



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**PETITION NO. E002 OF 2021**

**HON. JAMES WAHOME NDEGWA.....PETITIONER/APPLICANT**

**VERSUS**

**HON ZACHARY MWANGI NJERU.....1ST RESPONDENT/1ST CONTEMNOR**

**HON.EDINALD WAMBUGU KINGO.....2ND RESPONDENT/2ND CONTEMNOR**

**THE COUNTY ASSEMBLY OF NYANDARUA.....3RD RESPONDENT**

**THE GOVERNMENT PRINTER-GOVERNMENT PRESS.....4TH RESPONDENT**

**THE INSPECTOR GENERAL OF POLICE.....5TH RESPONDENT**

**THE HON. ATTORNEY GENERAL.....6TH RESPONDENT**

**AND**

**ELIZABETH WANJIKU MUTHUI.....3RD CONTEMNOR**

**JOHN DUBE KAMURIA.....4TH CONTEMNOR**

**BENSON LEPARMORIJO.....5TH CONTEMNOR**

**CONSOLIDATED WITH**

**CONSTITUTIONAL PETITION NO. E01 OF 2021**

**BETWEEN**

**HON. ZACHARY MWANGI NJERU.....PETITIONER/APPLICANT**

**VERSUS**

**HON. JAMES NDEGWA WAHOME .....1ST RESPONDENT**

**HON. MR. MUKIRI MUCHIRI.....2ND RESPONDENT**

**AND**

**THE COUNTY ASSEMBLY OF NYANDARUA .....1ST INTERESTED PARTY**

**THE COUNTY GOVERNMENT OF NYANDARUA.....2ND INTERESTED PARTY**

**RULING**

1. The applicant filed a notice of motion dated **23rd July 2021** under certificate of urgency seeking for orders interalia;

**a. THAT pending interpartes hearing and determination of this application, the honourable court be pleased to grant a temporary order of stay of execution of its decree and/or orders made on 22nd day of July 2021 as regards to prayer no. 2.**

**b. That this honourable court be pleased to set aside and/or review the orders issued on the 22nd day of July 2021.**

2. The application is premised on the applicant's supporting affidavit and the following grounds;

3. THAT there is an apparent error on the face of the record as regards to who is the acting clerk of the Nyandarua County Assembly. The said orders contradict existing orders issued by the Employment and Labour Relations Court on 8th day of March 2021 in which the Employment Court issued a restraining order against Gideon Mukiri Muchiri from interfering with the functions of Elizabeth Wanjiku Muthui in her roles and functions as the Acting Clerk of Nyandarua County Assembly in ELRC E007 of 2021 Elizabeth Wanjiku Muthui v Kariuki Muchiri which orders are still in force till to date.

4. This Court should not be seen to be contradicting the Orders issued by the Employment Court on the 8th day of March 2021 by referencing to one Gideon Mukiri Muchiri as the Acting Clerk of the Nyandarua County Assembly.

5. The orders pertaining to the mace of the County Assembly are equally contra statute noting that the Nyandarua County Assembly Standing Orders have provided effective guidelines on how the mace should be kept.

6. Standing Order No. 3 The Mace of the Assembly shall; "Form part of the Speaker's procession whenever the Speaker is entering or leaving the Chamber; be positioned at a place designated for that purpose at all times whenever the Assembly is sitting, including the time when the Assembly is in Committee; and, be kept in safe custody by the Sergeant-at-Arms whenever the Assembly is not sitting.

7. An attempt by any Member to remove the Mace of the Assembly from its place in the Chamber or to dispossess the Mace from the Sergeant-at-Arms during Speaker's Procession or at any other time, shall be dealt with in accordance with **Standing Order 112** (Disorderly Conduct).

8. As such, the Mace cannot be handed to an individual personally and particularly noting that the County Assembly is on recess and once the sittings resume on the 3rd day of August 2021, the mace shall be availed for the normal business of the County Assembly.

9. That the acting clerk has written a letter to the Deputy Registrar of the High Court indicating that she has complied with the order and that once the normal business of the County Assembly shall resume, the mace shall be handed appropriately. In his further supporting affidavit, the 1st respondent averred that it is not in the purview of this court to assess the validity of his appointment but rather it is the purview of the Employment and Labour Court. He further averred that the said order suspending all resolutions of the board could not apply in a blanket manner and was only restricted to the termination of the claimants and that by dint of **Article 236 of the Constitution** Elizabeth Wanjiku was shielded from any arbitrary actions.

10. It was further averred that Elizabeth Wanjiku assumed office sometime in March 2021 and the law could not apply retrospectively. He added that pursuant to the **High Court order in Appeal No. E527 OF 2021**, Reuben Gitau and Samuel Kaiyani remain valid members of the Nyandarua County Assembly Service Board and that Elizabeth Wanjiku was appointed by a fully constituted Board of the Nyandarua County Assembly. The 1st respondent averred that while it is conceded that the Employment Court did discharge the orders issued on 28th July 2021, the same did not alter her position as the Acting clerk as the order granted was a temporary injunction restraining Gideon Mukiri Muchiri from interfering with her functions as the clerk of the County Assembly.

11. The petitioner filed a replying affidavit dated 28th July 2021 and averred that the orders of 8th March 2021 were issued against the Acting Clerk Gideon Mukiri Muchiri but not against the speaker or the County Assembly Service Board. The said Elizabeth Wanjiku Muthui was purportedly appointed as the acting clerk by strangers purporting to be the Assembly Board despite very clear orders in Nairobi Political Parties and Disputes Tribunal (PPDT) case No. E005 of 2021 which were ignored. The court in its ruling in ELRC E007 OF 2021 nullified the alleged appointment of Elizabeth Wanjiku Muthui as the Acting clerk. The court in its order No. 2 stated **"it is hereby ordered and therefore follows that any action undertaken by the illegally appointed persons when the rightful Speaker was in office is also illegal, null and void"**.

12. The petitioner averred that by further orders issued by the Nakuru ELRC Court in Petition No. E010 of 2021 order no 3 specifically annulled all the decisions by the imposter Board. This order was also ignored as the claimants have never been allowed into the Assembly precincts and were removed from the Assembly payroll. The court was categorical in its further orders that were issued on 4th June 2021 by ELRC E007 OF 2021, that Elizabeth Wanjiku Muthui could not be the Acting Clerk of the County Assembly and neither would the 1st respondent/contemnor be the chairman thereof. The court also restrained the Respondent/ Contemnors from interfering with Mr. Gideon Mukiri Muchiri as the clerk of the Nyandarua County Assembly which orders have also been ignored.

13. It was averred that the Court in ELRC Court in Nyeri Petition No E005 OF 2021 in its order No. (ii) did secure the position of Gideon Mukiri Muchiri as the Acting Clerk of the Nyandarua County Assembly. By further order of Nakuru ELRC Court in Petition No E007 of 2021 made on 28th July 2021 declared the appointment of Elizabeth Wanjiku Muthui as having been irregular and it vacated the orders sustaining her in office as the purported clerk for non-disclosure of material facts. Therefore, Elizabeth Wanjiku Muthui is neither an employee nor the Acting Clerk of the County Assembly of Nyandarua and that she will be surcharged for any benefits in terms of salaries and allowances accruing to her effective the date of the termination on 3rd May 2021.

14. The petitioner averred that he has authority over all the proceedings and the operations of the Assembly and he has obligation to designate the place of the custody of the Mace and the personnel responsible thereof. He also averred that no evidence has been offered to

show that such routine mechanical maintenance is being undertaken such as supplying the court with a local service order (LSO) which is mandatory in any government vehicles.

15. The petitioner averred that this application should not be given audience until the Respondents/contemnors immediately and unconditionally comply with the orders of this Honourable Court issued on 22nd July 2021.

16. Mr. Gideon Mukiri Muchiri swore a replying affidavit on behalf of the 3rd respondent and averred that the 1st respondent cannot disobey a court order unless and until the same is set aside, varied or reviewed. He reiterated the sentiments that the 3rd contemnor is illegally in office since she was appointed by an illegal board and she is only trespassing in an office that he is the one who is supposed to hold.

17. The court directed that this matter be determined by way of written submissions which the parties have complied.

### **1st Respondent's submissions**

18. The 1st respondent relied on **Order 45, Rule 1 (b) of the Civil Procedure Rules and S. 80 of the Civil Procedure Act** and stated that the petitioner has not disputed that Elizabeth Wanjiku Muthui is the Acting Clerk but has contended that her appointment was done by strangers. It is not the purview of this court to establish the illegality or otherwise of the 3rd contemnors appointment as the same falls within the ambit of the Employment and Labour Relations Court. It was submitted that rights and privileges of a public officer accrue by dint of being an office bearer and not in their personal capacity. The 1st respondent submitted that there is indeed an apparent error on the face of the record as Elizabeth Wanjiku Muthui is the Acting Clerk of the Nyandarua County Assembly and urged this court to review the orders granted to reflect the correct position.

19. The 1st respondent submitted on the issue as to whether they should be granted audience unless they purge this court of contempt and stated that his right to fair hearing should not be limited especially when there is a contention as to whether or not the 1st respondent is in contempt of court. The 1st respondent submitted that he has made a case for review, and urged this court to exercise its discretion under section 80 of the Civil Procedure Act to make orders as it deems fit in the interest of justice.

### **Petitioner's submissions**

20. The petitioner submitted that the orders sought in this application are frivolous, the application is a waste of judicial time and meant to divert attention of the court from the serious acts of contempt by the contemnors. The petitioner placed reliance in the case of **Econet Wireless Kenya Ltd v Minister for info. Comm of Kenya & Another (2005)** where it was held that

**“Where an application for committal for contempt of Court orders are made the Court will treat the same with a lot of seriousness and urgency and more often will suspend any other proceedings until the matter is dealt with and if the contempt is proven to punish the contemnor or demand that it is purged or both. For instance, an alleged contemnor will not be allowed to prosecute any application to set aside orders or take any other step until the application for contempt is heard. The reasons for this approach are obvious, a contemnor would have no right of audience in any Court of the law unless he is punished or he purges the contempt. So, the Court is obliged to hear the application for committal first before any other matter. This is a general rule which must be applied strictly.”**

21. The main grievance by the 1st Respondent as per the application seems to be the part where the Court directed that the mace and Motor Vehicle be handed over to the Petitioner and/or the Ag Clerk Gideon Mukiri Muchiri. The orders issued on the 8/3/2021 in Nakuru E.L.R. E0070 2021 stopping Gideon Mukiri Muchiri from interfering with the functions of the 3rd contemnor were set aside after a full hearing and in the ruling of 28/7/2021. The order gave them an option of handing over the mace and vehicle to the Petitioner which they have failed to do. The Petitioner has disputed the fact that his official Motor Vehicle is at the garage as alleged by the 1st respondent and the 3rd contemnor. The name of the garage has not been given and the only document confirming the position is authored by the 3rd contemnor. The Petitioner did in paragraph 11 (b) confirm having met with the Motor Vehicle on the 22/7/2021 at Soko Mjinga area along the Naivasha/Nairobi highway and that its usual driver switched off his known telephone contact on the 22/7/2021 after the orders for its release were issued.

22. The contemnors would just have complied with the orders by handing over the vehicle in its current condition by identifying the garage to the petitioner. The Court did not order that the vehicle has to be in a good mechanical condition for it to be handed over and we strongly believe that were the contemnors keen on obeying the Court orders of 22/7/2021, they would simply have written to the petitioner to take over the vehicle from a specific garage. This is a deliberate attempt to disobey Court orders on lame excuses and this has to be brought to a stop. They urged the court to dismiss the Notice of Motion dated 23/7/2021.

### **3rd respondent's Submissions**

23. The 3rd respondent submitted that this application does not fulfil the requirements of **order 45 (1) of the Civil Procedure rules** on review hence it can only be concluded that the 1st respondent is aggrieved by the court's conclusion on the applicable law on contempt. He then ought to have appealed instead of seeking to review the court's orders. He relied on the case of Francis **Origo & Another v Jacob Kumali Mungala [2005] eKLR**.

24. As was established by the Court, the 3rd contemnor was appointed by an illegal Board of the Claimant in ELRC CASE NO E007 OF 2021, consequently the allegations that she is a clerk fall flat on its face. It was submitted that even before the 1st respondent can be allowed to seek review in the manner that he has, it must be ascertained that he respected the court by complying with orders of the court. The 3rd respondent submitted that this application is an abuse of the court process and this court should dismiss it.

### **Issues for determination**

25. The only issue herein is **Whether the threshold for review under Order 45 (1) of the Civil Procedure and Section 80 of the Civil Procedure Act has been met.**

26. Order 45, Rule 1(b) is clear that for the court to review its decision, certain requirements should be met. This section provides as follows:

**“(1). Any person considering himself aggrieved-**

**a. by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or**

**b. by a decree or order from which no appeal is hereby allowed.**

**and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.**

**(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.”**

27. The aforesaid rule is based on section 80 of the Civil Procedure Act, Cap. 21 Laws of Kenya which states as follows:

**“Any person who considers himself aggrieved-**

**c. by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or**

**d. by a decree or order from which no appeal is allowed by this Act. may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.**

28. **In Civil Appeal No. 2111 of 1996, National Bank of Kenya Vs Ndungu Njau**, the Court of Appeal held that;

**“A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self- evidence and should not require an elaborate argument to be established. It will not be sufficient ground for review that another Judge could have taken a different view of the matter nor can it be a ground for review that the court proceed on an incorrect expansion of the law”.**

29. The applicant has asserted that there is an apparent error on the face of the record as regards to who is the acting clerk of the Nyandarua County Assembly. The petitioner has demonstrated in his replying affidavit and through the many attached orders of the Employment and labour Relations Court issued on various dates that indeed the 3rd contemnor is illegally holding the office of the Acting clerk of the County Assembly of Nyandarua.

30. The 1st respondent averred that it is not in the purview of this court to assess the validity of his appointment but rather it is the purview of the Employment and Labour Court. The court record bears witness that this issue has been dealt with by the Employment and labor relations Court and Hon. Gideon Mukiri Muchiri is clearly the one who is the Acting Clerk of the County Assembly of Nyandarua.

31. The 1st respondent had averred that the said order suspending all resolutions of the board could not apply in a blanket manner and was only restricted to the termination of the claimants and that by dint of Article 236 of the Constitution Elizabeth Wanjiru was shielded from any arbitrary actions.

32. Article 236 of the Constitution provides for Protection of public officers

**“A public officer shall not be— victimized or discriminated against for having performed the functions of office in accordance with this Constitution or any other law; or dismissed, removed from office, demoted in rank or otherwise subjected to disciplinary action without due process of law.”**

33. From the above statement the applicant admits that all the resolutions of the illegally instituted board were suspended, including the appointing of Elizabeth Wanjiru but tries to hide behind an article of the Constitution which doesn't favour him or at all.

34. The applicant also asserted that the orders pertaining to the mace of the County Assembly are equally contra statute noting that the Nyandarua County Assembly Standing Orders have provided effective guidelines on how the mace should be kept. Standing Order No. 3 provides that the Mace of the Assembly shall; **“Form part of the Speaker's procession whenever the Speaker is entering or leaving the Chamber.”** The petitioner is still the lawful Speaker of the County Assembly of Nyandarua and therefore he has all the rights of being in possession of the Mace. The mace is an instrument of authority at the Assembly and needs to be availed when the speaker his carrying out his assembly duties.

35. Before the orders of this Court of 23rd February 2021 requiring the speaker to step aside, the speaker was in possession of the Mace which he handed over in compliance of the Courts order. Since there is an order directing the speaker to resume his duties, the same instruments of authority should be handed over to him for normal business of the Assembly to resume pending the hearing of the petition.

36. The upshot of the above is that the applicant has failed to demonstrate that there is mistake or error apparent on the face of record and/or any sufficient reason to enable this court set aside its decision. The application is dismissed with costs.

**DATED SIGNED AND DELIVERED AT NAKURU VIA VIDEO LINK THIS 4<sup>TH</sup> DAY OF OCTOBER, 2021**

**H K CHEMITEI**

**JUDGE**