



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO.430 OF 2019

AND

IN THE MATTER OF THE COUNTY GOVERNMENTS ACT NO. 17 OF 2012

AND

IN THE MATTER OF THE STANDING ORDERS FOR THE COUNTY ASSEMBLY OF ISIOLO

AND

IN THE MATTER OF ARTICLES 10;22;23;27;47;50;165;176;185;

AND 258 OF THE CONSTITUTION OF KENYA, 2010 AS READ

WITH THE FAIR ADMINISTRATIVE ACTIONS ACT

BETWEEN

ALI DIMA DUBA.....1ST PETITIONER

NUIRA DIBA BILLA.....2ND PETITIONER

AND

SPEAKER, COUNTY ASSEMBLY OF ISIOLO.....1ST RESPONDENT

COUNTY ASSEMBLY OF ISIOLO.....2ND RESPONDENT

RULING

1. Before me are two applications for determination. The first application is by the Respondents brought pursuant to article 165 of the constitution, section 12 and 15 of the Civil Procedure Act and Rule 8 of the Constitution of Kenya (Protection of rights and fundamental Freedoms) Practice and is dated 18th November 2019. The second application by the petitioners is brought pursuant to Articles 10, 22, 23,27,47,50,165,176,185 and 258 of the Constitution of Kenya and is dated 26/11/2019.

2. The two applications were heard together and I propose to do ruling in respect of each application.

A. Application dated 18th November by the Respondents.

3. The Respondents in their application mainly pray that this petition be transferred to the High Court in Meru for hearing and determination. The reasons given for seeking transfer are that the High Court at Milimani Law Courts; Nairobi lacks the requisite jurisdiction to hear and determine this petition; that the cause of action arose in Isiolo County and as such only the High Court in Meru has the territorial jurisdiction to hear and determine this petition; that the parties in this petition and all prospective witnesses reside in Isiolo County and it is more convenient and cost effective to have this matter transferred to Meru High Court which has requisite jurisdiction; that there is no arguable or good ground for filing this petition in Nairobi and lastly parties are likely to incur exorbitant costs if the petition is heard in Nairobi.

4. The application is supported by supporting affidavit by Hussein Halake Roba sworn on 18th November 2018, who has reiterated the grounds on the face of the application in support of the application and accuses the petitioners of being guilty of forum shopping and deposes that the petitioners have been flaunting that they did deliberately file the petition in Nairobi so as to punish the Respondents and cause untold hardship to the Respondents in terms of travel and other logistics.

5. The petitioners are opposed to the Respondents application for transfer and in doing so, rely on sworn affidavits by Ali Dima Bura sworn on 26th November 2019 and by Nura Diba Billa sworn on 26th November 2019.

6. The petitioners in reply contend, that the Respondents application amount to forum shopping, and the same amounts to an abuse of the court process. The petitioners deny being guilty of forum shopping. It is further averred by the petitioners that the question of cost is speculative as no such evidence has been placed before court in support of assertions on costs. It is further urged the applicants have come to this court with unclear hands as they have disregarded the orders of this court issued on 30/10/2019 and as such, it is urged, they do not deserve any such orders or sympathy from this court until they purge the contempt. It is further submitted that it has not been demonstrated that this court lacks competence to hear and determine the instant application and petition, as no such materials has been placed before it in support of the allegation.

7. The petitioners further argue that they have at no material time been flaunting that they filed the instant petition in Nairobi in order to punish the Respondents.

8. It is further urged that petitioners fear for their life and security as members of County Assembly of Isiolo are in danger, to which this matter they have reported to **DCIO** Isiolo (*annexture ADD -1A and ADD -1B copies of O.B*). The petitioners urge that they are apprehensive, that the Respondents will hire goons to cause harm upon them whenever they attend court proceeding in Meru and therefore feel safe when this matter is handled in Nairobi, which is a neutral arbiter (*see ADD-3*) a report of *misappropriation report*).

9. Upon considering the parties pleading and counsel rival submissions, I find that the issue for consideration herein is one thus:-

1. Whether the Respondents have met the threshold set for transfer of matters from one court to another?

10. The Constitution of Kenya under Article 165(3) (a) provides that subject to clause (5) the High Court shall have unlimited original jurisdiction in criminal and civil matters. Under the aforesaid Article there is no limitation of the High Court's jurisdiction on the basis of territorial jurisdiction as urged by the Respondents. The matter before this court is however a constitutional petition and therefore as opposed to Civil Procedure Act, the Constitutional of Kenya (*Protection of Rights and Fundamental Freedoms*) Practice and Procedure Rules, 2013 comes into play. Under Rule 5 thereof provides:-

"(5) For the purpose of furthering the overriding objective, the Court shall handle all matters presented before it to achieve the—

(a) Just determination of the proceedings;

(b) Efficient use of the available and administrative resources;

(c) Timely disposal of proceedings at a cost affordable by the respective parties; and

(d) Use of appropriate technology."

11. **Rule 8(1) of the Constitutional of Kenya** (*Protection of Rights and Fundamental Freedom*) Practice and Procedure Rules 2013; provides:-

"8. (1) Every case shall be instituted in the High Court within whose jurisdiction the alleged violation took place."

12. It is evidently clear, that a petition shall be instituted in the High Court within whose jurisdiction the alleged violation took place notwithstanding any High Court may receive such a petition. The Practice and Procedure Rules further states inspite of provision of Rule 1 of Rule 8, the High Court has discretion or may order that petition be transferred to another court of competent jurisdiction either on an application or on its own motion.

13. The cause of action arose in Isiolo in this matter; where there is no High Court at Isiolo currently. Isiolo mattes are filed at the nearest High Court, thus Meru High Court. There is no justification why this matter should not have been filed in Meru, which is a neutral ground for parties herein. The reasons why the petitioners want this matter heard in Nairobi is not justified at all and I find the reasons of security amongst others to be a mere excuse to cause the Respondents suffer unjustified expense and delay prompt hearing and determination of this petition. This being a constitutional petition governed by the Constitution of Kenya (*Protection of Rights and Fundamental Freedoms*) Practice and Procedure Rules 2013, I am satisfied, that the application before this court is proper and the Respondents have rightly invoked this court discretion for transfer of this petition. I further find if the application the transfer would not be allowed there will be chaos in hearing and determination of matter as parties would be out to delay this matters as they seek to punish each other on lame excuses. I am of the view that once a party decides to institute a suit, the party should institute a suit in a court which has jurisdiction and which is near to the Respondents residences.

14. I have considered the authorities relied upon by the petitioners counsel in this matter and find the decision are based on Civil Procedure Act, and not the practice and Procedure provided for under the constitution. I further find as the Constitution of Kenya (*Protection of Rights*

and Fundamental Freedom) Practice and Procedure Rules 2013, applies to all proceedings made under Article 22 of the Constitution and that the overriding objective of these rules is to facilitate access to justice for all persons as required under Article 48 of the constitution are sufficient enough in matters related to constitutional issues.

15. From the above I find the Respondents application to be meritorious.

B. The Petitioner's application dated 26th November 26/11/2019.

16. The petitioners filed a Notice of Motion dated 26th November 2019 seeking the following orders:-

- a) That a Notice to Show Cause does issue against the 1st and 2nd Respondents as to why contempt proceedings ought not to be instituted against them.
- b) That the Speaker of the County Assembly of Isiolo, be committed to civil jail for six months and be fined accordingly for being in contempt of this Honourable Court's Orders of 30th October, 2019.
- c) The costs of this application be borne by the Respondents.
- d) Any other remedy that the court deems fit and just.

17. The application is based on grounds nos. (a) – (j) on the face of the application.

18. The application is supported by supporting affidavit of Ali Dimba Duba, sworn on 26th November 2019. It is petitioners' contention that they were illegally and unconstitutionally removed from office and as a result, the petitioners instituted this suit on 30th October 2019. That this court on 30th October 2019 issued an interim conservatory order in the terms:-

"That contrary to the Respondents' assertions, the question of costs to be incurred is speculative and no such evidence has been placed before this Court in support of those assertions."

19. The extracted order was duly served upon the respondents on 1/11/2019. It is contended that the Respondents have however declined and willfully disregarded and disobeyed this court orders as issued on 30th October 2019 and the petitioners urges that they have been locked out of their offices, and denied benefits and allowances that they are entitled to by virtue of their position. It is therefore asserted that the Respondents acts are an affront to principle of constitution as enshrined under Article 10 on governance; Article 27 (1), 28, 38, 47, 48, 50 and 81 of the Constitution of Kenya 2010; that their legitimate expectation that court orders will be obeyed and respected and the rules of natural justice has been frustrated by the Respondents acts. It is further contended the acts of the Respondents constitute an infringement on the right of the people of Isiolo County Assembly, to be represented by the petitioners as their chosen representative, in the various forthcoming House sittings and hence the Respondents actions have greatly prejudiced the petitioners.

20. The petitioners urge the court to find and hold the Respondents in contempt of this Honourable Court's order.

21. The 2nd petitioner filed further Replying affidavit in response to Replying affidavit by Hussein Halake Roba sworn on 19th November 2019 denying giving any false information or concealing any such facts as contended by Mr. Halake urging that Mr. Halake is the one misleading the court. He denied having unilaterally, arbitrary, illegally and unconstitutionally pronouncing himself as the minority leader as the position of minority leader is an elective position. However the 2nd petitioner contends that Mr. Halake, unilaterally ordered the 2nd petitioner removal from the house, decided to remove the 2nd petitioner as a minority leader as recorded in the Hansard at page 21 of Mr. Halakes Affidavit.

22. The 1st Respondent swore an affidavit on his own behalf and that of the 2nd respondent in opposition of the petitioners application. It is Respondent's contention that the petitioners application is riddled with falsehood all tailored to paint the 1st respondent in bad light and portray him as a rogue.

23. The Respondents aver that as per affidavit dated 30/10/2019, he proceeded and complied with the court's order immediately he was served with the same and allowed the petitioners to resume sitting on 5th November 2019 and issued a memo to the clerk in that regard on the same date (**HHR-1-A**). He contends that however the members of public blocked the petitioners from accessing the County Assembly prompting him to make a report at the Isiolo Police Station, who intervened, visited the assembly precincts in the company of anti-riot police officers and dispersed the crowd milling at the entrance of the assembly, managed to quell the commotion but by that time the petitioners had left (*see HHR I-B or extract from OB in respect of the report made*).

24. That since then the petitioners have freely and nonchalantly attended sittings of the assembly as they desire as demonstrated by a copy of one of the attendances, Hansard in respect of 13th November 2019 and 28th November 2019 and duly signed attendance register for the 13th November 2019 and 28th November 2019 both in the morning and afternoon session (*annexture HHR-3*).

25. The Respondents further argue the petitioners sometimes on their own volition and for reason better known to themselves did not attend the house sittings. It is further averred that the petitioners have all along received the dues that they are entitled to as attested by copies of the pay slips (*annexture HH 24*). It is further submitted that this petition was filed on 30/10/2019 and by the time of filing of the petition; a new County Minority leader had already been elected and as such the court's orders had been overtaken by event (*see annexure HH 25 and HH-*

26) copies of resolution by caucus appointing new minority leader and a communication to speaker vide a letter dated 18/10/2019. The replacement of the minority leader was therefore done by 18th October 2019 and implementation of the same effected.

26. It is further deposed by the Respondents in the Replying affidavit of 30/10/2019 under paragraph 14, 15,16,17,18 and 19 the petitioners were removed from various committees by their political parties through a letter dated 15/10/2019, a communication whereby had been done by the Respondent's office, thus therefore by the time of orders issued on 30/10/2019, the same had been overtaken by events (*see annexure HH 27*). The Respondents therefore contend that it is clear two limbs of the orders had already been overtaken by events, which he proceeded to obey and the third limb which the court had issued, urging all in all the Respondents obeyed the court order as issued.

27. The Respondents assert that the petitioners are rubble rousers whose sole intention is to ensure that no harmony prevails in the assembly and that both of them have a personal vendetta against the 1st Respondent because of the two criminal cases in court saddled against them by the 1st Respondent. It is further contended that the application is not made in good faith and is only intended to harass the 1st Respondent and interfere with the operations of the county assembly.

28. I have very carefully considered the petitioners chamber summons, supporting affidavit, further Replying affidavit to the Replying affidavit by Hussen Halake Roba; Affidavit in response to the notice to show cause and from the aforesaid only one issue arises for considerations; thus:-

a) Whether notice to show cause should issue against the 1st and 2nd Respondent as to why contempt proceedings ought not to be issued against them?

29. The petitioners contention is that it is not for a party to choose which part of the court's order to obey and disobey; urging that a party aggrieved by court's order is under an obligation to move the court accordingly. The petitioners aver that it is not enough for the Respondents to urge the court's orders were overtaken by events.

30. In the instant petition, there is no dispute that petitioners petition was filed on 30/10/2019 long after a new County minority leader had already been elected (*see annexure HHR-5 and HHR-6*) in which resolutions by the caucus appointing a new minority leader had taken effect on 18/10/2019. The petitioners were removed from various committees by their political parties in accordance with a letter dated 15/10/2019 and communication thereto made to the Respondents (*see annexure HHR-7*). The petitioners were all along aware of their removal in respect of the position of minority leader and from various committees before filing of the petition and present application; yet they decided not to disclose that fact to the court. I find the petitioners guilty of non-disclosure of material facts pertaining to the subject matter, and find had that been done this court would not have issued such an order. The petitioners should not be allowed to benefit from their non-disclosure of material facts.

31. It is clear from the uncontroverted affidavit by the 1st Respondent that two limbs of the order issued had already been overtaken by events, whereas the Respondents obeyed the third limb which had been issued by this court. There is no dispute that the petitioners have since the order was served been allowed to resume house sitting with respect from 5th November 2019 by the Respondents. However the blocking of the petitioners from assessing County Assembly by members of public, and in view of the steps taken by 1st Respondent to report to police, clearly demonstrates the Respondents were not involved in the blocking of petitioners to access the County Assembly. I find that the respondents action in any way cannot be taken as an act of disobeying this court's order.

32. It is further demonstrated that the petitioners have since been free to attend the sittings of the assembly as when and as they desire. The Respondents have produced sufficient documentary evidence demonstrating, that they complied with the court's order as from the time it was served. The failure of the petitioners' attendance on their own violation cannot be attributed to the Respondents nor can it be used as basis to blame the Respondents but the petitioners. Whenever a political party decides to remove any of its members from various committees and follows the laid down procedure and that is accordingly effected. The change cannot in all fairness be attributed to the Respondents herein.

33. This court did not order reinstatement of the petitioners but from clear reading of the order it reveals that the court issued conservatory orders maintaining the status quo as of the time of the order; preventing and restraining the Respondents from electing a new County Assembly Minority Leader; removing the Applicants from their respective positions in the County Assembly of Isiolo Committee and suspending the suspension of the Applicants. This had as already stated been overtaken by events and the petitioners are to blame themselves for non-disclosure of material facts at the time of issuing the order and for failure to have sought an order for reinstatement.

34. In the case of **Abdiwahab Abdullahi Ali vs. The Clerk County Government of Garissa the Clerk, County Assembly of Garissa (2013) eKRL** Hon Lady Justice S. Mutaku stated thus:-

"The burden of proof lies with the applicant to demonstrate to this court that the Respondents disobeyed the orders of this court. My view is that the applicant has failed to discharge the burden of proof. The Respondents have on the other hand demonstrated that by the time the orders were served, the names of the nominees had already been forwarded to the County Assembly for debate and therefore the order had been overtaken by events. It is incumbent upon a litigant to exercise due diligence to ensure the orders he/she is seeking will not be in vain. Failure to do this amounts to an abuse of the court's process."

35. **Section 107 of the Evidence Act** provides:-

"1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."

36. It is the duty of the Petitioners/Applicants to demonstrate that the Respondents disobeyed the orders of this court. I have considered the evidence by the petitioners and find that the Petitioners have not discharged the burden of proof. The Respondents have on the other end demonstrated that by the time of filing the petition, and the application and the time the orders were issued and subsequently served, two limbs in the court's order regarding election of a new minority leader and removal of the petitioners by the political party had taken effect and therefore overtaken by events. I find it is incumbent upon a litigant to disclose material facts before court in his pleadings and submission, as no party should be allowed to benefit from an order obtained through non-disclosure of material facts in a matter. It is further duty of a party to exercise due diligence to ensure the order sought will not be in vain; failure to do so amounts not only to wastage of court's valuable time but is also an abuse of the court process.

37. Upon considering the two applications, I find that the Respondents application dated 18th November 2019 succeeds whereas upon considering the petitioners application dated 26/11/2019 I find the same to be without merit. I accordingly order as follows:-

- a) The Respondents application dated 18th November 2019 is allowed.**
- b) The Petition herein be and is HEREBY transferred to the High Court in Meru for hearing and determination.**
- c) The Petitioners application dated 26th November 2019 is dismissed.**
- d) The Respondents are awarded costs of both applications.**

Dated, signed and delivered at Nairobi this 7th day of February, 2020.

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J .A. MAKAU

JUDGE