



REPUBLIC OF KENYA

IN THE HIGH COURT

AT BUNGOMA

CONSTITUTIONAL PETITION NO. E003 OF 2021

IN THE MATTER OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF STANDING ORDERS OF THE COUNTY ASSEMBLY, 2016

IN THE MATTER OF ALLEGED INFRINGEMENT OF THE PROVISIONS OF ARTICLES 1(3), 2(1)-(4),

3(1), 10, 20, 23 & 165, 24(1), 27(1), 47(1), 73(1)&(2), 174, 236(a), 258(1) and 259(1) OF THE CONSTITUTION

BETWEEN

ANTHONY NAMUNYU LUSENEKA.....1ST PETITIONER

JORAM WANJALA.....2ND PETITIONER

AND

THE SPEAKER COUNTY ASSEMBLY OF BUNGOMA.....1ST RESPONDENT

COUNTY ASSEMBLY OF BUNGOMA LEADER OF MAJORITY.....2ND RESPONDENT

COUNTY ASSEMBLY OF BUNGOMA LEADER OF MINORITY.....3RD RESPONDENT

COUNTY ASSEMBLY OF BUNGOMA MAJORITY PARTY WHIP.....4TH RESPONDENT

COUNTY ASSEMBLY OF BUNGOMA MINORITY PARTY WHIP.....5TH RESPONDENT

HON.HENRY MAJIMBO OKUMU.....6TH RESPONDENT

HON.JACK WAMBULWA OUMA.....7TH RESPONDENT

HON. ELLY MANASE TINDI.....8TH RESPONDENT

HON. GEORGE MAKARI.....9TH RESPONDENT

HON. BARASA MUKHONGO.....10TH RESPONDENT

HON JOSHUA BEN KIPKUT.....11TH RESPONDENT

HON. JOSEPH OKHABA MUKUNDA.....12TH RESPONDENT

HON. MARTIN WANYONYI PEPELA.....13TH RESPONDENT

RULING

The petitioners are members of the County Assembly of Bungoma (hereinafter the assembly) duly elected under the provisions of Article 177(1)(a) of the Constitution while the 1st respondent is the head of the assembly and the other respondents are also elected members of the assembly serving in various positions of leadership within the assembly.

It is the petitioners case that pursuant to the General Elections of 2017, the assembly undertook to create a select committee on selection comprising of the 2nd respondent who is the chairperson, the 3rd respondent, members not less than 5 and not more than 9 nominated by the assembly parties and approved by the county assembly pursuant to Standing Order Number 153(1) of the assembly. That the committee sits once at the beginning of each term to constitute members to the committees.

The supporting affidavit is sworn by the first petitioner who depones that in October, 2017, the assembly purported to create a select committee known as the committee on selection consisting of the following members;

1. Florence Wekesa Fulano Ford Kenya
2. Francis Chemion Jubilee
3. Elly Tindi Ford Kenya
4. James Mukhongo Ford Kenya
5. Jack Wambulwa Ford Kenya
6. George Makari Ford Kenya
7. Ben Kipkut Jubilee
8. Paul Wamalwa Jubilee
9. Henry Majimbo ODM
10. Joseph Mulongo Independent
11. Martin Wanyonyi Independent

That from the list, 2 members were never from any assembly party and did not qualify to be members in the committee of selection and that out of the 11 members, 1 is a female. He depones that on 5/5/2021, the 1st respondent presided over a plenary session of the assembly and passed without amendment a report by the selection committee on nominating members to assembly committees.

He depones that prior to the tabling of the report, each member of the assembly served in at least 3 committees but pursuant to a letter from the majority chief whip, all nominated members were removed from the committees except those aligned to a faction favoured by Hon. Joseph Nyongesa and Hon. Majimbo Okumu where each of the favoured members were nominated to serve in 8 committees. That in the report tabled, the 1st petitioner was discharged from the committee of Labour & social welfare, justice and legal affairs and delegated county legislation while the 2nd petitioner was discharged from public investment, tourism, environment, water and natural resources and the implementation committee.

The petitioners therefore seek;

- a. A declaration that the constitution of the committee on selection of the county assembly of Bungoma as constituted in February, 2021 or whenever that occurred is unconstitutional and all its consequential acts, decisions, resolutions recommendations, processes and outcomes and more particularly the report on the nomination of members to committee memberships, the county assembly proceedings touching thereon and any other further date, are null and void.**
- b. A declaration that the decision, resolution, or proceedings by the plenary resolution by the County Assembly of Bungoma that discharged honourable Anthony Luseneke or Joram Wanjala from their respective assembly committees was unconstitutional, null and void.**
- c. A declaration that the petitioners have equal status and entitled to equal opportunities and privileges including opportunities for membership to the County Assembly committees on equitable basis.**
- d. A declaration that all standing and sectorial committees of the County Assembly constituted pursuant to the report of the committee on selection under the leadership of the Honourable Joseph Nyongesa and approved by the plenary are null and void and that, a mandatory injunction do issue forth by which the County Assembly of Bungoma do within 14 days or such other period within the discretion of the court, reconstitute the committee on selection and other County Assembly Committees, their equitable leadership in accordance with the equal protection Article of the Constitution of Kenya, the County Governments Act and the Standing Orders of the County Assembly of Bungoma.**

e. An order in terms of Article 23(3)(e) of the Constitution by which each member of the County Assembly who has earned sitting allowances far in excess of what was due for a maximum of 3 committees do compensate the County Assembly of Bungoma by way of surcharge to the extent of the excess sums earned.

f. The petitioners be reinstated to the membership of their previous committees prior to the illegal removal.

g. Costs of the petition.

The 1st, 2nd, 4th, 6th, 7th, 8th, 9th, 10th, 12th and 13th respondents filed their Preliminary Objection on the grounds *inter alia* that the petition is bad as it invites the court to violate the principles of separation of powers, that the Standing Orders provide an avenue for dispute resolution as opposed to court action, that the question of membership in committees is a matter outside the realm of the court and that membership of committees is not a right that can be litigated under Article 23 of the Constitution.

Pursuant to the directions of the court, the petition was disposed of by way of written submissions. The same have been considered.

Since the respondents have raised issue that the court lacks the requisite jurisdiction to entertain the matter by virtue of the fact that the issues raised by the petition are purely political which ought to be handled in the house as opposed to court action. It is therefore imperative that the court considers this issue first.

It is settled law that jurisdiction is everything and without it, the court ought not to take a further step. The principle was established in the celebrated case of *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd. (1989) KLR1* where it was held;

"Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction....Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given."

On the issue, the respondents have referred the court to the case of *Ibrahim Swaleh Vs Speaker County Assembly of Embu & 2 others (2015)eKLR* where the court upheld a Preliminary Objection based on jurisdiction. The petitioners on the other hand contend that pursuant to the provisions of Article 23(1) and 165 of the Constitution, the High Court is clothed with unlimited jurisdiction to determine civil matters and protection of fundamental rights.

The petitioner's gravamen is that the nomination does not take into account the gender parity principle, that members who are aligned to a certain faction are favoured, the petitioners have been discharged from committees and that members who do not form assembly parties have been appointed to the committees.

It is true as the petitioners argue that the High Court under Article 23 is clothed with the power to uphold and enforce the bill of rights although in doing so, the courts ought to respect the roles of other institutions; that is, the legislature and executive. The principle of separation of powers is a cardinal principle of our constitutional order which this court is bound to adhere to at all times. The court however is alive to the duty bestowed upon it to give effect to the constitutional provisions and provide the relevant checks and balances to the other arms of government whenever called upon so to do.

The conduct of business by county assemblies are governed by various statutes *to wit*, the Constitution, the County Governments Act, 2012, the County Assemblies Powers and Privileges Act and the Standing Orders.

Under section 10 of the County Assemblies Powers and Privileges Act, it is provided;

No proceedings or decision of a County Assembly or the committee of powers and privileges acting in accordance with this act shall be questioned in any court.

Standing Orders No. 153, 155 and 157 of the County Assembly of Bungoma provide as follows;

153. (1) There shall be a select committee, to be designated Committee on Selection consisting of the Leader of the Majority party or coalition of parties who shall be the Chairperson, the Leader of the Minority party or coalition of parties, not less than five and not more than nine members, who shall be nominated by County Assembly Parties and approved by the County Assembly.

(2) The Committee on Selection shall nominate members to serve in Committees, save for the membership of the County Assembly Business committee and Committee on Appointments.

(3) The Committee on Selection shall be appointed within ten days on assembly of a new County Assembly.

155. (1) In nominating Members to serve on a select Committee, the Committee on Selection shall ensure that the membership of each Committee reflects the County Assembly of Bungoma relative majorities of the seats held by each of the County Assembly parties in the County Assembly.

(2) Despite paragraph (1), a Member belonging to a party other than a County Assembly party or independent Member may be nominated to serve in Select Committee and the allocation of membership of Select Committees shall be as nearly as practicable

proportional to the number of Members belonging to such parties and independent Members.

(3) Except as the County Assembly may otherwise resolve, on the recommendation of the Committee on Selection for reasons to be stated, no member shall be appointed to serve in more than three Sectoral Committees.

157. (1) (a) The County Assembly Party that nominated a member to a select Committee, may give notice, in writing, to the Speaker that the member is to be discharged from a Select Committee.

(b) Before a member is removed from a Select Committee, he/she shall be accorded a fair hearing in accordance with Article 47 of the Constitution of Kenya.

(2) The discharge of a member shall take effect upon receipt by the Speaker of a notice under paragraph (1).

From the above provisions, an elaborate procedure on the nomination of member to committees is given. Standing Order No. 157(1)(a) provides that a member may be discharged from a committee upon the speaker receiving a letter from the party that nominated the member communicating the discharge of that member from the committee he has been serving in. In this case, the letter from the Majority Whip communicating the discharge of the petitioners from the committees was duly received by the speaker on 5/5/2021. The letter reads;

DISCHARGE OF MEMBERS FROM COMMITTEES-STANDING ORDER 157(1)

1. The honourable Anthony Luseneka is discharged from;

a) Labour & social welfare committee

b) Justice and legal affairs committee

c) Delegated County legislation

2. Hon Joram Wanjala Okumu is discharged from

a) Public investment committee

b) Tourism, environmental, water & natural resource committee

c) Implementation committee

The case of *Dominic Ndonge Maithya & 3 others v Machakos County Assembly Speaker & 2 others [2017] eKLR* addressed the issue of removal of a member from committees where Kemei J. held;

As regards the second issue and as observed hereinabove, the removal and or discharge of the petitioners from committees by the Respondents was not only an internal matter for the Respondent but that the Petitioners were amenable to removal as deemed by their sponsoring political parties through the leaders of Majority and Minority and whips in the Machakos County Assembly. If the Petitioners parties felt that they were not handling committee issues to the party's satisfaction, they had the prerogative to remove them and replace them with others. Hence I find their removal proper and legitimate and if they had any issues, they could raise them through their Party's machinery. Again on perusal of the Petitioners petition I find that the Petitioners have not specified the Article of the Constitution that has been denied, violated, infringed or otherwise threatened.

As such and having considered the relevant law and the submissions by parties on the issue of jurisdiction of the court, the court finds and holds that the actions complained of by the petitioners are a political function which ought to be resolved within the internal mechanisms of the appointing parties. The court would be actively interfering with the internal processes of the political party by determining the membership of various committees in that County Assembly more so where there is a provided dispute resolution mechanism which should be exhausted first before a petitioner seeks intervention of court.

In the circumstances, the respondents' objection on jurisdiction is hereby upheld with the resultant order that the petition is hereby dismissed. Each party to bear its own costs.

DATED at BUNGOMA this 16th day of November, 2021

S. N. RIECHI

JUDGE