



Huka & 2 others v County Assembly of Isiolo & another; Kenya Kwanza Coalition & 2 others (Interested Parties) (Constitutional Petition E009 of 2023) [2023] KEHC 18913 (KLR) (22 June 2023) (Ruling)

Neutral citation: [2023] KEHC 18913 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CONSTITUTIONAL PETITION E009 OF 2023**

EM MURIITHI, J

JUNE 22, 2023

IN THE MATTER OF THE COUNTY GOVERNMENTS ACT 2012

AND

**IN THE MATTER OF SECTION 16 & 17 OF THE COUNTY POWERS &
PRIVILEGES ACT 2017**

AND

IN THE MATTER OF THE ISIOLO COUNTY ASSEMBLY STANDING ORDER

AND

**IN THE MATTER OF ILLEGAL SUSPENSION, DE-WHIPPING AND/OR
REMOVAL OF MEMBERS OF ISIOLO COUNTY ASSEMBLY**

AND

**IN THE MATTER OF ARTICLE 1, 2, 3, 10, 23, 38, 47, 48, 50, 108, 159, 232, 251 & 258
OF THE CONSTITUTION**

AND

IN THE MATTER OF FAIR ADMINISTRATIVE ACTION ACT 2015

BETWEEN

HON. NURA MOHAMMED HUKA 1ST PETITIONER

HON. MEJJA ABDULLAHI GOLICHA 2ND PETITIONER

HON. ABUBAKAR ABDI GODANA 3RD PETITIONER

AND

COUNTY ASSEMBLY OF ISIOLO 1ST RESPONDENT



THE SPEAKER COUNTY ASSEMBLY OF ISIOLO 2ND RESPONDENT

AND

KENYA KWANZA COALITION INTERESTED PARTY

HON. ABDINOOR DIMA JILO INTERESTED PARTY

HON. KAMILA WARSAME INTERESTED PARTY

RULING

Introduction

1. By a Notice of Motion under certificate of urgency dated 3/5/2023 pursuant to Article 23, 38, 47, 48, 50, 108, 159 and 194 of *the Constitution*, Section 1A, 1B, 3, 3A of the *Civil Procedure Act*, section 9 of the *County Governments Act*, section 3 of the *Fair Administrative Action Act*, section 16 & 17 of the County Assembly Powers and Privileges Act, Order 51 and 53 of the *Civil Procedure Rules* and all other enabling provisions of the law, the Applicants seek that:
 1. Spent
 2. Pending the interpartes hearing of this application, this Honorable Court be pleased to issue conservatory orders in favour of the petitioners to resume their roles and functions as members of county assembly of Isiolo with the privileges accruing thereto ante 27th of March 2023.
 3. Pending the hearing and determination of this suit, leave be granted to the Applicants to seek an order of certiorari to bring to this court the “internal memo” dated 28th of March 2023 for purposes of quashing for being in breach of the standing orders 42, 108, 109, 110, 111, 112, 158 and 160 of the County assembly standing orders and Article 47, 48 and 50 of *the Constitution* of Kenya.
 4. The honorable court be pleased to grant orders 2 and 3 above pending the determination of the petition.
 5. The costs of this application be provided for.
2. The application is premised on the grounds on the face of it and supporting affidavit of Hon. Abubakar Abdi Godana, the 3rd Applicant herein sworn on even date. He avers that on 28/3/2023, the Respondent made sweeping communications outside the precinct of the assembly to the media and the clerk of the county assembly to the effect that the Applicants have been suspended for 21 sittings of the assembly and that the county assembly leader of majority had been removed and, in his place, another member elevated to leader of majority coalition. Flowing from the media and fluffy of tweets and social media posts, the Applicants learnt of an “internal memo” authored by the 2nd Respondent to the 1st Respondent’s clerk allegedly suspending them for a period of 21 sittings and consequently curtailing their privileges as members of the County Assembly of Isiolo. Through social media, they further learnt of emergence of falsified minutes dated 27/3/2023 in which, they had been dewhipped/ discharged from committees they were nominated and/or elected to serve as members of the majority coalition. He has been advised by his counsel that Article 165 (3) of *the Constitution* donates jurisdiction to this court with the duty to intervene in actions of other arms of government and state organs where it is alleged or demonstrated that *the Constitution* has either been violated or threatened with violation. The said minutes are a forged set of documents purportedly signed by



them with intentions of impeaching themselves and pulling the carpet off their privileges and powers as donated by the standing orders, powers and privileges Act and *the Constitution*. Despite being aware of the provisions of Article 232 of *the Constitution*, the Respondents went ahead to abuse the process, rules and procedures thereby abandoning their duty of protecting *the Constitution*. Further, on 28/3/2023, the Respondents without cause or a motion moved in the assembly, and after failing in attempting to impeach the majority leader in the county Assembly of Isiolo, subsequently made an adverse, draconian, irrational, arbitrary and in open abuse of discretion a decision against them, after they opposed the irregular move to override procedure and breach of its own standing orders. The intricate balance of legislation and leadership in the County Assembly is guided by the Standing Orders, the County Assembly Powers and Privileges Act of 2017, the *County Governments Act* 2012, the Kenyan Constitution and other statutes and legislations in force which were not adhered to. The present decision of the speaker sought to vary the strict provisions of the statute and the standing orders and thereby summarily, without giving them an opportunity to defend themselves, be heard or establish locus on the allegations shot at them, condemned them to suspension and required them to forfeit all privileges and allowances entitled to their stature as members of the County Assembly of Isiolo. The statutes and the standing orders of the County Assembly of Isiolo are not aware of the creature known as “internal memo” and the same cannot be construed to constitute proceedings of the 1st Respondent or an official record of the County Assembly of Isiolo. In fact, the internal memo was issued outside the precincts of the assembly. The members allegedly discharged are members of Kenya Kwanza (majority coalition) while the replacement belongs to minority coalition, which contravenes standing order 160 on discharge of a member from a committee. Further, standing order 158 provides that nomination of members to a select committee shall reflect the relative majorities of the seat held by each of the parties in the Assembly, and in the falsified minutes, those alleged to be removed belonged to the interested party, with 8 members in the Assembly and replaced with members of minority coalition (KANU) and NARC with 2 and 1 members in the Assembly respectively. He avers that by failing to pursue due process in the reconstruction and discharge of members, the Respondents arrogated to themselves and usurped the mandate of the 1st Interested Party and the selection committee, and cites James Opiyo Wandayi v Kenya National Parliament and Hon. J.B Muturi and another (2016) eKLR. The occasion of the breaches herein against them has ramifications of ousting 4 members from 21 sittings of the assembly, which undermines their mandate and justification for their roles of representation, legislation and oversight donated to them by the people of Isiolo. As a measure to harness the exigencies of the Respondents, the Powers and Privileges Act requires that the assembly, under section 15, retains a functional powers and privileges committee which is vested with the mandate to investigate, report and table a motion for suspension of members and the withdrawal of powers and privileges, and the same cannot be applied suo moto by the Respondents. The purported removal is therefore a breach of the mandatory requirements under *the Constitution* for public participation in such a public interest matter and the principles of this court cited in locus classicus case of Speaker of the National Assembly v James Njenga Karume (1992) eKLR.

Responses

3. The 1st Respondent opposed the application vide a replying affidavit sworn by Salad Guracha, its Clerk on 8/5/2023. He avers that the application together with the petition reeks abuse of court process as the same is a classic example of forum shopping for reason that the Applicants have filed multiple other suits in different courts on account of the same facts, seeking similar or substantially similar orders and involving same parties herein. He received an internal administrative communication from the Speaker of the County Assembly dated 28/3/2023 whose net effect was to communicate to his office the decision to suspend the Applicants from house sittings for 21 days. The said memo is not a foreign document as purported by the Applicants since it is an internal administrative communication



device within the administrative offices of the County Assembly, and more specifically the Assembly of Isiolo and its intent is to keep record of administrative communications to which the Applicants have control over. The House, through his office received a letter from Kenya Kwanza Coalition whose effect was to remove Hon. Abdinur Dima Jillo as the Leader of Majority and replace him with Hon. Adirashid Ali Diba, pursuant to Isiolo County Assembly Standing Order 20 (3). The House has no nexus whatsoever with the management of the political affairs of political parties and/or coalitions save as to effect the same when communicated to the House. His office received another letter dated 28/3/2023 from Majority Whip reiterating that Kenya Kwanza coalition had discharged Hon. Kamila Warsame Suku and Hon. Abdinur Dima Jillo from the services of the Committee on Public Accounts and Investments pursuant to Isiolo County Assembly Standing Order 160. The net effect of the aforementioned communications is that the House through the Speaker was under a legal obligation to comply with the express provisions of the standing orders without further inquiry and the deponent's contestation of falsification are outside the mandate of either his office or that of the Speaker. He is not in any way concerned with the appointments and/or removal of the Party Leaders in the Assembly, and his only obligation is to convey any correspondence directed to him and intended for the Speaker to the Speaker for his further action. Whereas Article 165(3) of *the Constitution* appropriates such jurisdiction as pleaded to this court, judicial restraint demands that where the law provides for mechanisms for addressing certain social issues, such mechanisms ought to be employed to their finality before the courts arrogate themselves jurisdiction. This court is not the right forum to address issues of forgery as the Applicants ought to have reported the same to the relevant authorities constitutionally and statutorily vested with investigatory powers to investigate the alleged forgeries. He accuses the Applicants of failing to demonstrate how the Assembly has interfered with their enjoyment of their rights, and further section 11 of the Powers and Privileges Act insulates them from civil proceedings and judicial interference. The decision to suspend the Applicants was duly arrived at after they became unruly and advertently made the House business inoperable, and all requisite processes were followed. The members were suspended under Standing Order 112 which is a stand-alone order in so far as suspension on account of grave disorderly conduct is concerned, and the internal memo is an internal administrative communication of the Speaker of the House to the Clerk on the decisions of the House and does not in any way form part of the record of the House nor does it in any way prejudice the Applicants.

4. The 2nd Respondent opposed the application vide his replying affidavit sworn on 8/5/2023. He avers that he received a letter dated 28/3/2023 from majority party whip Hon. Ewoton Nicholas Lorot whose net effect was to effect changes to the Majority Party or coalition of the Party's Leadership at the County Assembly pursuant to Isiolo County Assembly Standing Order 20. He received another letter dated 28/3/2023 also from the said majority whip reiterating that Kenya Kwanza coalition had discharged Hon. Kamila Warsame Suku and Hon. Abdinur Dima Jillo from the services of the Committee on Public Accounts and Investments pursuant to Isiolo County Assembly Standing Order 160. On the same date, he made that public communications informing the Assembly of the changes discharging his duties as per the Standing Orders. That communication was implemented immediately as he was given the names of the newly elected party officials and the newly appointed leader of majority took oath. He is not in any way concerned with the appointments and/or removal of the party leaders in the Assembly as his obligation is to communicate any changes forwarded to him by the parties/coalitions. The Applicants have filed PPDT E001/2023 Nairobi seeking the same orders and it is imperative that the Tribunal is allowed to determine the matter before this court appropriates any of its jurisdiction conferred under Article 165 (3) of *the Constitution*. The Applicants seek orders of Certiorari, a relief already sought and declined by the High Court in Judicial Review E001/2023. The Applicants were suspended under Standing Order 112 which is a stand-alone Order in so far as suspension on account of grave misconduct is concerned and the same is not tied to the



procedure purported by the Applicants in the affidavit in response. The internal memo relied on by the Respondent is an internal administrative communication of the Speaker of the House to the Clerk on the decisions of the House and does not in any way form part of the record of the House nor does it in anyway prejudice the Applicants. The application and the petition offend the provisions of section 11 of the Powers and Privileges Act, which inter alia expressly insulates the Speaker, Leader of Majority, Leader of Minority, Chairperson of Committee, Member, Clerk or Member of Staff from civil proceedings for an act done or ordered by them in the discharge of their functions of their office.

Submissions

5. The Applicants/Petitioners urge that by missing the continuum of debate, research, public participation, committee deliberations, expert advice and the congruence of the making of the particularized public policies is a damage, prejudice or loss so apparent and which cannot be compensated by payment of whatever monetary consideration, as espoused in *Giella v Cassman Brown & Co Ltd* (1973) EA 358. They urge that they have approached this court to ventilate on the internal memo dated 28/3/2023 which summarily, and at the stroke of a pen, condemned them as persona non grata, excommunicating them from the assembly for 21 sittings equivalent to 3 months. They urge that their excommunication has grossly been misapplied, stretched and cultured against all known statutory or legal dimensions to the effect that they have henceforth been denied access to their ward offices, the precincts of the assembly together with statutory monthly payments of their staff and maintenance, withdrawal of their monthly allowances, payments of their statutory deductions including standing check off payments for mortgage and loans, denial of all benefits accruing and due as at 27/3/2023, travel and committee reimbursements and ultimately the removal of their appointed representatives in committees such as County bursary committees within their wards. They accuse the Respondents of quickly running to the shelter of sections 10 and 11 of the Powers and Privileges Act yet they fail to implement the statutory provision of Sections 15, 16 and 17 of the same Act. They urge that the internal memo is neither a proceeding of the assembly as enumerated under Order 41 of the Isiolo County Assembly Standing Orders nor a statutory document created by law or best practices in governance, and cite *Izzudin Abdullahi & 9 others v County Assembly of Mandera & 3 others* (2017) eKLR. They urge that standing order 112 of the Isiolo County Standing Orders offends *the Constitution* and is null and void, and cite *Okija Omtata Okoiti & 3 others v Anne Waiguru, the Cabinet Secretary, Devolution and Planning & 6 Others* (2021) eKLR and *Republic v National Police Service Commission ex-parte Daniel Chacha* (2016) eKLR. They urge that a member condemned under Order 112 of the Isiolo County Assembly should be provided with an opportunity to defend self, to a fair trial, open and accountable public process and provided an avenue for appeal, in the absence of which members can be said to be subjected to inhuman treatment, personal indignity, open humiliation and harassment hence they pray for conservation of their rights ante 27/3/2023, and cite *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* (2014) eKLR. They urge that following the said illegal and irregular excommunication, the county assembly of Isiolo has proceeded to make very important public policy documents and held deliberations on the supplementary budget, CIPD and CADP, which is prejudicial to the voters and the public the Petitioners represent. They implore the court to allow the application with costs, and cite *Attorney General & another v Andrew Kiplimo Sang Muge & 2 others* (2017) eKLR, *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* (2013) eKLR and *Faustine Omwanda Kweyu v Carol Majuma Wanyonyi & another* (2017) eKLR.
6. The Applicants/Petitioners filed a list of authorities on 8/6/2023.
7. The 1st Respondent submits that prayer 2 is a substantive prayer in the petition and in view of the doctrine of presumption of constitutionality of parliamentary actions, it cannot issue at a preliminary stage, as such, there is need for the Petitioners to rebut this presumption before a court pronounces



itself substantially in this matter. It urges that the conservatory orders cannot issue at this stage, until the Petitioners prove within the required standard, the unconstitutionality, if at all, of the events of 27/3/2023, and cites *Law Society of Kenya v Attorney General* (2021) eKLR. It urges that a blanket issuance of conservatory orders reinstating the status quo ante 27/3/2023 has the effect of reversing the decision of Kenya Kwanza Coalition in respect of its leadership and membership to various committees in the Assembly. It urges that the decision of who becomes the majority leader or member of the house committee on behalf of the party was exclusively reserved by Parliament and *the Constitution* to the members of a political party and/or coalition of parties and it is neither a function of this court nor of the Speaker, and issuance of prayer 2 is akin to usurpation of the legitimate rights of political parties under Section 10 of the *County Governments Act* as read with Standing Order 20 of Isiolo County Assembly Standing Orders. It urges that a dispute arising out of removal of a member from a committee under Standing Order 160 gives rise to a dispute subject to resolution under section 40(2) of the *Political Parties Act*. It accuses the Petitioners of failing to demonstrate that the mechanisms for appeal provided under the *Political Parties Act*, have been exhausted. It urges that the Petitioners cannot hide beneath the escarpments of mere recital of constitutional provisions to purport that they are raising constitutional and/or fundamental rights and freedom violation issues to escape complying with the laid down procedures, as set out in *Anarita Karimi Njeru v Republic* (1979) eKLR and *David Mathu Kimingi v SMEC International PTY Limited* (2021) eKLR. It urges that the Petitioners in their petition merely recite the provisions of *the Constitution* which does not amount to a claim of violation of constitutional provisions and/or fundamental rights and freedoms of an individual. In fact, there is nowhere in the petition where the Petitioners are questioning the constitutionality of the events of 27/3/2023 neither have they demonstrated how, if at all, those events have violated their fundamental rights and freedoms. It urges that the issue of unconstitutionality of the Standing Orders is neither pleaded nor prayed for both in the application and the petition, and cites *Independent Electoral & Boundaries Commission v Stephen Mule & 3 Others* (2014) eKLR and *Joseph Mbuta Nziu v Kenya Orient Insurance Company Limited* (2015) eKLR. It urges that the communication between the Speaker and the Clerk must be guided by some official record and it is for this reason that administratively, the offices of the Speaker and Clerk of the County Assembly of Isiolo devised the memo as their official administrative and documentable communication device. It urges that standing orders only apply to House and its committee procedures and do not apply as to the Assembly's communication with the outer world. It urges that in granting conservatory orders, a court is called upon to balance the public interest consideration against public policy consideration, and cites *Samburu Bar Wines and Spirits Self Help Group v County Government of Samburu Nyahururu HCCP/E006/2021* (Unreported) and *Gatirau Peter Munya v Dickson Mwenda Githinji & 2 Others* (2014) eKLR. It urges that the petition is improperly before the court to the extent that it challenges coalition activities and/or decisions made on 27/3/2023, it fails to comply with *Anarita* (Supra) and *Mumo Matemu* (Supra) and, therefore, it ought to be dismissed.

8. The 2nd Respondent urges that the constitutionality of the actions of the Respondents has not been challenged by the Petitioners, as their application only speaks to the decision by Kenya Kwanza Coalition of 27/3/2023 to remove the leader of majority and the various members of County Assembly from their House Committees, which dispute falls in the jurisdiction of the Political Parties Dispute Tribunal as per Section 40 of the *Political Parties Act*, a matter being adjudicated upon in Meru PPDT No. E001/2023. It urges that the Petitioners have not elaborated the constitutional provisions that were infringed in their removal from the House Committees by their Political Party, as the petition only recites various constitutional provisions without specifically directing this court to an infringement or violation thereof, and cites *Anarita Karimi Njeru* (No. 1) (1979) 1 KLR 154. It faults the Applicants for failing to plead the questions of constitutionality, and cites *David Sironga Ole Tukai v Francis Arap Muge & 2 others* (2014) eKLR. It urges that standing orders do not apply to administrative



communications between the Speaker and the Clerk of the County Assembly and the internal memo is not in any way a breach of the Standing Orders listed or the constitutional provisions. It urges that the Applicants are seeking a mandatory injunction to compel the Respondents and the Interested Parties to reinstate them to their house committees by portraying it as a conservatory order, and the court is not capable of granting such orders in the interim. It faults the Applicants for failing to demonstrate the prejudice they may suffer if the conservatory orders are not granted, how the petition or its substratum will be rendered nugatory if they are not returned to their respective Committees in the House and also the purpose the conservatory orders will serve in public interest, and cites *Invesco Assurance Co. Ltd v MW (Minor suing thro' next friend and mother)* (HW) (2016) eKLR, *Judicial Service Commission v Speaker of the National Assembly & Another* (2013) eKLR, *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* (2014) eKLR, *Wilson Kaberia Nkunja v The Magistrate and Judges Vetting Board and others* (2016) eKLR and *Board of Management of Uhuru Secondary School v City County Director of Education & 2 others* (2015) eKLR. It urges that the grant of the prayers to remove the new members and reinstate the Petitioners and the order to quash the internal memo at this juncture would mean that this court is issuing final orders at the interim stage, as the nature of those prayers would determine the entire petition, and cites *Okiya Omtatah Okoiti v Attorney General & 5 others* (2020) eKLR. It urges the court to strike out the petition and dismiss the application with costs.

Analysis and Determination

9. Having considered the pleadings herein and the submissions on record, the court finds the issues for determination to be (a) whether the Petition and the Notice of Motion filed thereunder is competent; (b) the grant of prayers sought will amount to grant of the final orders of the Petition; and (c) whether the application for conservatory orders pending hearing of the petition is merited.

Right of appeal under Standing Order 155?

10. In allowing the application dated 3/5/2023 to proceed to hearing despite the respondents' strong urging for the doctrine of constitutional avoidance or judicial restraint in matters capable of resolution by other lawful means, the court had considered that it had not been demonstrated that there existed an alternative process for challenging the suspension under the law or standing orders.
11. The Counsel for the 1st respondent pointed to Standing Order No. 155 of the Isiolo County Assembly Standing Orders and urged that there was right there a procedure for appealing the Speaker's decision to the Committee on Privileges. Whether the said Standing Order provides for an appeal from the decision of a Speaker under Standing Order 112 is a matter for determination at the hearing of the Petition.
12. At this stage, having read the Standing Order No. 155, the Court considers that there is an arguable case that no procedure for appeal is provided for, and consequently, the petitioners' right to fair hearing is to the extent of lack of an appeal or other procedure to challenge the adverse decision.

Anerita Karimi Njeru standard

13. The Counsel for the 2nd respondent objected to the Notice of Motion on grounds that the petitioners had not complied with the rule on specificity of pleading in constitutional cases as established in *Anerita Karimi Njeru v. AG* and approved in *Mumo Matemu supra*. This Court has previously considered the Rule in *Anerita Karimi Njeru* in the case of Nairobi Hc Petition No. 284 of 2016, *Bryson Mangla v. Attorney General & Others*, as follows:

“Particularity of pleading constitutional cases



9. The requirement of setting out with specificity the particulars of the petitioner’s complaint under the Bill of Rights and other constitutional litigation (and indeed any pleading before the court) is a requirement of common sense that a claimant’s case should be clear and elaborate to enable the respondent know the case it has to meet and the court the question it will be asked to determine. Pleadings should not leave the Court guessing the case before it, as the court in *Anerita Karimi Njeru*, supra, did or the respondent the case he has to answer.
10. The context of the oft-cited holding of the High Court (Travelyan J. and Hancox, JJ.) in *Anerita Karimi Njeru v. Republic* (No. 1) (1979) KLR 154, 156 gives the background and motivation of the directions for precision in pleading constitutional infringement cases, which is applicable to all litigation:

“On the morning of the commencement of the hearing before this Court Mr Muttu representing the Republic raised a preliminary objection. After hearing it, we then invited Mr Mwirichia to give us further and better particulars of precisely that which he is alleging under the second head of his complaint, that is to say that the applicant was not given facilities to procure the attendance of witnesses other than Mr Mase. In the event he did not do so; and in our opinion he could not validly do so, for he is on record as having said to the magistrate, after he had returned to conduct the applicant’s defence, that the only evidence the defence wished to call was that of Mr Mase. Accordingly, in our view, the only complaint that can lie of an alleged refusal to afford the defence such facilities (and we accept that this means “reasonable facilities” under section 77(2) (e) of *the Constitution*) is as respects Mr Mase. We mention that we also sought to be enlightened as to which of the paragraphs of section 77 of *the Constitution* were thereby alleged to have been infringed, and Mr Mwirichia referred to his list of authorities (filed on to the day preceding the hearing) which mentioned both paragraphs (c) and (e) of subsection (2) of that section. This was a rather curious manner of bringing a statutory provision to the notice of a court of law, but, at all events, we were prepared to permit Mr Mwirichia to develop his arguments under both paragraphs. In the event, on the second day of the hearing before us, Mr Mwirichia abandoned the position he had previously taken up under paragraph (c). We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to *the Constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”

14. The test is one for (a) “reasonable degree of precision that of which he complains”, (b) “the provisions said to be infringed”, and (c) “the manner in which they are alleged to be infringed”. The Applicants are accused of reciting Articles of *the Constitution* in the petition without particularly demonstrating



how the same were violated, as authoritatively stated in the Anarita Karimi Njeru Case (Supra). The Court considers that the Applicants/Petitioners' case for breach of constitutional right to fair hearing is reasonably discernable from the facts supporting the petition as one alleging breach of due process and the unavailability of an avenue for appeal against an impugned decision, and the Respondents and the Court are no embarrassed in understanding the case they, respectively, have to respond to and adjudicate on. The Court finds that the petitioners' case is "clear and elaborate to enable the respondent know the case it has to meet and the court the question it will be asked to determine."

15. While the Petitioners may not have pleaded their case in an elegant manner, connecting each fact to the relevant constitutional violation alleged, this court does not see that the respondents were in any way embarrassed in their response by the manner of pleading in the Petition. The Petitioners' case appears simply to be that the 2nd respondent's decision made through the internal memo offended the petitioners' rights to fair trial, etc. While the Petitioners set out paragraphs 18-44 of the Petition the constitutional, statutory and regulatory provisions relied on, the facts of breach of the constitution, statute and regulations is set out in the statement of facts at paragraphs 6-17 of the Petition as follows:

"Facts

6. That the speaker failing to pursue due process and the rules of procedure in the house falsified minutes dated 27th March 2023 and originated an Internal memo dated 28th March 2023 whose Import was to discharge the applicants from their committees and suspend them from the assembly for 21 sittings.
7. That the said minutes are falsified to arrive at a quorum requisite for the invoking of Order 20 of the county assembly standing orders.
8. That flowing from the falsification and the draconian pursuit to implement the said intentions. the 1st respondent was faced with raucous within and outside the assembly precinct on the session of 28th March 2023 thereby failing to admit, dispense or ventilate on the order paper or at all table a motion as required by statute on the said date and consequently. having the house adjourned indefinitely.
9. That having failed in attempting to impeach the Majority Leader in the county Assembly of Isiolo, subsequently and outside the precinct of the house the 2nd respondent made an adverse, irrational, arbitrary and in open abuse of discretion a decision against the Applicants who opposed the attempts to breach House Standing Orders and Procedures and suo moto suspended them for 21 sittings.
10. That the intricate balance of legislation and leadership in the County Assembly is guided by the Standing Orders. The County Assembly Powers and Privileges Act of 2017. the County Governments Act 2012. the Kenyan Constitution and other statutes and legislations in force. In particular the process for the suspension of a member of a County Assembly is laid out in Standing Orders 108 to 112, which procedure was not followed by the respondents.
11. That the memo served to the clerk on behalf of the 1st respondent herein, on whose premise the applicants have been denied their privileges is materially faulty, defective, and does not fall within the confines of Section 10 and 11 of the Powers and privileges Act as the same is neither a committee proceeding or



a motion of the house or a proceeding in the assembly and therefore null and void ab initio.

12. That the Applicants are Members of the County Assembly of Isiolo entitled to sit in all assembly meetings and committees and the imaginary creature referred to as the "internal memo" is a strange creation of the speakers imagination without a basis in law or standing orders.
 13. That in light of the provisions above, Suspension of a member on the floor of the house Is only allowed for periods of 1 day, 4 days or a maximum of 28 sitting days arising from 1st, 2nd and subsequent gross violations of the standing orders respectively and the powers and privileges Act provide for the process of the penalty where an Indict of grave disorderly conduct is to be established and founded against a members under sections 15, 16 and 17 of the statute by the recommendation of Powers And Privileges Committee Of The County Assembly.
 14. That the urgency in the matter is that the impugned decision of the respondent has grave ramifications against the applicants and pose a threat to their tenure as members of the County Assembly of Isiolo resulting from absence in the house for more that eight sittings based on an irregular, falsified and biased footing of the administrative powers of the respondents.
 15. That the majority coalition has been deducted to 12 members after the election petition and the communications of the speaker declared him Kevin Waruguru a persons non grata. Therefore the allegations of having minutes by the respondents on the face of facts should have informed the respondents of the falsification of records.
 16. That in the event that such an arbitrary decision Is not arrested, the applicants will suffer loss Irreparable and not capable of being compensated or remedied including such losses as loss of political capital, social good will from their constituencies, injury to the person and dignity of the applicants and eventual loss of powers and privileges incumbent of members of a County Assembly.
 17. That the county assembly standing orders and the respondents have not made provisions for an appeal or such an intermediary process following their impugned decision and therefore the respondents will not be prejudiced if this application is allowed.”
16. The Petitioners clearly comply with the requirements of specificity set out in *Anerita Karimi Njeru v. The Republic* case. This Court finds that in the alleged failure to afford the Applicants a fair hearing and/or a mechanism for appealing against the decision, the Petitioners have presented a prima facie case, or an arguable case at the very least, fit for further investigation upon full hearing of the Petition by the court. With respect, and without making a concluded view on the matter, the Court does not find that Standing Order 155 of the Isiolo County Assembly Standing Orders afford the necessary procedure for appeal from the decision of the 2nd Respondent impugned herein.



Conservatory orders

17. All parties agreed on the applicable principles for the grant of conservatory orders as set out by the Supreme Court of Kenya in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others*, Civil Application no. 5 of 2014, [2014] eKLR, (para. 86) that –

“Conservatory Orders bear a more decidedly 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 issue as “the prospects of irreparable harm” occurring during the pendency of the case; or “high probability of success” in the Applicant’s case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of the case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.”

18. The appreciation of this court of these principles was set out in Nairobi Const. Pet. No. 206 of 2016 *Satinderjit Singh Matharu V. Armajit Singh Gabir & 5 Others*, as follows:

“Principles for the grant of the conservatory order

5. Despite varied nomenclatural expressions, the principles upon which the High Court considers application for conservatory orders in constitutional litigation are now settled by several decisions on the point, and may be condensed as follows:-

1. The applicant must demonstrate prima facie case, or an arguable case, for the grant of the relief sought.
2. The applicant must stand to suffer an irreparable harm, injury or loss not remediable by any other relief; and
3. As a remedy in constitutional litigation, the conservatory order calls for consideration of the public interest in the matter, and the balance of convenience between the petitioner’s and the respondent’s case must favour the grant of the conservatory order.

See generally, authorities cited by the petitioner, *AG v. Sumair Bansraj* [1985] 38 WIR 286; *Tunoi & Anor v. Judicial Service Commission and Anor*, (2014) eKLR; *Judicial Service Commission v. Speaker of the National Assembly & Anor*, (2013) eKLR; *Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 Ors.* (2014) eKLR; *Centre for Rights Education and Awareness (CREAW) & 7 Ors. v. AG* (2011) eKLR; and *Centre for Human Rights and Democracy & Ors. v. The Judges and Magistrates Vetting Board* (2012) eKLR.

6. This Court has also previously expressed itself on the matter. See *Muslims for Human Rights (MUHURI) & 4 Ors. v. Inspector General of Police & 2 Ors.*, Mombasa Petition No. 62 of 2014 of 22nd December 2014, where the Court held as follows:

“The emerging principles for the grant of injunction or conservatory orders under the constitutional litigation, as I



understand them, are firstly, that the applicant must demonstrate an arguable case - sometimes called prima facie arguable case - the reference to arguable case distinguishing it from the prima facie test of the *Giella v. Casman Brown* (1973) EA 385 traditionally applied in regular civil cases; secondly, that the applicant must show that the petition would be rendered nugatory or that the damage that would be suffered in the absence of the conservatory order would be irreversible; and, thirdly, that in constitutional cases, the public interest in the matter would be considered and generally upheld. See *Kenya Transport Association Limited v. Cabinet Secretary for Transport and Infrastructure and Ors.*, Mombasa HC Petition No. 16 of 2014 where I considered some of the decisions on the matter as follows:

“The tests for the grant of conservatory orders has been variously expressed by different courts. See Mombasa High Court petition No. 7 of 2011, *Muslim for Human Rights and 2 Ors v the Attorney General*, per Ibrahim J. (as he then was), Mombasa High Court Petition No. 47 of 2011 *Harun Barky Yator v. Judicial Service Commission* (JSC), per Okwengu J, (as she then was), Nairobi High Court Petition No. 557 of 2013, per Majanja J, and *Mecha Magaga v Jackson Obiero Magaga* (2014) eKLR, per Okong’o, J. All the courts require for the grant of conservatory orders a prima facie case or a prima facie arguable case as in Yator’s case; irretrievability or irreparability if conservatory order is not granted and the subject matter is irretrievably lost (akin to the irreparability of damage test) and a balancing of the interests of the applicant and the respondents. There arises confusion as to whether the test of standard of the applicant’s case is on the prima facie or arguable case. Once accept that the court cannot determine the disputed merits of the case at the interlocutory stage, the correct standard must be the standard of arguable case. See *Mbutbia v. Jimba Credit Corporation* (1988) KLR 1. I also consider that Under Article 23 (3) of *the Constitution*, the court may make a broad spectrum of orders as conservatory orders to preserve the status quo where circumstances warrant and that may include fashioning a remedy to fit the particular circumstances of the application before the court.”

19. The Applicants are only concerned with the actions of 28/3/2023 and not those of 27/3/2023. The Applicants are in this petition challenging the constitutionality of the internal memo of 28/3/2023 suspending them from house sittings for a period of 21 days. And therefore, the question before the court is whether the said suspension was in accordance with the law and *the Constitution*. The issues of sub judice and res judicata, regurgitated by Counsel Lesaigor for the 1st Respondent and Theuri for the



2nd Respondent during their oral submissions in this application, with respect, have been exhaustively addressed by this court in its ruling dated 5/6/2023 rejecting the Preliminary Objection thereon.

20. The Applicants in their application dated 3/5/2023 seek conservatory orders to resume their duties at the County Assembly of Isiolo and leave to apply for certiorari for purposes quashing the internal memo dated 28/3/2023 for being in breach of standing orders 42, 108, 109, 110, 111, 112, 158 and 160 of the County Assembly of Isiolo Standing Orders and Articles 47, 48 and 50 of *the Constitution*.

21. According to the internal memo dated 28/3/2023, the Applicants are accused of attacking the persona of the Speaker, a conduct deemed to be gravely disorderly, thereby violating the provisions of Standing Order 112 (1a,c) of the Isiolo County Assembly Standing Orders. That Standing Order provides that:

- “(1) Conduct is gravely disorderly if the Member concerned
 - (a) Uses violence against a Member or other person in the Chamber or Committee –
 - (b) Attempts to or disrupts the Speaker’s Procession;
 - (c) Handles, dismember, breaks, attempts to snatch or snatches and or removes the Mace from its place in the Chamber;
- (2) The Speaker or the Chairperson of Committees shall call a Member whose conduct is gravely disorderly to order, and shall order the Member to withdraw immediately from the precincts of the Assembly –
 - (a) On the first occasion, during the same Session, for a minimum of fifteen sitting days and a maximum of twenty-one sitting days, including the day of suspension;
 - (b) on the second occasion, and any subsequent occasion during the same Session, for a minimum of twenty-two sitting days and a maximum of a period equivalent to a Session, including the day of suspension.
- (3) In the event of grave disorder arising in the Assembly, the Speaker may adjourn the Assembly forthwith or suspend any sitting for a period to be determined by him or her.
- (4) In the event of grave disorder arising in the Committee of the whole Assembly, the Speaker shall resume the Chair forthwith.”

22. The Applicants seek conservatory orders to resume their roles and functions as members of the county assembly of Isiolo with the privileges accruing thereto ante 27th of March 2023. There can be no dispute that the act of attacking the persona of the Speaker within the precincts of the Assembly is in itself uncouth and it deserves punishment in line with the provisions of Standing Order 112 of the County Assembly of Isiolo Standing Orders. The applicants’ case, however, appears to be that before the said punishment is inflicted upon them, the Applicants must be accorded a fair hearing and/or an avenue for appeal against the said decision in line with the provisions of Articles 47 and 50 of *the Constitution*.

23. That is what the rights to a fair administration act and fair hearing under Articles 47 and 50 of *the Constitution* entail. The Court in *Republic v Firearms Licensing Board & another; Ex parte Jimi Wanjigi*



[2019] eKLR, (John M. Mativo J. as he then was), while appreciating the importance of the right to a fair hearing held that:

“*The Constitution* recognizes a duty to accord a person procedural fairness or natural justice when a decision is made that affects a person’s rights, interests or legitimate expectations. It is a fundamental rule of the common law doctrine of natural justice expressed in traditional terms that, generally speaking, when an order is made which will deprive a person of some right or interest or the legitimate expectation of a benefit, he is entitled to know the case sought to be made against him and to be given an opportunity of replying to it...The right of a person to defend him/herself in the face of a decision potentially affecting his/ her rights or interests necessarily implies that the person must receive prior notice of the facts on which the decision will be based. Failure to give proper notice is itself a denial of natural justice and of fairness. I have carefully analyzed the facts of this case. I note that no notice was served upon the ex parte applicant. Details of the complaint (if any) were not availed to him nor have they been provided in this court. He was not accorded a hearing.”

24. There is, of course, the allegation that the 2nd respondent Speaker’s exercise of the disciplinary powers under the Standing Orders were taken “outside the precinct of the house [when] the 2nd respondent made an adverse, irrational, arbitrary and in open abuse of discretion a decision against the Applicants who opposed the attempts to breach House Standing Orders and Procedures and suo moto suspended them for 21 sittings.”

It would appear that Standing Order No. 112 prescribes discipline with regard to conduct, as relevant here, “in the Chamber or Committee”.

Final orders at Interlocutory stage

25. The court notes that the Petitioners in their Petition seek specific reliefs that

- “2. This court be pleased to issue an order of certiorari to bring into this court and quash the internal memo dated 28th March 2023;
3. A perpetual order do issue directing the petitioners to resume their roles and functions as members of county assembly of Isiolo with the privileges accruing thereto ante 27th of March 2023.”

The court is minded, as urged by Counsel for the 2nd Respondent, that in granting those orders in those terms at this interlocutory stage would summarily determine the Petition without affording the parties herein an opportunity to be heard on the full petition.

26. The Court accepts that the grant of prayer no 3. of the Notice of Motion on judicial review in the context of this constitutional petition would be to grant an aspect of a final order. It is a clear misapprehension by the Petitioners of the remedy of judicial review under article 23 of *the Constitution*. The grant of leave to commence judicial review application is only necessary in proceedings under Order 53 of the *Civil Procedure Rules*. Under Article 23 (3) of *the Constitution*, the Court is empowered to grant appropriate relief including an order of judicial review, which is the final orders of certiorari, mandamus and prohibition not leave to commence proceedings which the petitioner by the constitutional petition will already have commenced. Prayer no. 3 of the Notice of Motion herein is, with respect, misconceived.



27. In prayer no. 2 of the Notice of Motion which the petitioners, by prayer no.4 thereof seek in the interim pending the hearing of the Petition, an order is sought for –

“conservatory orders in favour of the petitioners to resume their roles and functions as members of county assembly of Isiolo with the privileges accruing thereto ante 27th of March 2023”

28. The grant of this order in whole would be the grant of the prayer no. 3 of the Petition. The Court considers, however, that there is scope under the prayer No. 4 of the Notice of Motion to fashion appropriate orders in accordance with the provisions of Article 23 (3) of *the Constitution* limited to the interlocutory stage and leaving the main petition for full hearing.

Appropriate relief

29. The Court is empowered to fashion a suitable remedy under the circumstances of the case before it in terms of Article 23 (3) of *the Constitution* which provides as follows:

“3. In any proceedings brought under Article 22, a court may grant appropriate relief, including—

- a. a declaration of rights;
- b. an injunction;
- c. a conservatory 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.”

30. The appropriate relief in this matter having regard to all the circumstances of the case is for an order that uphold the representation of the people of the County Assembly Wards affected while holding in abeyance the question of the privileges and allowances of Members of the County Assembly. This interlocutory order pending the hearing of the Petition is fashioned as an appropriate relief by way of a conservatory order to facilitate the participation of the Members in the deliberations of the County Assembly and therefore representation of inhabitants of their respective Wards of the County Assembly of Isiolo. This flows from the prayer no. 2 as read with No. 4 of the Notice of Motion, and, with respect, the court does not thereby address, as urged by Mr. Theuri, Counsel for the 2nd respondent, an unpleaded matter.

31. The issue of bestowal and payment of any privileges and allowances, which is personal and private to the office of the particular Members of the County Assembly must await the determination of the Petition on the validity of the suspension by the 1st Respondent Speaker of the County Assembly. Private law factor of substantial loss or “the prospects of irreparable harm” occurring during the pendency of the case” as held in Peter Gatirau Munya case is not a consideration for grant of conservatory orders. The Court does not consider as substantial loss, even if that were an ingredient of the test for conservatory order, such loss of allowances whether to the petitioners or persons and offices associated with them as Mr. Mwendani, Counsel for the Petitioners, sought to introduce by



submissions before the court. In any event, not being pleaded evidence of the specific loss of allowances may not be introduced by way of submissions, written or oral.

Conclusion

32. When all is said and done, Counsel for the Petitioners has failed to present a compelling case for the issue of the conservatory orders sought herein for the resumption of the suspended petitioners to the privileges, prestige, allowances, or perks of their offices.
33. However, as regards the complaint urged in that the members of the affected Wards of the County of Isiolo are denied representation by the continued suspension, if wrongful suspension, of the Petitioners there is a public interest element consistent with the object of conservatory orders “to facilitate ordered functioning within public agencies”. While the Court investigates the validity of the suspension, the same may be stayed in the public interest consideration that the inhabitants, voters and the residents, of the Wards are continuously represented in the County Assembly, but the issue of private entitlements to the Members must await the determination on the validity of the suspension.
34. It is indubitable that the Respondents have power to discipline errant members of the County Assembly. It would be a strange thing to argue that a member of County Assembly who behaves in a manner dishonourable to the Assembly, its members, leadership or officers or and violently causes disruption of the proceedings of the House cannot be disciplined! The County Assembly is an august House whose business, proceedings and deliberations must be dignified and conducted with utmost honourable conduct, and there is no place for boisterous verbal and or violent physical attacks, real or threatened, or the reasonable apprehension thereof, among members or against the House leadership or the officers of the House.
35. While the Court does not condone breach of discipline by the Honourable Members of the County Assembly, and consequently would uphold the provisions of standing orders which empower the Speaker and the County Assembly to discipline by suspending a misbehaving member, it must also uphold the constitutional rights of a member to fair hearing before a decision to suspend is arrived at by either of the two competent authorities. Where such fair hearing is allegedly not given, the affected party in enforcement of his rights may appeal, in accordance with the procedure therefor prescribed, if any, and or to the Court as the guarantor of constitutional Bill of Rights.
36. For avoidance of doubt, the Court makes an order staying the suspension of the Members to the extent only that they are allowed to participate in the debate in committee and plenary sessions, as applicable, to enable them effectively represent their constituencies. The question of privileges and payment of any allowances to the Members of the County Assembly petitioners herein shall await the determination of the Petition, or further orders of the Court.

Orders

37. Accordingly, for the reasons set out above the Notice of Motion dated 3/5/2023 filed herein is allowed in terms of prayer no. 2 as read with prayer no. 4 thereof, to the extent limited to allow the attendance and participation of the Petitioners as Members of County Assembly in the debates and proceedings of the County Assembly and its Committees for the effective representation of the inhabitants of the respective Wards of the County Assembly that they represent.
38. For clarity, the Court does not authorize the resumption of the Petitioners to the membership and or leadership of Committees of the Isiolo County Assembly from which they may have been removed or de-whipped by the Kenya Kwanza Coalition Party, which matter is pending determination before the Political Disputes Tribunal as PPDT E001/2023 Nairobi or elsewhere.



39. Further, the Court does not make any order for the stay of the suspension with regard to privileges and payment of allowances, which will remain in force until the hearing and determination of the Petition or further orders of the Court.

40. There shall be no order as to costs.

Order accordingly.

DATED AND DELIVERED THIS 22ND DAY OF JUNE, 2023.

EDWARD M. MURIITHI

JUDGE

Appearances:

Mr. Mwendani F. Advocate for the Petitioners.

Mr. Aluku with Mr. Lesaigor for the 1st Respondent.

Mr. E. Theuri with Ms. Kiunga for the 2nd Respondent.

N/A for the Interested Parties.

