



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

PETITION NO. E002 OF 2021

HON. JAMES WAHOME NDEGWA.....PETITIONER/RESPONDENT

VERSUS

HON. ZACHARY MWANGI NJERU.....1ST RESPONDENT

HON. EDINALD WAMBUGU KINGORI.....2ND RESPONDENT

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

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

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

THE HONOURABLE ATTORNEY GENERAL.....6TH RESPONDENT

CONSOLIDATED WITH CONSTITUTIONAL PETITION NO. E01 OF 2021

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. By his application dated 18th October 2021, the applicant herein **Zachary Mwangi Njeru** sought the following orders;

a) That the court be pleased to stay further proceedings in this matter and submit the dispute herein for mediation by the Inter-Governmental Relations Technical Committee established under Section 11 of the Intergovernmental Relations Act no. 2021.

b) The Intergovernmental Technical Relations Committee be ordered to conduct the mediation and submit a report to court within 60 days of submission of the dispute.

c) In conducting the mediation, the Intergovernmental Technical Relations Committee be at liberty to invite officers from the Controller of Budget, the Central Bank of Kenya, the Council of County Governors, the national and county government coordinating summit, the ministry responsible for devolution to assist in the mediation.

d) During the mediation period, the proceedings of the county assembly be presided over by any member of the speaker's panel.

e) Costs be provided for.

2. The application is supported by the grounds on the face of it and the sworn affidavit of the applicant dated the same date.
3. The applicant states that this matter concerning the impeachment of the county speaker Mr. Ndegwa Wahome has been pending in this court for the last 6 months and the same has greatly impacted the business of the assembly. There have also been other numerous suits pending before this court as well as Nyeri Court all concerning the parties herein.
4. Despite the orders of this court reinstating the speaker, the whole issue according to him has taken a political dimension as he has declared that he will be vying for governorship in the 2022 general elections and has continued to intensify his attack on the incumbent governor Hon Francis Kimemia.
5. He went further to depone that the speaker no longer has the support of the majority of the members of the county assembly as he has been perceived to be an impartial arbiter. The sum total of this is that many executives led processes like approval of budgets have stalled among others.
6. For this reason, it is apparent that the speaker has lost credibility and the court cannot impose him on the county assembly as is exemplified by the incidence of 5th October 2021 where the members boycotted the sessions and the chaos at the assembly between the rival supporters.
7. As a result of this it was his view and prayers that given the role of the assembly in the implementation of devolution, it was necessary that the dispute be referred to mediation through the inter-governmental technical relations committee and a report be filed in court. This position is underpinned by the provisions of **Article 159 of the constitution** which encourages disputes such as this to be resolved amicably.
8. The petitioner/respondent **James Wahome Mwangi** vide his replying affidavit date 3rd November 2021 vehemently opposed the application terming it a ploy to defeat the orders issued by this court on **29th April 2021, 22nd July 2021 and 4th October 2021** and other applications pending.
9. That the applicants cannot be granted audience till they purge their contempt which in essence takes precedence over this application. He went on to state that the issues at hand do not require mediation but compliance with simple court orders and the assembly will resume to normalcy.
10. He denied that he had been impeached by the county assembly as the numbers peddled by the contemnors are fraudulent and imaginary. He said that he had all the rights of contesting for the gubernatorial seat in the next general elections and it was not the preserve of the current governor alone.
11. He said that the contemnors and others illegally refused to open the assembly on **5th October 2021** and despite the presence of the security team they were unable to break the premises so as to flash out the thugs who had been hired by the contemnors and had barricaded themselves inside.
12. The assembly was thus locked and no session could take place as the mace had not been handed over to him.
13. In response **Gideon Mukiri Muchiri** the 2nd respondent has opposed the application vide his replying affidavit sworn on 2nd November 2021 asserting that the applicant is a contemnor who has not purge his contempt hence the application dated 13th October 2021 by the speaker which he intends that he be committed to civil jail. That he cannot be allowed to have audience herein till he purges his contempt and or complies with the court orders dated 4th October 2021.
14. He went on to state that the real issue is not to refer the matter for mediation but to delay and obstruct the application dated 13th October 2021 which seeks for orders to punish him and his contemnors. That the applicant has come to court with unclean hands and he should not be heard till he complies with the courts orders namely the surrendering of the mace, the speaker's motor vehicle and opening of the assembly.
15. When the matter came up for hearing the court directed that parties do file written submissions which they have complied.

1ST TO 5TH CONTEMNIORS SUBMISSIONS.

15. They reiterated the contents of their application and the supporting affidavit namely that for the issues bedeviling the county of Nyandarua to be amicably resolved the best option was to refer it to the Intergovernmental Relations Technical Committee as provided under **Article 159(2) (c) of the constitution**. This they supported by the authority of **COUNCIL OF GOVERNORS & 47 OTHERS V. THE ATTORNEY GENERAL & 6 OTHERS (2019) eKLR** which the court found that it was efficacious to have such disputes resolved by way of mediation.
16. That the issues herein and the wrangles between the speaker and the county assembly has crippled the affairs of the assembly. There are other numerous disputes pending in various courts and which are all unresolved including **PETITION NUMBER E383 OF 2021** which is asking for the change of signatories at the Central Bank of Kenya.

17. They submitted that the contemnors were state officers who were seeking to advance lawfully the best interest of the Nyandarua county government. That the parties have not made any meaningful efforts to resolve the issues but have instead proceeded to litigate hence the need to comply with the provisions of **Section 35 of the Intergovernmental Relations Act no. 2 of 2012.**

18. It was the submission by the applicants therefore that his application is for the best interest of the county government and this court should allow this window of opportunity.

PETITIONERS/ RESPONDENT'S SUBMISSIONS.

19. The issues raised by the respondent are whether the matter merits a reference to mediation and if so whether the proceedings herein should be stayed.

20. The respondent went ahead to cite several portions of the Intergovernmental Relations Act hereinafter referred to as IRA in regards to the Alternative Dispute Resolutions hereinafter referred to as ADR.

21. It was his opinion that the issues raised in this petition does not fall within the armpit of IRA and thus not capable of being delegated to a mediation process. What constitutes a dispute under IRA was well settle in the case of **ISIOLO COUNTY ASSEMBLY SERVICE BOARD & ANOTHER V. THE PRINCIPAL SECRETARY (DEVOLUTION) AND ANOTHER (MILIMANI HIGH COURT NO 370 OF 2015.**

22. That the dispute herein is not between the central government and a county assembly or amongst county governments but simply a removal of a speaker from the county assembly. In other words, it is the interest of the respondent and his guaranteed rights under the constitution which were violated and not the county government of Nyandarua. This does not therefore fall under IRA or at all.

23. The respondent thus prayed for the application to be dismissed with costs as being a mere smokescreen to ensure that the applicants are not punished for their contempt against the valid court orders herein especially the contempt application.

3RD RESPONDENT'S SUBMISSIONS.

24. The 3rd respondent relied on the case of **COUNCIL OF COUNTY GOVERNORS V. CABINET SECRETARY LAND HOUSING AND URBAN DEVELOPMENT & ANOTHER 2017 eKLR** where the court defined what was intergovernmental issue.

25. The respondent went ahead to refer to Sections 30 and 31 of the IRA and the mechanism therein of resolving dispute and that the issue in this petition did not in any way qualify to be referred to ADR or at all as it was not a dispute between the county governments and or county government and the central government.

26. The 1st ,2nd ,3rd ,4th and 5th contemnors are natural persons whereas the AG, the Government Printer and the Inspector General of Police are enjoined as government advisors. Essentially therefore the dispute at hand does not in the opinion of the respondent fall within the ADR as anticipated in the act but purely a private issue between the speaker and the assembly as a result of the latter infringing his rights under Articles 22and 23 among others of the Constitution. He prayed that the same be dismissed with costs.

ANALYSIS AND DETERMINATION.

27. The singular issue which ought to be determined herein and well captured by the parties is whether the issues raised in the petition herein can be termed as issues to be referred to mediation as anticipated by parliament when enacting the IRA 2012.

28. The substratum of the petition herein revolves around the impeachment of the speaker James Wahome Ndegwa by the county assembly of Nyandarua. Feeling aggrieved he filed the petition and contemporaneously sought stay orders which the court granted and directed that the impeachment be done according to the law and the relevant statutes and the standing orders of the assembly. From there onwards the matter mutated into several applications and counter applications which are already on record. The latest application is by the speaker to have the contemnors be committed to civil jail for violating the orders issued on 4th October 2021.

29. IRA 2012 in the preamble defines the act as follows;

“Objects and purposes of the Act

The objects and purposes of this Act are to—

(a) Provide a framework for consultation and co-operation between the national and county governments;

(b) Provide a framework for consultation and co-operation amongst county governments;

(c) Establish institutional structures and mechanisms for intergovernmental relations;

(d) Provide a framework for the inclusive consideration of any matter that affects relations between the two levels of government and amongst county governments;

(e) *give effect to Articles 187 and 200 of the Constitution, in respect of the transfer of functions and powers by one level of government to another, including the transfer of legislative powers from the national government to the county governments; and*

(f) *Provide mechanisms for the resolution of intergovernmental disputes where they arise.”*

30. This was well captured by the court in **REPUBLIC V. TRANSITION AUTHORITY & ANOTHER EX PARTE KENYA MEDICAL PRACTITIONERS, PHARMACIST & DENTIST BOARD & ANOTHER (2013) eKLR** on what disputes could be resolved under the IRA 2012.

31. The parties anticipated by the act are governments and not individual persons. In this case the issue is between the speaker, the county assembly and the contemnors. The issues raised in the petition are to do with the fundamental breach of the respondent's rights as a speaker. It is not to do with the county assembly of Nyandarua and another county assembly or the central government. It is as plain as that.

32. Whereas I agree with the applicant that **Article 159 of the Constitution** promotes settlement of issues through mediation this does not fall within such as the IRA clearly stipulates what a government is. **Article 189 of the Constitution** which the applicant seeks solace in clearly stipulates the disputes to be between governments and how it ought to be resolved reasonably.

33. In my view the court in **COUNCIL OF COUNTY GOVERNORS V. LAKE BASIN DEVELOPMENT AUTHORITY & 6 OTHERS (2017) eKLR** clearly spelt out such similar issue at hand. It went on to state that;

‘The dispute must be between the two levels of government. It must not be between one or the other on the other hand and an individual or person on the other hand. A dispute between a person or State officer in his individual capacity seeking to achieve his own interest or rights would not equate an intergovernmental dispute. A dispute between two or more county governments would however equate an intergovernmental dispute: see section 30(2) (b) of the Act. By the better reason, it would also follow that where a state officer seeks through any means to advance the interest of a government, whether county or national, against another government whether county or national, then such a dispute would rank as an intergovernmental dispute.

What precisely amounts to an intergovernmental dispute is not expressly detailed either under the Constitution or the Act. Guidance may however be retrieved from both Articles 6 and 189 of the Constitution as well as from Section 32 of the Act. Articles 6 and 189 provide for respect, cooperation and consultation in the conduct of the two governments' mutual relations and functions. The focus appears to be performance of functions and exercise of powers of each respective level of government. Section 32 of the Act however appears to precipitate even a commercial dispute as an intergovernmental dispute when the Section expressly refers to “any agreement” between the two levels of government or between county governments. The agreement, in other words, is not limited to that of performing functions or powers or that of guiding relations.’ (underlining mine).

34. Taking cue from the above authority and the petition before this court i respectfully do not agree with the applicant that the dispute is in the nature that ought to be referred to mediation as anticipated under the IRA 2012. This is purely a contest between the speaker and the county assembly of Nyandarua. The standing orders and other relevant statutes sufficiently provides how the issues can be resolved between themselves.

35. Of course nothing precludes the parties from seeking ADR in their fights. In my view perhaps this would have been a better approach. The contest is purely political in nature. It pits the speaker, the assembly and the executive. The suffering grass are the Wanjiku's of Nyandarua County. This court cannot say much for now save to state that the matter not being intergovernmental as outlined above cannot be referred to mediation under IRA 2012.

36. The issue that this application has been brought to defeat the contempt application against the applicants herein may or may not be true but this court shall treat each application separately.

37. **The court therefore does not find any merit in the application and the same is hereby dismissed with costs.**

DATED SIGNED AND DELIVERED VIA VIDEO LINK AT NAKURU THIS 6TH DAY OF DECEMBER 2021.

H K CHEMITEI.

JUDGE.