down procedures as he appointed himself as the judge, jury and executioner by assuming the role of the Committee of Powers and Privileges.

43. On the other hand, the respondents contended that the decision taken by the 1st respondent was legal and procedural hence can not be questioned before a court of law as it has no jurisdiction considering that the Assembly has an internal mechanism of resolving such disputes.

44. The question calling for an answer is whether the application/petition offends the doctrine of separation of powers. In this regard, I seek guidance from the case of Margaret Lorna Kariuki & Another v County Assembly of Embu & Another; National Forum for County Assemblies (Interested Party) [2019] eKLR, where the court stated that;

> " 20. The Supreme Court in Speaker of the Senate & Another v Attorney General & 4 Others, Reference No. 2 of 2013; [2013] eKLR signalled that it would be reluctant to question parliamentary procedures, as long as they did not breach *the Constitution*. In reference to Article 109 of *the Constitution*, which recognizes that Parliament is guided by both *the Constitution* and the Standing Orders in its legislative process, the Court thus held:
>
> > "Upon considering certain discrepancies in the cases cited, as regards the respective claims to legitimacy by the judicial power and the legislative policy - each of these claims harping on the separation-of-powers concept - we came to the conclusion that it is a debate with no answer; and this Court in addressing actual disputes of urgency, must begin from the terms and intent of *the Constitution*. Our perception of the separation-of-powers concept must take into account the context, design and purpose of *the Constitution*; the values and principles enshrined in *the Constitution*; the vision and ideals reflected in *the Constitution*...
> >
> > It is clear to us that it would be illogical to contend that as the Standing Orders are recognized by *the Constitution*, this Court, which has the mandate to authoritatively interpret *the Constitution* itself, is precluded from considering their constitutionality merely because the Standing Orders are an element in the 'internal procedures' of Parliament. We would state, as a legal and constitutional principle, that Courts have the competence to pronounce on the compliance of a legislative body, with the processes prescribed ..."

45. In the case of James Opiyo Wandayi v Kenya National Assembly & 2 Others [2016] eKLR the court was emphatic that the issue of disciplining the member of parliament for Ugunja Constituency had met the threshold of fairness and proportionality as well as discharge of general administrative powers under article 47 of *the Constitution*. Odunga J (as he was then) stayed the orders as he held that the doctrine of separation of powers was not available where it was alleged that *the constitution* had been violated.

46. It therefore follows that the court will not interfere with the mandate and in this case County Assembly, if the threshold of fairness and proportionality is discharged with regard to article 47. Of importance to note is the fact that in as much as the Standing Orders are internal rules that govern the running of the various Assemblies, care must be taken to ensure that the interpretation of the same is in consonance with the provisions of *the constitution* being the supreme law.

47. It is thus important to note that a court has the competence to pronounce itself on the compliance of a legislative body in as far as the provisions of *the constitution* are concerned and more so in upholding the rights of those affected. This is intended to protect parties who would have no recourse if the decision maker of the impugned decision deliberately ignores clear procedural requirements for internal dispute

resolution mechanism provided under the relevant provisions thus encroaching into the constitutional right of another person.

48. In view of the above finding, I am inclined to find that this court has the jurisdiction to entertain the suit herein.

49. Having held as above, I will proceed to determine whether conservatory orders sought ought to issue as prayed hence the doctrine of separation of powers does not preclude it from interrogating the same.

50. The nature and the principles guiding grant of conservatory orders in Kenya are well settled. The Supreme Court in Civil Application No 5 of 2014 Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others (supra), at paragraph 86 discussed the subject as follows: -

> 86)"Conservatory orders" bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as "the prospects of irreparable harm" occurring during the pendency of a case; or "high probability of success" in the applicant's case for orders of stay".

51. Conservatory orders are therefore, aimed at preserving the substratum of the matter pending the determination of the main issues in dispute.

52. Given the interlocutory nature of conservatory orders, it is argued, that there is need for a court to exercise caution when dealing with any request for such prayers. This is premised on the reasoning that matters which are the preserve of the main petition ought not to be dealt with finality at the interlocutory stage unless circumstances strongly so demands. [See Ibrahim, J (as he then was) in Muslim for Human Rights (Milimani) & 2 others v Attorney General & 2 others (2011) eKLR and also Centre for Rights Education and Awareness (CREAW) & 7 others v Attorney General (2011) eKLR].

53. It follows that the principles for consideration by a court in exercising its discretion on whether to grant conservatory orders have been developed by courts over time and therefore well settled. In the case of Board of Management of Uhuru Secondary School v City County Director of Education & 2 others [2015] eKLR, the court summarized the principles for grant of conservatory orders as:

    i. The need for the applicant to demonstrate an arguable prima facie case with a likelihood of success, and to show that in the absence of the conservatory orders, he is likely to suffer prejudice.

    ii. The second principle is whether the grant or denial of the conservatory relief will enhance the constitutional values and objects of a specific right or freedom in the Bill of Rights.

    iii. Thirdly, the court should consider whether, if an interim conservatory order is not granted, the petition or its substratum will be rendered nugatory.

    iv. Whether the public interest will be served or prejudiced by a decision to exercise discretion to grant or deny a conservatory order.

54. The first issue for determination in matters of this nature, is whether a prima facie case has been established. It is however worth noting that a prima facie case, is not a case which must succeed at the hearing of the main case. In the same spirit, it is not a case which is frivolous or hopeless. In other words, it has to be shown that a case which discloses arguable issues has been raised and in this case, arguable constitutional issues.

55. On what constitutes a prima facie case, the same was determined by the Court of Appeal in the case of Mirugi Kariuki v Attorney General Civil Appeal No 70 of 1991 (1990-1994) EA 156 (1992) KLR 8. The court, in an appeal against refusal to grant leave to institute judicial review proceedings by the High Court, stated as follows: -

> " It is wrong in law for the court to attempt an assessment of the sufficiency of an applicant's interests without regard to the nature of his complaint. If he fails to show... that there has been a failure of public duty, this court would be in error if it granted leave. The curb represented by the need for the applicant to show, when he seeks leave to apply, that he has a case, is an essential protection against abuse of the legal process. It enables this court to prevent abuse by busy-bodies, cranks and other mischief-makers... In this appeal, the issue is whether the applicant in his application for leave to apply for orders of certiorari and mandamus demonstrated to the High Court a prima facie case for the grant of those orders. Clearly, once breach of the rules of natural justice was alleged, the exercise of discretion by the Attorney General under section 11(1) of this Act was brought into question. Without a rebuttal to these allegations, this appellant certainly disclosed a prima-facie case".

56. Therefore, in determining whether a matter discloses a prima-facie case, a court must look at the case as a whole. It must weigh, albeit preliminarily, the pleadings, the factual basis, the respective parties' positions, the remedies sought and the law. In so doing, a constitutional court must be guided by Articles 22(1) and 258(1) of *the Constitution* which provisions deals with the right to institute court proceedings whenever a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened or when *the Constitution* has been contravened, or is threatened with contravention.

57. In the instant case, the petitioners/applicants reiterated that the power to suspend and otherwise discipline member/s of the County Assembly is the preserve of the Powers and Privileges Committee which is established under section 15 of the *County Assemblies Powers and Privileges Act*. That the Committee investigates or makes inquiry into the complaints of alleged gross disorderly conduct such as is the case herein and thereafter makes appropriate finding. It was urged that in doing this, parties alleged to have committed any gross disorderly conduct are afforded an opportunity to be heard.

58. On the other hand, the respondents argued that the 1st respondent acted within the Garissa County Assembly standing orders in particular orders No.95 to 109. Of significance is Order No.104 which provides that incase of gross misconduct, the speaker or chairperson shall order any member whose conduct is grossly disorderly to withdraw immediately from the precincts of the county Assembly; on the 1st occasion, for the remainder of that day's sitting; on the second or subsequent occasion during the same session, for a maximum of three sitting days including the day of suspension.

59. Considering that the speaker did not exercise his authority pursuant to Sections 15, 16, and 26 of the *County Assemblies Powers and Privileges Act*, his other recourse was order 104 of the Garissa County Assembly standing orders. The arguable issue therefore is whether Order 104 was properly applied as envisaged. Arguably, proceedings by the committee under the powers and privileges Act does envisage the right to be heard. This is a factual and arguable issue hence not hopeless.

60. In my view, the questions raised in the application/petition cannot be said to be frivolous for the reason that the law stipulates how the petitioners ought to have been removed from the Assembly. The question that begs an answer is whether the same was followed. Parties have given opposing views which substantially calls for parties to be given a chance to fully interrogate their case without prematurely dismissing it.

61. On whether the grant or denial of the conservatory relief will enhance any constitutional values and principles, one would have to interrogate the spirit of *the constitution* which is a reflection of the values and principles which Kenyans opted to be guided by in commanding their affairs. The values and principles are diverse and are carefully provided for throughout *the Constitution*. The same are meant to guide and provide direction in the running of the country and also its affairs.

62. The suit herein has been underpinned on violation of the processes as provided for by *the constitution*. That the said violations have since infringed not only the rights of the petitioners but also the rights of the people represented by the petitioners/applicants. That the 1st respondent's impugned ruling is an act in excess of his powers which prejudices the people of Sankuri, Damajale and Galbet wards who urgently require representation by their elected leaders in the County Assembly. I note that the applicants/petitioners listed articles 10, 28,47,50 and 73 of *the constitution* which is the supreme law and that the same had been breached. It follows that all persons whether individually or collectively are enjoined to respect, uphold and defend *the constitution*. Therefore, denial of the orders prayed would not therefore enhance the said constitutional values aforesaid.

63. On whether the petitioner is likely to suffer prejudice and the case rendered nugatory unless the conservatory orders are granted, a court must, in dealing with a petition(s) brought under the various provisions of *the Constitution*, be careful in determining the prejudice at least at the preliminary stages. I say so because, at such stages of the proceedings, the provisions of *the Constitution* alleged to have been infringed or threatened with infringement are yet to be subjected to legal scrutiny.

64. Regarding the question whether the suit attracts public interest, it would be fair to understand what public interest entails. 'Public interest' is defined by the Black's Law Dictionary 10th Edition at page 1425 as: -

> " The general welfare of a populace considered as warranting recognition and protection. Something in which the public as a whole has stake especially in something that justifies government regulation".

65. In this case, it was urged that the 1st respondent's impugned ruling was an act in excess of his powers and which prejudiced the people of Sankuri, Damajale and Galbet wards who urgently require representation by their elected leaders in the County Assembly. At this preliminary stage, it is my view that the listed wards elected leaders to represent their interests at the County Assembly. As such, the fact that the said elected leaders if remain suspended, the rights of the people in the said wards remain threatened. As said, the constitutionality or otherwise of the impugned ruling of 25.10.2023 is at the heart of the petition herein.

66. As a consequence of the circumstances of the matter herein, it is my humble finding that public interest tilts in favor of the petitioners/applicant. Further, considering that the suspension period is coming to an end on 13th February 2024, the petition will be rendered nugatory if the prayers sought are not granted.

67. In a nut shell and taking into account the totality of the facts surrounding this case, it is my finding that the orders commendable to me at this juncture are:

    i. A conservatory order be and is hereby issued staying and/or setting aside the 1st respondent's ruling of 25.10.2023 suspending the 1st and 2nd petitioners from the remainder of the Garissa County Assembly Second Session pending the hearing and determination of the petitioner's Petition.

ii. The petition to be heard by way of reliance on the pleadings, affidavit evidence and written submissions.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 2ND DAY OF FEBRUARY 2024.

J. N. ONYIEGO

JUDGE