



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARISSA

PETITION CASE NO. 11 OF 2019

HON. HASSAN HALANE.....PETITIONER

VERSUS

HON. AHMED IBRAHIM ABASS, SPEAKER COUNTY

ASSEMBLY OF GARISSA.....RESPONDENT

JUDGEMENT

Introduction

The Parties

1. The Petitioner is the elected Member of County Assembly for Fafi Ward Garissa County and he has also brought this Petition in the interest of the following members of the County Assembly Hon. Mohamed Omar Abdullahi (Township) Hon. Suleiman Mohamed (Jarajara) Hon. Hussein Dakane (Nominated) and Hon. Habiba Abdi (Nominated).
2. The Respondent is the Honourable Speaker of the County Assembly of Garissa and hold Office pursuant to Article 178(1) of the Constitution, and preside over the Assembly pursuant to Article 178(2)(a) of the Constitution.

Petitioner's Case

3. The petitioner is challenging the Respondent ruling issued on 24th September, 2019 where together with the above other four members of the County Assembly of Garissa were expelled from the County Assembly for three months. The ruling was as follows:

“The following Honourable members are hereby expelled for the remainder of the session and have been expelled from the assembly and its precincts for three (3) months and they are as follows:

- (i) Hon. Mohamed Omar Abdullahi (Township)**
- (ii) Hon. Suleiman Mohamed (Jarajara)**
- (iii) Hon. Hussein Dakane (Nominated)**
- (iv) Hon. Habiba Abdi (Nominated)**
- (v) Hon. Hassan Halane (Faji)”.**

4. The Petitioner allege that the above ruling of the Respondent was as a result of their protest against the Respondent undemocratic leadership, which in protest thereof they blew whistles in the assembly and in punishing them for their action, the Respondent issued the above ruling. It is their contention herein that the Respondent decision violated the Garissa County Assembly Standing Orders, The County Government Act, 2012 and the Constitution of Kenya 2010.

5. In regard to the Respondent ruling and breach of the Assemble Standing Orders, the Petitioner alleges that the same is in breach of Standing Order No. 104(1) and (2). Standing Order No. 104(1) which lists the conducts that would be considered disorderly by a member of

the County Assembly, and they include where a member: -

- a. **Creates actual disorder**
- b. **Knowingly raises a false point of order**
- c. **Uses or threatens violence against a member or other person**
- d. **Persist in making serious allegations without, in the speaker's opinion, adequate substantiation**
- e. **Otherwise abuses his or her privilege**
- f. **Deliberately gives false information to the County Assembly**
- g. **Votes more than once in breach of the standing orders**
- h. **Commits a serious breach of the standing orders**
- i. **Acts in any other way to the serious detriment of the dignity or orderly procedure of the County Assembly.**

6. It is their case that Standing Order No. 104(2) provides that the Speaker or Chairperson of the Committee shall order any member whose conduct is grossly disorderly to withdraw immediately from the precincts of the assembly.

- a. **On the first occasion, for the remainder of that day sitting**
- b. **On the second or subsequent occasion during the same session, for a maximum of three sitting days including the say suspension.**

7. The Petitioner in view of the above ruling contend that they are right holders and the Respondent in his capacity is a duty bearer -has failed to observe, respect, protect, promote and fulfill the Constitution pursuant to Article 21(1), and that in failing to adhere to the above provisions of Standing Orders No. 104 failed to observe the National Values and Principles provided for under Article 10 of the Constitution.

8. In this regard they argue that the bowing of whistles by the Petitioner at the Assembly is not disputed, and that the same amounts to a creation of actual disorder, and in this regard, it is their contention that the speaker ought to have punished them within the premise of Standing Order No. 104(2)(a).

9. Additionally, they argue that the speaker's actions violate Article 47(1) of the Constitution which provided for administrative action which must be lawful and reasonable.

10. Further, the Petitioner contend that the Respondent ruling herein violates Article 185(1)(2)(3) and (4) of the Constitution which creates the functions of the County Assembly which include legislation, representation and oversight, and therefore the Respondent decision inhibits them from performing their functions as provided for under the Constitution and the law.

11. Furthermore, they allege that the Respondent denied them access to the Hansard of Garissa County Assembly for proceedings that took place on 25th September, 2019 which action they allege violates Article 35(1) of the Constitution providing for access to information.

12. The Petitioner seeks the following reliefs from this Court: -

- a. A Declaration that the Respondent order made on 24th September, 2019 expelling; **Hon. Mohamed Omar Abdullahi (Township) Hon. Suleiman Mohamed (Jarajara) Hon. Hussein Dakane (Nominated), Hon. Habiba Abdi (Nominated) and Hon. Hassan Halane (Member of County Assembly, Fafi Ward)** for three months from Garissa County Assembly violates Article 47(1) and Article 185(1)(2)(3)(4)(a) and (b) of the Constitution of Kenya 2010 and is therefore **null and void ab initio**.
- b. A Declaration that the Respondent can only expel or suspend Members of Garissa County Assembly for gross misconduct in the manner prescribed under Standing Order Number 104(2)(a) and (b).
- c. An Order of Prohibition to restrain the Respondent from expelling, suspending and/or removing; **Hon. Mohamed Omar Abdullahi (Township) Hon. Suleiman Mohamed (Jarajara) Hon. Hussein Dakane (Nominated), Hon. Habiba Abdi (Nominated) and Hon. Hassan Halane (Member of County Assembly, Fafi Ward)** from Garissa County Assembly for their conduct on 24th September, 2019.
- d. Costs and Interest of the Petition.
- e. Any Other Orders as the Honourable Court deems just and appropriate.

13. The petition is supported by the affidavit of Hon. Hassan Halane sworn on 3rd September, 2019, which reiterates the above.

Respondents' Case

14. The Respondent filed their response to the petition which is dated 4th November, 2019 and filed on 8th November, 2019 in opposition to the instant petition.
15. The Respondent denied that he acted in breach of Article 21(1) of the Constitution. It is his position that the Petitioner misconceived the purposive and literal meaning of Article 47 of the Constitution, and that they have turned a blind eye on the provisions of section 9(1) and (2) of the Fair Administrative Action Act, which creates the doctrine of exhaustion.
16. In this respect they argue that the Petitioner failed to resolve the instant dispute vide the established internal mechanism, arguing that the petitioner ought to have first submitted his complaint to the County Powers and Privileges Committee established under Article 176(3) of the Constitution.
17. Additionally, they argue that section 15(4) of the Powers and Privileges Act vest the powers to privileges committee to inquire into the conduct of a member whose conduct is alleged to constitute breach of privilege and it shall make its finding after 14 days. And that the petitioner ought to have raised the matter before the assembly before approaching this court. In this respect they allege that this court lacks the jurisdiction to handle the dispute at hand.
18. Further, the Respondent has argued that the instant petition is an affront to the doctrine of separation of powers, alleging that the same has been filed in bad faith and it invites this court to direct the County Assemblies which are legislative branches of Government on their procedures and how to run their affairs.
19. In this regard they argue that its proceedings are subject to Article 196(3) of the Constitution as read with sections 16 and 17 of the County Government Act and sections 10 and 11 of the County Assembly (powers and Privileges) Act which protects members from prosecution with respect to matters in a debate, petition, motion or other proceedings in the County Assembly.
20. It is their argument that the instant petition does not raise any cause of action and neither is there any violation of the Petitioners fundamental rights and/or freedoms that can be attributed to the Respondent.

Submissions

21. Both Parties filed their respective written submission.

PETITIONERS SUBMISSIONS

22. The Petitioner submissions 8th November, 2019 and filed on even date, whereas the Respondents submissions are dated 4th November, 2019 and filed on 5th November, 2019.
23. The Petitioner reiterated their case above submitting that the right procedure which ought to have been followed by the Respondent in disciplining the Petitioner is the one provided for under sections 16, 26(1) and 28 of the County Assemblies Powers and Privileges Act No. 6 of 2017, which provisions creates the Powers and Privileges Committee whose main function is to inquire into the conduct of a member whose conduct is alleged to constitute a breach of privilege, and determine the impugned conduct within 14 days and thereafter present a report to the assembly recommending such action against the member in question, and the action may include suspension from the house.
24. In this regard they submitted that the Respondent herein acted on his own motion in delivering his impugned ruling, which decision they submit was being undertaken within the premise of Standing Order No. 104(2) which has a limited disciplinary scope which they submit the Respondent did not adhere to.
25. In addition, they submitted that this court has the jurisdiction to hear the instant petition pursuant to Articles 165(3)(b) and also article 163(3)(d)(ii) of the Constitution, which basically provides that the high court has the jurisdiction to determine questions whether a right or fundamental freedom in the bill of rights has been denied, violated, infringed or threatened.
26. Further, they submitted that the Respondent holds office under Article 178(1) of the Constitution, and therefore he is bound to exercise his mandate in compliance with the Constitution. In this regard they submitted that the Respondent impugned ruling is in breach of Article 47(1) of the Constitution which provides for the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
27. In addition, they submitted that the same is also contrary to national values and principles envisaged under Article 10 of the Constitution, and more specifically that he failed to uphold the rule of law.
28. In support of their case they rely in the following authorities **Justus Kariuki Mate & another vs Martin Nyaga Wambora & Another (2017) eKLR James Opiyo Wandayi vs Kenya National Assembly & 2 Others, (2016) eKLR and Coalition for Reform and Democracy (CORD) & 2 others vs Republic of Kenya & 10 Others (2015) eKLR Nathanael Nganga Reuben vs Speaker, Machakos County Appollo Mboya vs A.G & 2 others (2018) eKLR.**

RESPONDENT SUBMISSIONS

29. The respondent in their submissions also reiterated their case above. They identified the following issues for determination. The first

issue addressed is on whether this court has the jurisdiction to determine this Petition.

30. In this regard they submitted that the Petitioner failed to adhere to the laid down internal procedure to deal with the dispute, and therefore argue that they have approached the court prematurely, which action they submit is contrary to the exhaustion principle established under section 9 (2) of the Fair Administrative Action Act. Therefore, it is their submissions that this court lacks the jurisdiction in view of the Supreme Court decision in *Samuel Kamau Macharia & another vs. Kenya commercial Bank Limited and 2 Others (2012) eKLR*.

31. The second issue identified is on whether the Respondent followed the laid down procedure. In this respect they submitted that it is the Petitioner who failed to follow the laid down procedure in raising the issue herein as provided for under the Constitution and the Fair Administrative Action Act.

32. In addition, they argued that no evidence has been tendered on an attempt to approach the speaker over the dispute in issue and submit that the instant petition is a fraud.

33. The third issue submitted on by the Respondent is on whether the court can interfere with the Speakers ruling delivered on 24th September, 2019. And in this respect, it is their position that this court ought not to interfere with the said ruling in view of the doctrine of separation of powers.

34. In this regard they rely in the following authorities, **Republic vs The National Assembly Committee of Powers and Privileges JR Case No. 129 of 2015, John Harun Mwai vs Dr. Andrew K. Mullei & 3 Others Misc Application No. 186 of 2006, Justus Kariuki Mate & another vs Martin Nyaga Wambora & another (2017) eKLR and Canada (House of Commons) vs. Vaid, (2005) 1 S.C.R 667; 2005 SCC 30.**

35. The other issue addressed by the Respondent is on costs, where they urged the court to award the cost to the successful litigant. In sum they urged the court to dismiss the instant petition for lack of merit.

ISSUES AND ANALYSIS

36. I have considered the respective parties pleadings and submissions and It is apparent to this court that most of the issues raised by the Respondent herein were addressed by this court vide its ruling delivered on 18th October, 2019, which ruling considered the issues raised by the Respondent vide their Notice of Preliminary objection dated 4/10/2019 which raised the following 3 grounds namely:

- i. The Court lacks jurisdiction to hear and determine this matter, reason being that it flies in the face of the doctrine of separation of powers.**
- ii. The matter lies within the ambit of the powers and privileges Committee of County Assembly.**
- iii. The exhaustion principle:**

37. This court in its ruling identified the following as the issues for determination, these are:

- i. Whether High court has jurisdiction to entertain this matter?**
- ii. Whether Petitioners have exhausted internal mechanisms for appeal review and all available remedies available under any other written law as required by S9 (2) of Fair Administrative Action Act?**
- iii. Whether this court can directly deal with the speakers ruling delivered on 24.9.2019?**
- iv. Whether Respondent has violated Article 47 of the Constitution?**
- v. Whether the instant Notice of Motion is meritorious?**
- vi. What is the order as to costs?**

38. It therefore clear to this court that vide its ruling above, the most of the issues raised by the Respondent herein were comprehensively dealt with. The court more notable held that it has the jurisdiction to deal with the issues raised and that the same does not breach the aspect of separation of powers and additionally held that it does not breach the exhaustion principle envisaged in section 9 of the Fair Administrative Action Act.

39. In the circumstances the only issue in this petition that stands out for determination is whether the impugned Respondent ruling herein is in breach of the Constitution and the law.

40. I have looked at the relevant laws in the circumstances of this case and the following is the procedure to be followed in the instance where a member of county assembly behavior is put into question.

41. In this case, the behavior which has not been disputed is the petitioner's action of blowing whistle in the assembly, which action led to the Respondent delivering the impugned ruling as a punishment for their action.

42. **Section 15(1) of the County Assemblies Powers and Privileges Act, 2017** (hereinafter referred to as the Act) establishes the County Committee of Powers and Privileges consisting of the Speaker, who shall be the chairperson of the Committee; and such other members of the county assembly as may be provided in the Standing Orders of the county assembly.

43. Section 15(4)(a) of the Act provides that the functions of the Committee of Powers and Privileges shall be to:-

“Inquire into the conduct of a member whose conduct is alleged to constitute a breach of privilege in terms of [section 16](#).”

44. Section 15(6) of the act provides that the Committee of Powers and Privileges shall, within fourteen days of the conclusion of an inquiry, table its findings in the relevant county assembly together with such recommendations as it considers appropriate.

45. **Section 16 of the Act** provides for the conduct constituting breach of privilege. It provides that the Committee of Powers and Privileges may find a Member to be in breach of privilege if the member:-

a. contravenes sections 25, 26(1), 27 or 29;

b. commits an act mentioned in section 28(1)(a), (b) or (2) and (3)(d), (e), (f) or (g);

c. willfully fails or refuses to obey any rule, order or resolution of a county assembly;

d. contravenes any provision of the Speaker’s orders issued under section 40 of this Act; or

e. conducts himself or herself in a manner which, in the opinion of the Committee on Powers and Privileges, is intended, or is likely to reflect adversely on the dignity or integrity of a county assembly, or of the Members or to be contrary to the best interests of a county assembly or its Members.

46. The relevant part in regard to the instant case is section 26(d) of the Act which provides for acts which can be considered as breach for privilege. It provides that a person shall not: -

“While a county assembly or a committee is sitting, create or take part in any unlawful disturbance which interrupts or is likely to interrupt the proceedings of a county assembly or any committee while a county assembly or the committee is sitting.”

47. On finding that a member of the County Assembly has acted in breach of privilege, section 17(3) of the Act provides that where a county assembly finds that a Member has committed a breach of privilege, the county assembly may, in addition to any other penalty to which the Member may be liable under this Act or any other law, impose any or more of the following penalties:-

a. a formal warning;

b. a reprimand;

b. an order to apologize to the county assembly or a person in a manner to be recommended by the Committee of Powers and Privileges;

d. the withholding, for a specific period of time, of the member's right to the use or enjoyment the removal or suspension for a specified period of time of the Member from any a county assembly position occupied by the Member; of any specified facility provided to Members by a county assembly;

e. such fine in terms of the Member's monthly salary and allowances as the House may determine;

f. the suspension of the Member for such period as the House may decide, whether or not the county assembly or any of its committees is scheduled to meet during that period;

g. vacation of seat pursuant to Articles 75(2)(b) and 194(1)(c) of the Constitution.

48. In regard to the Respondent scope to discipline members of the assembly, the Garissa County Standing Orders No. 104 provides for grossly disorderly conduct. It provides as follows:

1. Conduct is grossly disorderly if the member concerned:-

a. Creates actual disorder.

b. Knowingly raises a false point of order.

c. Uses or threatens violence against a member or other persons.

d. Persist in making serious allegations without, in the speaker's opinion adequate substantiation.

e. Otherwise abuses his or her privileges.

f. Deliberately gives false information to the county assembly.

g. Votes more than once in breach of the standing orders.

h. Commits any serious breach of these standing orders: or

i. Acts in any other way to the serious detriment of the dignity or orderly procedure of the County Assembly.

49. Standing Order 104(2) provides that the speaker or chairperson of committees shall order any member whose conduct is grossly disorderly to withdraw immediately from the precincts of the County assembly-

a. On the first occasion, for the remainder of that days' sitting

b. On the second or subsequent occasion during the same session, for a maximum of three sitting days including the day of suspension.

50. It is apparent to this court based on the foregoing that there are two instances where a member of county assembly can be punished for a conduct which is considered to amount to a breach of privilege. The first instance is where the Committee of Powers and Privileges established under section 15 of the Act above inquires into a member conduct and within 14 days delivers reports to the assembly for adoption recommending the commensurate punishment to the said member.

51. The second instance is where the speaker or chair of a committee in exercising their limited disciplinary powers provided for under Standing Order No. 104 above punishes a member for a conduct considered grossly disorderly.

52. In this case it is clear that the Respondent did not refer the petitioner's actions herein to the Committee of Powers and Privileges and instead he seems to have invoked his powers to punish the petitioner within the provisions of Standing Order No. 104(2) of Garissa County Assembly Standing Orders.

53. The petitioner herein are challenging the Respondent ruling herein on the ground that the same is ultra vires, as it is outside the scope of Standing Order No. 104(2) which gives the Respondent the limited disciplinary powers.

54. Indeed, upon considering the impugned ruling *vis a vis* the provisions of the Standing Order No. 104(2) of Garissa County Assembly Standing Orders, it is clear to me that the respondent action expelling the petitioners from the assembly for the remainder of the session and expelling them from the assembly and its precincts for three (3) months is outside the provisions of the standing orders and therefore not within the law. It is contrary to Standing Order No. 104(2) which gives the respondent the power to suspend the petitioners (a) On the first occasion, for the remainder of that days' sitting and (b) on the second or subsequent occasion during the same session, for a maximum of three sitting days including the day of suspension.

55. As was held by this court in its ruling herein, the courts can interfere where there is a clear breach of law.

56. In *Justus Kariuki Mate & Another vs Martin Nyaga Wambora & Another (2017) eKLR* the Supreme Court held that:

“In a jurisdiction like ours in which the Constitution is supreme, the court has jurisdiction to intervene where there is a failure to abide by standing orders which have been given constitutional underpinning under the said Article. However, the court must exercise restraint and only intervene in appropriate instances, bearing in mind the specific circumstances of each case.

57. In *Apollo Mboya vs Attorney General & 2 Others [2018] eKLR*, Justice Mativo in this regard held that: -

“..According to the doctrine of the separation of powers, one of the important functions of the judiciary is to keep the other organs of the State in check by ensuring that their actions comply with the law, including, where applicable, the Constitution. Ouster clauses prevent courts from carrying out this constitutional function.”

58. Therefore, in view of the above, it is clear to me that this is one of the instances where the court ought to interfere in view of the glaring non obedience of the Constitution and its own standing orders by a legislative body or person acting or exercising their Constitutional mandate such as the instant Respondent case, the resultant effect being the breach of persons fundamental freedoms and rights.

59. The upshot is that it is my finding that the Respondent exceeded its mandate under the standings orders No. 104 (2), thus breaching Article 47 and 10 of the Constitution of Kenya.

CONCLUSION

60. It is therefore my view that this court finds this petition meritorious and allows the same with costs. Thus the court makes the following

orders;

i. Prayers a, b, c, and d of the petition are hereby granted.

ii. Costs to the petitioner.

DATED, DELIVERED AND SIGNED AT GARISSA THIS 12TH DAY OF FEBRUARY, 2020.

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C. KARIUKI

JUDGE