



Mutai v Mutai & 2 others; Kirui (Interested Party) (Constitutional Petition 003 of 2023) [2024] KEHC 2628 (KLR) (5 March 2024) (Judgment)

Neutral citation: [2024] KEHC 2628 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
CONSTITUTIONAL PETITION 003 OF 2023**

JK SERGON, J

MARCH 5, 2024

IN THE MATTER OF: ARTICLES 2 (1), 2 (2) , 3 (1) , 10, 19, 20 (1), 23, 47, 48,73, (1), 73 (2), 75 (1), 165, 175 (5), 179 (4), 258 OF THE CONSTITUTION OF KENYA, 2010 .

AND

IN THE MATTER: OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLE 47 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF VIOLATION OF SECTION 8 OF THE FAIR ADMINISTRATIVE ACTION ACT, NO. 4 OF 2015

AND

IN THE MATTER OF VIOLATION OF SECTION 30 (2), (A), 30 (3) ©, 32 (2), 32 (3) OF THE COUNTY GOVERNMENTS ACT NO. 17 OF 2012

AND

IN THE MATTER OF THE COUNTY GOVERNMENT OF KERICHO

BETWEEN

KIPKEMOI RICHARD MUTAI PETITIONER

AND

HE DR ERIC KIPKOECH MUTAI 1ST RESPONDENT

ROSEMARY C ROP 2ND RESPONDENT

THE COUNTY GOVERNMENT OF KERICHO 3RD RESPONDENT

AND

HE ENG FREDRICK KIPNGETICH KIRUI INTERESTED PARTY



JUDGMENT

1. The petitioner herein has moved to court by way of a petition dated 11th May, 2023 seeking the following reliefs;
 - (a) A declaration that the 1st Respondent's decision to delegate the exercise of executive authority of the office of the County Governor to the 2nd respondent violated article 179 (4) and 179 (5) of the Constitution.
 - (b) A declaration that the interested party was empowered by article 179 (5) of the Constitution and section 32 (2), (3), (4) and (5) of the County Government Act to act as governor in the absence of the governor and to exercise the powers assigned to the governor with the exception that he could not nominate, appoint or dismiss.
 - (c) A declaration that by dint of article 259 (3) of the Constitution, the exercise of the functions of the executive office of the governor ought to devolve to the deputy governor whenever the governor is absent from office.
 - (d) A declaration that the 1st respondent's decision communicated vide the letter dated 19th April, 2023 amounts to a reclassification of the executive structure of the county is an attempt to redefine the role of the interested party otherwise than in a manner compliant with the Constitution.
 - (e) A declaration that the 1st Respondent's decision to arbitrary strip the interested party of his constitutional mandate is unconstitutional, illegal, null and void.
 - (f) A declaration that by his acts of commission and omission, the 1st Respondent has grossly violated the Constitution of Kenya, and in particular articles 2, 10, 47, 73, 179 (4), 179 (5) and 232 of the Constitution of Kenya.
 - (g) A declaration that the 1st Respondent, by his acts of omission and commission has grossly violated the Constitution of Kenya, 2010 the County Governments Act, No 17 of 2012 and the law.
 - (h) A declaration that by their acts of commission and omission, the 1st respondent has violated section 3 and 4 (3) (b) of the Fair Administrative Act No 4 of 2015, section 30 (2) (a) and section 30 (3) (c) of the County Governments Act No 17 of 2012.
 - (i) A declaration that by their acts of commission and omission, the 1st respondent has violated section 3 and 4 (3) (b) of the Fair Administrative Act, No 4 of 2015, section 30 (2) (a) and 30 (3) (c) of the County Government's Act No 17 of 2012.
 - (j) An order of permanent injunction be and is hereby issued restraining the 1st respondent from delegating the rules of the interested party or reclassifying the constitutional office of the deputy governor otherwise that in compliance with the Constitution and the law
 - (k) That the costs of this petition be provided and borne by the respondents
 - (l) Any other relief that the court shall deem fit and just in the circumstances
2. The petitioner furnished a brief factual background to the petition as follows; the office of the governor and the deputy governor is intertwined, inseparable and both are elected in the same election. From the



foregoing and the pecking order of ascension to the office of the governor, it flows that in the absence of the governor, the deputy governor is constitutionally mandated to discharge the functions of the executive office of the governor to the extent provided by the Constitution and the County Governments Act, No 11 of 2012. The above notwithstanding, the 1st respondent vide a letter dated 19th April, 2023 addressed to the 2nd respondent and copied to the interested party, the 1st respondent notified various offices of the intended absence between 24th April, 2023 to 3rd May, 2023 and purported to appoint the 2nd respondent to be in charge of all matters at the executive office of the governor during his absence.

3. The petition is supported by the supporting affidavit of Kipkemoi Richard Mutai the petitioner herein who reiterated the factual background to the instant petition
4. The petitioner further deponed that the decision to strip the 1st interested party of his constitutional mandate was ill advised and did not auger with the objects of devolution and the principles of exercise of executive authority and that the same was arbitrary, actuated by malice and without any legal basis.
5. In response to the petition, the 1st respondent filed grounds of opposition dated 29th May, 2023 opposing the petition on several grounds.
6. The 1st respondent contended that the petition is premised on a misconstruction and/or misinterpretation of a letter dated 19th April, 2023 where the 1st respondent asked the 2nd respondent to take charge of the affairs in his office.
7. The 1st respondent was adamant that the role of the interested party is safeguarded under the Constitution and the County Government Act, 2012 and therefore cannot be extinguished through a letter. The 1st respondent contended that the instant petition violated the doctrine of ripeness as the matter had not crystallized enough to warrant this court's intervention.
8. The 1st respondent pointed out that the question of absence was well settled in the case of Kariuki v Attorney General; Waititu & another (Interested Parties) (Petition 373 of 20190 [2022] KEHC 3185 (KLR) (Constitutional and Human Rights) (13 May 2022) (Judgment) where the court insisted that mere absence or temporary absence of the governor does not confer the deputy to act as governor and hence mere/temporary absence was not contemplated under article 179 (5) of the Constitution.
9. The 1st respondent therefore reiterated that the instant petition is bad in law, an abuse of court process and ought to be dismissed.
10. The 2nd and 3rd Respondents filed a joint replying affidavit dated 25th May, 2023 sworn on their behalf by Dr. Wesley Bor the 3rd Respondent's County Secretary.
11. The 2nd and 3rd Respondents deponed that the absence in the instant circumstances did not meet the threshold of absence as enshrined in article 179 (5) of the Constitution. They reiterated that the absence in the circumstances was a mere absence and the same was not occasioned by any incapacity, inability or lack of power to perform duties and in any event not every absence of a governor brings about devolution of power to the deputy governor.
12. The 2nd and 3rd Respondents deponed that the 2nd Respondent religiously performed the assigned duties and that the same was done within the ambit of the law.
13. The 2nd and 3rd Respondents deponed the instant petition is frivolous, vexatious, abuse of court process, non-meritorious and should be dismissed in its entirety as it lacks any viable grounds to stand on.



14. The Interested Party filed a replying affidavit on 28th June, 2023, the replying affidavit was sworn by H.E. Eng. Frederick Kipngetich Kirui the deputy governor, the deputy chief executive of the 3rd respondent, charged with deputizing the 1st respondent in the discharge of his functions including acting in his capacity during his absence from the County.
15. The Interested Party deponed that on 19th April, 2023 he received a letter from the 1st Respondent addressed to the 2nd Respondent and copied to several others, pursuant to which the 1st Respondent notified them of his intended absence and appointed the 2nd Respondent to be incharge of all matters at the executive officer of the county governor during the 1st Respondent's absence.
16. The Interested Party deponed that he has at all times discharged his constitutional mandate as the deputy chief executive of the 3rd respondent, even under the most difficult circumstances characterized by the deliberate and open refusal of the 1st Respondent to delegate responsibilities to him and facilitate his office, which is a matter of public notoriety and subject to a public spat between himself and the 1st respondent.
17. The interested party deponed that article 179(5) of the Constitution is coached in mandatory terms that the deputy governor shall act as the county governor when the governor is absent, there was therefore no room to wriggle out of the said mandatory provisions of the Constitution and that there must be executive deference to the repository of the function before it can be delegated to someone else. Therefore the purported delegation to the 2nd respondent was in violation of the law and effectively usurped the roles of his office.
18. The interested party was adamant that the respondents had grossly violated the Constitution and the law and that the instant petition presents a ripe constitutional dispute which needs to be settled by this Court.
19. The matter came up for directions on 22nd May, 2023 and by consensus of the parties, this Court directed that the petition be canvassed by way of written submissions.
20. The Petitioner filed submissions in support of the petition and in response to the 1st respondent's grounds of opposition and the replying affidavit by the 2nd and 3rd respondents.
21. The petitioner submitted that it was undisputed that the 1st respondent wrote a letter dated 19th April, 2023 notifying of his absence and delegating the exercise of the functions of his office to the 2nd respondent whereas section 32 (2) of the Governments Act, No 17 of 2012 provides that; " The deputy governor shall deputize for the governor in the execution of the governor's functions. "
22. The petitioner was adamant that the import of the letter was to strip the interested party of his Constitutional mandate and assign it to the 2nd respondent.
23. The petitioner submitted that the office of the governor is a vital office in the governance structure of the county government and therefore at the heart of the devolved structure of government. The petitioner further submitted that the roles of the county governor and the deputy governor are intricately linked and therefore the absence of the 1st respondent from office for whatever period and for whatever reason, did not even require him to write a letter devolving the exercise of the functions of his office to the 2nd respondent, it merely and automatically devolved the powers and duties of that office upon the interested party.
24. The petitioner contended that the Constitution empowers the interested party to assume all the powers to enable execution of his functions whenever the 1st respondent is absent without limitation to avert a deficiency on service delivery and ensure a seamless running of the county. Furthermore, the 1st



- respondent purporting to appoint the 2nd respondent, an unelected official, to take charge of the executive office of the county governor was in violation of article 2 (2) of the Constitution which delegates the exercise of sovereign power of the people to elected representatives. The petitioner cited the case of Narok County Government & another v Richard Bwogo Birir & another [2015] eKLR, whereby the Court of Appeal stated that; “Article 73 provide that authority assigned to a State Officer is a public trust which ought to be exercised in a manner that is consistent with the purposes and objects of the Constitution.”
25. The petitioner reiterated that the deputy governor is empowered by article 179 (5) of the Constitution and section 32 (2), (3), (4) and (5) of the County Government Act to act as governor in the absence of the governor and to exercise the powers assigned to the governors except nominate, appoint or dismiss.
 26. The petitioner maintained that in the instant petition the standard to be used to measure what constitutes a gross violation does not involve a mathematical formula but rather a consideration of article 179 (5) of the Constitution alongside other Constitutional provisions violated by the 1st Respondent. The petitioner contended that gross violation has to be considered on a case by case basis taking into account the peculiar facts and circumstances of each case and cited the Court of Appeal Case of Martin Nyaga Wambora & 3 others v Speaker of the Senate & 6 other [2014] eKLR where the court discussed at length what amounts to a gross violation of the Constitution.
 27. The 1st Respondent filed written submissions.
 28. The 1st respondent submitted that the instant petition did not meet the threshold required for a constitutional petition and reiterated that the petitioner did not demonstrate how the Constitution was violated. The 1st Respondent cited the *locus classicus* case of Anarita Karimi Njeru v The Republic (1976-1980) KLR 1272 in which the court stated that in order for a constitutional petition to be sustained; a party must provide evidence which demonstrates how their rights have been violated as merely citing the provisions of the Constitution alleged to have been violated is not enough.
 29. The 1st Respondent maintained that he has powers to appoint and delegate roles in his office and that the same was backed by statutory provisions, he cited section 31 (d) of the County Government Act, 2012.
 30. The 1st Respondent submitted that absence envisaged in the petition did not meet the threshold of absence contemplated in article 179 (5) of the Constitution. The 1st Respondent contended that the absence contemplated in article 179 (5) is not just mere or temporary absence and cited the case of Kariuki v Attorney General; Waititu & another (Interested Parties) (Petition 373 of 20190 [2022] KEHC 3185 (KLR) (Constitutional and Human Rights) (13 May 2022) (Judgment) where the Learned Judge discussed what constituted absence and observed that not every absence will invoke the operation of article 179 (5) of the Constitution.
 31. The 2nd and 3rd Respondents filed joint submissions and reiterated that the 1st Respondents' absence in the pendency of the instant petition does not meet the threshold anticipated by article 179 (5) of the Constitution. The absence in the circumstances is a mere absence and did not in any way render the 1st Respondent to be mentally, physically or legally incapacitated and/or lack ability or power to perform functions of the Office of the Governor. In any event the 2nd Respondent faithfully performed the assigned duties in furtherance of the provisions of article 31 (d) of the County Governments Act which enjoins the 1st Respondent to ensure that there is no loophole in the performance of duties of the Office of the Governor.
 32. The 2nd and 3rd Respondents maintained that there is jurisprudence that the mere absence of a governor does not automatically confer the deputy governor to be in acting capacity and cited the case



- of *Kariuki v Attorney General; Waititu & another (Interested Parties)* (Petition 373 of 20190 [2022] KEHC 3185 (KLR) (Constitutional and Human Rights) (13 May 2022) (Judgment) where Ongudi J. observed as follows; “...since not all forms of absence of a governor from office are deemed to invoke devolution of the governors powers to his deputy.”
33. The 2nd and 3rd Respondent submitted that the 2nd Respondent acted on the assigned roles and could neither defy the same nor delegate further; *delegata potestas non potest delegari* and cited article 183 of the *Constitution* and section 36 (1) of the County Act which empowered the 2nd Respondent to carry out any function incidental to any of the assigned functions. Therefore the 2nd Respondent acted within the ambit of the law when she was assigned delegated duties by the 1st Respondent.
34. The 2nd and 3rd Respondent submitted that the petitioner has not discharged the evidentiary threshold to warrant the grant of prayers sought in the petition and cited section 107 of the *Evidence Act* which provides as follows; “Whosoever desires any court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exists.”
35. I have considered the pleadings and submissions by the parties. I find that the sole issue for determination by this court is whether the petition meets the threshold for a constitutional petition, which answer is in the negative. In *Grays Jepkemoi Kiplagat v Zakayo Chepkoga Cheruiyot* [2021] eKLR the court observed as follows; “It is indisputable that a constitutional petition to be sustainable as such must at a minimum satisfy a basic threshold. It must with some reasonable degree of precision identify the constitutional provisions that are alleged to have been violated or threatened to be violated and the manner of the violation and/or threatened violation. I do not suppose it is enough to merely cite constitutional provisions. There has to be some particulars of the alleged infringements to enable the respondents to be able to respond to and/or answer to the allegations or complaints.”
36. I have considered the case of *Kariuki v Attorney General; Waititu & another (Interested Parties)* (Petition 373 of 20190 [2022] KEHC 3185 (KLR) (Constitutional and Human Rights) (13 May 2022) (Judgment) which has been cited by the parties whereby the court discussed definition of absence and the threshold of absence that invokes article 179 (5) of the *Constitution* and observed as follows; “It is not reasonable to adopt so narrow and strict construction or interpretation of the word ‘absence.’ We think that the other view which is made to depend upon the particular facts and circumstances of each ‘absence’ from the state by the governor comprehends the common sense idea of the word ‘absence’ as used in the *Constitution*.”
37. I have carefully studied the pleadings and submissions by the parties and I am persuaded that the absence in the circumstances giving rise to the instant petition constitute mere and/or temporary absence and that the same was not occasioned by any incapacity, inability or lack of power to perform duties and therefore did not meet the threshold anticipated by article 179 (5) of the *Constitution*. In *Kariuki v Attorney General; Waititu & another* (*supra*) the Learned Judge stated that not all forms of absence of a governor from office are deemed to invoke devolution of the governor’s powers to his deputy.
38. In the premises, I am satisfied that in the present matter there was no violation and/or infringement of any constitutional provisions under the Bill of Rights to justify the petitioner to invoke the constitutional jurisdiction of this Court. The instant constitutional petition is not sustainable and constitutes an abuse of the process of the Court and is accordingly dismissed with no order as to costs.

DELIVERED, SIGNED AND DATED AT KERICHO THIS 5TH DAY OF FEBRUARY, 2024.

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J.K. SERGON



JUDGE

In the Presence of:-

C/Assistant – Mr. Rutoh

No Appearance for the Parties

