



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MALINDI

CONSTITUTIONAL PETITION NO 006 OF 2021

FORMERLY

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CONSTITUTIONAL PETITION NO 001 OF 2021

FORMERLY

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARSEN

CONSTITUTIONAL PETITION NO 002 OF 2021

**IN THE MATTER OF ARTICLES 2(1), 3(1), 10, 19, 20, 22, 23, 25 (C), 27,
28, 47, 48,50, 159, 165, 196 AND 236 OF THE CONSTITUTION OF KENYA**

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF THE CONSTITUTION OF KENYA

AND

**IN THE MATTER OF VIOLATION OF THE RIGHT TO FAIR HEARING, DIGNITY AND
PROTECTION FROM DISCRIMINATION AND SECURITY OF PERSONS**

AND

IN THE MATTER OF SECTION 11 OF THE COUNTY GOVERNMENTS ACT, 2012

AND

**IN THE MATTER OF STANDING ORDER NOS 69 AND 75 OF THE TANA RIVER
COUNTY ASSEMBLY STANDING ORDERS**

AND

**IN THE MATTER OF A RESOLUTION TO IMPEACH THE SPEAKER OF
TANA RIVER COUNTY, HONOURABLE MICHAEL JUSTINE NKADUDA**

AND

IN THE MATTER OF THE COUNTY ASSEMBLY OF TANA RIVER

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTIONS ACT, 2015

BETWEEN

HON. MICHAEL JUSTINE NKADUDA.....PETITIONER

VERSUS

THE COUNTY ASSEMBLY OF TANA RIVER.....1ST RESPONDENT

THE CLERK, THE COUNTY ASSEMBLY OF TANA RIVER.....2ND RESPONDENT

HON. MOHAMED BUYA YUSA.....3RD RESPONDENT

HON. GALOLE SADDAM HUSSEIN.....4TH RESPONDENT

HON. ABDI ERGAMSO GOBU.....5TH RESPONDENT

RULING

1. This ruling relates to the application dated 15th November 2021. The application is by the Respondents in the main Petition. The Applicants pray for orders as follows:

- a) *That the application be certified as urgent and service thereof be dispensed with in the first instance and thereafter the application be heard on priority basis.*
- b) *That the court be pleased to stay further proceedings, execution of the ruling and or order by the court dated 29th October 2021 together with all consequential orders pending the hearing and determination of the application inter partes.*
- c) *That upon hearing of the application inter partes the court be pleased to stay further proceedings, execution of the ruling and or order by it dated 29th October 2021 together with all consequential orders pending the hearing and determination of the Petition and intended Appeal.*
- d) *That the court be pleased to issue an order of injunction to restrain the Petitioner/Respondent from assuming office as the Speaker of the County Assembly of Tana River pending the hearing and determination of this application.*
- e) *That upon hearing of the Application inter-partes, the court be pleased to issue an order to restrain the Petitioner from assuming office as the Speaker of the County Assembly of Tana River pending the hearing and determination of the main Petition and intended Appeal.*
- f) *That the court to issue any further orders it may deem fit to grant.*
- g) *That the court gives directions on costs of the application.*

2. The Application was triggered by the orders the court (differently constituted) made arising from an Application for conservatory orders dated 27th April 2021. In the said Application, the court issued orders barring the Respondents (now Applicants before me) from implementing a resolution of 4th May 2021 impeaching the Petitioner. For reasons of ease and clarity I set out here below the section of the orders of the court under consideration verbatim. They read as follows: -

- a) *That pending the hearing of the Petition, a conservatory order is issued restraining the 1st, 2nd, 3rd, 4th, and 5th Respondents from in any manner whatsoever whether by themselves, their servants, agents or advocates or any of them or otherwise from effecting, implementing or enforcing the decision or resolution on the motion passed by the 1st Respondent on Tuesday the 4th day of May 2021 including not to gazette or declare the resultant vacancy or fill it with another person.* (emphasis added by underlining)

3. The Applicants have filed a Notice of Appeal against this portion of the order. And now they have filed the current application seeking that the order be stayed pending the hearing of both the Petition and the Intended Appeal. They also want an injunction to issue to forbid the Petitioner from trying to resume office until both the Petition and the Intended Appeal are disposed of.

4. I should say that at this stage of the matter, prayers 1, 2 and 4 of the application have perhaps been rendered redundant due to passage of time. Consequently, the court may only pronounce itself on prayers 3, 5, 6 and 7.

5. In respect of prayer 3 of the application, the thrust of the Applicants' arguments as appears from the grounds on the face of the application and the supporting affidavit by Abdullahi Husein is that the Petitioner has misunderstood the foresaid order of the court and sought to forcibly regain entry into the office of Speaker. That the order did not sanction his reinstatement into office. It only restrained the Applicants from processing the impeachment from where it was arrested by the court order.

6. The Applicants argue that the Petitioner's attempted forcible come back as County Speaker has exposed the County Assembly members and staff to the danger of harm. As a result, it is necessary that the orders be stayed to prevent these occurrences.

7. In his replying affidavit, the Petitioner denies that he ever forced his way into the Speaker's office as asserted by the Applicants. He denies visiting the office in the company of hired goons. In his view, this assertion of alleged violence against him is just a ploy by the Applicants to have the orders stalling his impeachment vacated.

8. If the Petitioner is using the orders of the court to seek re-entry into office, it is doubtful that seeking their stay is the right way to address the challenge. This is because the orders are directed at the Applicants barring them from completing the impeachment process. If I were to stay them, I will not thereby bar the Petitioner from seeking to go back to the office. On the contrary, I will in effect have reversed the court's interim order stalling gazettement of the purported impeachment with the consequence that the Applicants will be at liberty to complete the impeachment. If the Applicants believe that the Petitioner has misread the order, I think that the right remedy lies in approaching the court for its interpretation and not stay of the order.

9. Another critical issue that is raised by the Petitioner in relation to prayer 3 is whether the court can stay a negative order. The order in question restrains the Applicants from completing the impeachment process against the Petitioner. It is in this sense a negative order. However, is it the kind of negative order that is incapable of being stayed?

10. A couple of decisions have evaluated this issue. My understanding of the matter as analyzed in the decisions is that only those orders that do not require of the parties to do anything are the negative orders that may not be the subject of an order for stay. However, negative orders which nevertheless require some action from a party may be the subject of stay of execution pending appeal. For instance, in this case the impugned order requires the Respondents (now the Applicants) not to finalize the impeachment of the Petitioner. Although it is a negative order, it issues a command to the Applicants not to for instance publish the impeachment in the Kenya Gazette. The Applicants can therefore properly seek to stay the order not to gazette.

11. Addressing this issue in *Western College of Arts and Applied Sciences v EP Oranga & 3 others [1976] eKLR* the Court of Appeal expressed itself as follows:-

“ But what is there to be executed under the judgment, the subject of the intended appeal? The High Court has merely dismissed the suit, with costs. Any execution can only be in respect of costs. In Wilson v Church the High Court had ordered the trustees of a fund to make a payment out of that fund. In the instant case, the High Court has not ordered any of the parties to do anything, or to refrain from doing anything, or to pay any sum. There is nothing arising out of the High Court judgment for this Court, in an application for a stay, it is so ordered.”

12. But what is the effect of staying the court's order restraining the Applicants from completing the impeachment process through for instance causing it to be gazetted before the Petition is heard and determined? Would this not give the Applicants a blank cheque to complete the process notwithstanding the pendency of the Petition? And wouldn't such action defeat the very reason why the orders were issued in the first place?

13. Order 42 of the Civil Procedure Rules pursuant to which the Applicants have moved the court for stay of execution pending appeal obligates the court not to issue an order for stay of execution as a matter of course. Certain conditions must be satisfied before these orders issue. These are: -

- a) The Court must be satisfied that substantial loss may result to the applicant unless the order is made;***
- b) The application for stay of execution pending appeal must have been made without unreasonable delay; and***
- c) The applicant has furnished security for the performance of the decree or order in the event the appeal is lost and such security must ultimately be binding on the applicant.***

14. On the other hand rule 5 (2) (b) of the Court of Appeal under which an order for stay of execution pending appeal may issue provides as follows: -

“Subject to sub-rule (1), the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the Court may: -

a)

b) In any civil proceedings, where a notice of appeal has been lodged in accordance with rule 75 order a stay of execution an injunction or a stay of any further proceedings on such terms as the Court may think fit.”

15. Similarly, Rule 17 of the Supreme Court Rules on interlocutory applications, like rule 5(2)(b) of the Court of Appeal Rules, does not overly constrain the court's discretion in the manner Order 42 rule 6 of the Civil Procedure Rules does.

16. The reason I highlight these provisions is to make the point that the grounds for granting or declining an application for stay of execution pending appeal before the High Court and Courts of Equal Status are significantly though not entirely different from those that obtain in the Court of Appeal and the Supreme Court. The latter two courts have a wider discretion than do the High Court and article 162 courts to grant such orders. It is in this context, in my view, that the general guidelines in the cases of *Gitirau Peter Munya v Dickson Mwenda Kithinji and 2 others eKLR, County Director of Planning & Architecture, County Government of Mombasa v Makupa Transit Shade Limited [2017] eKLR and Permanent Secretary Ministry of Roads & another v Fleur Investments Limited [2014] eKLR* should be understood.

17. Has the Applicant met the conditions under Order 42 rule 6 of the Civil Procedure Rules? I do not see the substantial loss the Applicants will suffer if I do not stay the order preventing further processing of the Petitioner's impeachment pending the hearing of the Petition. In fact, the Applicants aver that they already have an acting Speaker who is already in office. What loss does the 1st Respondent suffer if the order preventing it from appointing a substantive speaker is not stayed? With respect, this is not demonstrated. What is clear is that it is the Petitioner who will likely suffer substantial loss if the process goes on while the Petition is pending. His job will thereby be lost.

18. For similar reasons as stated above I am not convinced that public interest will be jeopardized unless stay of the order barring the finalization of the impeachment of the Petitioner pending the conclusion of the Petition is granted. In the Applicants' own words, the 1st Applicant appointed an acting speaker who has been running the activities of the 1st Applicant which are critical to its public service mandate.

19. I note that the current application was brought timeously. I further take cognizance of the fact that the Applicants have offered to provide security for the performance of the court's orders in the event they fail in the proposed appeal. However and as I have pointed out the condition as to substantial loss under Order 42 rule 6 of the Civil Procedure Rules has not been met. From the wording of Order 42 rule 6 above, it is a requirement that all the three and not just some of the conditions be met for an order for stay pending to be granted.

20. In effect, I think that the Applicants have not met all the requirements for grant of the orders sought as stipulated under Order 42 rule 6 of the Civil Procedure Rules. And in my view, they have also not satisfied the public interest condition suggested by the Supreme Court in the *Gitirau Peter Munya v Dickson Mwenda Kithinji and 2 others* case.

21. On prayer number 5 in the application, the Applicants pray for an order of injunction to restrain the Petitioner from assuming office as speaker of the County Assembly of Tana River pending the hearing and determination of the Petition and the intended appeal. On this I note that the rules under which the Applicants have applied do not grant the court jurisdiction to grant the order for injunction. Specifically, I refer to the provisions of Order 42 rule 6 and Order 22 rule 22. These two speak to stay orders; not injunctions. Importantly, Order 22 rule 22 relates to applications before a court which has been tasked to execute a decree or order emanating from another court. That is not the case in the current cause.

22. Although the Applicants have also invoked provisions of the Civil Procedure Act on the inherent power of the court, I have previously expressed my reservations on the wholesale application of the Civil Procedure Act and Rules to disputes before the ELRC Court in the face of the presence of the Employment and Labour Relations (Procedure) Rules (ELRC Rules). These rules apply only where the ELRC Rules permit (see *Miscellaneous Civil Application No3 of 2019 Vincent Nguma and others v Kilifi Mariakani Water and Sewerage Co Ltd (unreported)*). And the ELRC Rules have not adopted the Civil Procedure Rules on inherent jurisdiction donated to both the High Court and the subordinate courts.

23. As the application dated 26th April 2021 pursuant to which the conservatory orders were made was instituted under the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, the Applicants ought to have sought the interim injunction under rule 23 (1) of these rules which permits applications for both conservatory and other interim orders. But they elected to invoke other provisions of law.

24. While the court is alive to the need to avoid glorifying the place of rules of procedure in the pursuit for substantive justice, I think that this ought to be done with caution so that we do not render obsolete these rules.

25. The Supreme Court in *Zacharia Okoth Obado v Edward Akong'o Oyugi & 2 others [2014] eKLR* (quoting with approval the views of Kiage J in *Nicholas Kiptoo Arap Korir Salat v IEBC & 6 others [2013] eKLR*) had this to say about adherence to procedural rules: -

"... I am not in the least persuaded that Article 159 of the Constitution and the oxygen principles which both command courts to seek to do substantial justice in an efficient, proportionate and cost-effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice. This Court, indeed all courts, must never provide succor and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even-handed. Courts cannot aid in the bending or circumventing of rules and a shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. I apprehend that it is in the even-handed and dispassionate application of rules that courts give assurance that there is a clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned..."

26. On my part, I think that rules of procedure ought to be substantially observed particularly where it is within a party's power, exercising reasonable diligence, to do so.

27. The Applicants also want this court to order a stay of proceedings in the Petition until such time that the intended appeal to the

Court of Appeal shall have been heard and determined. Although this is not expressly pleaded in the application dated 15th November 2021, the reason for the prayer as appears from the Applicants' counsel's submissions is that should the court hear the Petition before the intended appeal is canvassed, it is likely to be influenced by the decision of 29th October 2021 granting conservatory orders as, in the Applicants' view, the ruling made final findings on the question of the legality of the impugned impeachment before considering the full evidence that could only be availed during the hearing of the Petition. In the Applicants' view, should the court proceed with the cause before the intended appeal is heard, it is likely to arrive at a biased decision.

28. An order for stay of proceedings is usually considered as grave. It may have the unintended effect of stalling judicial proceedings sometimes to the disadvantage of a party to the cause. It has the potential of delaying the expeditious disposal of matters before a court. As a result, such orders ought to be issued sparingly and only in the clearest of cases.

29. In *Halsbury's Law of England*, 4th Edition. Vol. 37 page 330 and 332, the following is said of these orders: -

"The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court's general practice is that a stay of proceedings should not be imposed unless the proceeding beyond all reasonable doubt ought not to be allowed to continue."

"This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases."

30. In *Re Global Tours & Travel Ltd HCWC No. 43 of 2000* Justice Ringera had this to say of orders of stay of proceedings:-

"As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously."

31. The proposed appeal seeks to challenge the decision of the court to make what the Applicants argue are final orders before hearing the full evidence on the matter. Would hearing of the main Petition before this question is addressed by the Court of Appeal jeopardize the proposed appeal? I do not think so.

32. The question relating to the grant of interim conservatory orders by this court is now a closed one. It is unlikely to be revisited by the court unless there is an application for review. A challenge on the exercise of the court's power to grant the interim conservatory orders cannot therefore influence the direction of the main Petition.

33. The question of bias in my view is therefore farfetched. The court will be able to evaluate the evidence that will be tendered during the hearing of the Petition independent of its pronouncements in respect of the interim conservatory orders before it arrives at its final decision. I am therefore not convinced that there is a compelling reason why I should exercise my discretion to stay the cause.

34. Finally, I must point out that the arguments advanced by the parties either in support of or opposition to the application essentially invite me to engage in the exercise of interpreting the order of Justice Ongaya who issued the conservatory orders before the cause was transferred to Malindi for hearing and disposal. This is an invitation which I must resist. Being a judicial officer exercising concurrent jurisdiction as this court, it is untidy to attempt to engage in the task of interrogating and purporting to interpret his orders. This exercise is best left to the judge who made the order if not the appellate court.

35. In view of the foregoing, I decline to grant the orders sought in the application. However, and in recognition of the fact that these proceedings are conducted under the auspices of the Constitution of Kenya Practice and Procedure Rules as read with rule 7 of the ELRC Rules, I am minded to invoke rule 3 (8) of the Constitution of Kenya Practice and Procedure Rules to order for the maintenance of the status quo currently obtaining for a period of 45 days pending any further application by the Applicants to the Court of Appeal for stay pending Appeal. And by status quo currently obtaining, I mean that the Petitioner is physically not in the Speaker's office despite the conservatory orders that issued on 29th October 2021. For the 45 days as well, the proceedings in the cause shall be temporarily suspended. Parties may move the court thereafter to fix a date for the Petition should the Applicants not have obtained orders to the contrary from the Court of Appeal.

36. Costs of the application shall abide the results of the Petition.

DATED, SIGNED AND DELIVERED ON THE 8TH DAY OF DECEMBER, 2021

B O M MANANI

JUDGE

In the presence of:

Mr. Binyenya for the Petitioner

Ms. Juaje for the 1st to 5th Respondents

ORDER

In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th April 2020, this ruling has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B. O. M. MANANI

JUDGE