



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA KIAMBU

PETITION NO. 65 OF 2018

IN THE MATTER OF ARTICLES 1(1), 1(4) (b), 2,3,10,19,20,21,22,23,27,28,47,50,73,75,77,174,175,185 & 197 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF SECTIONS 7,9,12,13 & 14 OF THE COUNTY GOVERNMENTS ACT

AND

IN THE MATTER OF ARTICLES 2,3,4,7,13 & 19 of the AFRICAN CHARTER ON HUMAN & PEOPLE’S RIGHTS and other provisions;

AND

IN THE MATTER OF STANDING ORDERS OF THE COUNTY ASSEMBLY OF KIAMBU

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES 2013

BETWEEN

KARIUKI MWANGI.....APPLICANT/PETITIONER

VERSUS

STEPHEN NDICHU THE SPEAKER, COUNTY ASSEMBLY OF KIAMBU.....1ST RESPONDENT

THE CLERK, COUNTY ASSEMBLY OF KIAMBU.....2ND RESPONDENT

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

RULING

1. By a Notice of Motion filed on 4/09/2018, the Petitioner/ Applicant herein sought the following orders:

“a) SPENT

b)That pending the hearing and determination of this Petition the Honourable Court issues a prohibitory order in the nature of an injunction to prohibit, restrain and stop the Deputy Speaker for Kiambu County by himself or by his officers, agents, servants and/or any person acting through them from performing the duties of Deputy Speaker as purportedly spelt out in the standing orders Part III Section 16.

c)That pending the hearing and determination of this Petition the Honourable Court issues a prohibitory order in the nature of an injunction to prohibit, restrain and stop the Deputy Speaker of Kiambu County by himself or by his officers, agents, servants and/or any person acting through them from accessing the offices created for him for that purpose.

d) That pending the hearing and determination of this Petition, this Honourable Court issues a prohibitory order in the nature of an injunction to restrain the 1st, 2nd and 3rd Respondents by themselves or by their officers, agents, servants and/or any person acting through them from assigning duties, remunerating and/or engaging the services of the said Deputy Speaker in that capacity.

e) That pending the hearing and determination of the Petition the Honourable Court issues a prohibitory order in the nature of an injunction to restrain the said Deputy Speaker from enjoying benefits that accrue to him in the capacity of Deputy Speaker including using the official assigned to him, having a bodyguard and driver among others.” (sic)

2. The gist of the application is that the current occupant of the office of Deputy Speaker of the County Assembly of Kiambu is occupying an unconstitutional office and is causing waste of public resources and funds.

3. **KARIUKI MWANGI** the Applicant/Petitioner swore the affidavit in support of his application. He deposed that the provisions of Standing Orders Part III Section 16 of the County Assembly of Kiambu provide for the office of a Deputy Speaker contrary to the provisions of Article 178(3) of the Constitution and Section 9(4) of the County Governments Act.

4. The Respondents opposed the motion through an affidavit sworn by **JOSEPH IGOGO NDIRANGU**. He deposed that the National Assembly has a Deputy Speaker under its standing orders and that the election of a member to deputize the Speaker in the County Assembly is provided for under Section 14(8) of the County Governments Act. He further deposed that Part III of the Standing Orders of the County Assembly of Kiambu provides for the election of a Deputy Speaker and as such the office is not illegal and is indeed in line with the Constitution and the County Governments Act. It was contended that salary scale for the contested office is along others, set by the Salaries and Remuneration Commission.

5. The application was canvassed by way of oral submissions. The Applicant through his counsel submitted that the position of Deputy Speaker does not exist in the law as the County Governments Act envisages a temporary speaker elected in the event the Speaker is absent. Counsel submitted that in any event, the office of the Deputy Speaker as a permanent office cannot be created by a provision in the County Standing Orders where no such office is recognised under the Constitution. Reliance was placed on the case of **Douglas Bundi Kirimi vs Joseph Kaberia Arimba & 2 others Meru Constitutional Petition No. 26 of 2017** where similar provisions creating the position of Deputy Speaker in the Meru County Assembly Standing Orders were declared unconstitutional and struck down.

6. Mr. Muriuki for the Respondents submitted that Article 178 2(b) provides for the election of a temporary speaker who remains in office until the end of the electoral term. He contended that the notion that the position of the Deputy Speaker is illegal is faulty. He submitted that the salary of the deputy speaker was gazetted by the Salaries and Remuneration Commission and that the decision of the High Court at Meru is not binding on this court.

7. The court has considered the matters canvassed in respect of the motion. The Petitioner herein seeks conservatory orders which this court is empowered to grant pursuant to the provisions of Article 23(3) of the Constitution which states:

“In any proceedings brought under Article 22, a court may grant appropriate relief, including—

a)...

b)....

c) a conservatory order

d).....

e).....

f)....”

8. In the case of **Gatirau Peter Munya v Dickson Mwenda Kithinji (2014) eKLR** the Supreme Court stated regarding the exercise of this jurisdiction that:

“Conservatory orders” bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as “the prospects of irreparable harm” occurring during the pendency of a case; or “high probability of success” in the supplicant’s case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.”

9. To be successful the Applicant seeking a conservatory order must demonstrate real and impending danger of the violation of a fundamental right or freedom or violation of the Constitution which portends the likelihood of the Petitioner himself or the public at large suffering prejudice. In **Judicial Service Commission v Speaker of the National Assembly and Another [2013] e KLR**, the court stated that;

“Conservatory orders ... are not ordinary civil law remedies but are remedies provided for under the Constitution, the supreme law of the land. They are not remedies between one individual as against another but are meant to keep the subject matter of the dispute *in situ*. Therefore such remedies are remedies in rem as opposed to remedies in personam. In other words, they are remedies in respect of a particular state of affairs as opposed to injunctive orders which may only attach to a particular person”

10. The court further observed that before granting such orders, the court had to inquire into the credentials of the Petitioners, the prima facie correctness of information availed to the court, be satisfied of the legitimacy of the grievances presented and seriousness of the dispute. In other words, that where violations of rights or the constitution are alleged, there are demonstrable arguable issues and where assertions of violations of the Constitution are made, the constitutional issues arising are arguable. Not necessarily that the case will succeed at the trial.

11. On this point, the Petitioner’s case is that the Respondents have in violation of Article 178 of the Constitution and the County Governments Act, purported to create the permanent position of Deputy speaker of the Kiambu County Government and that these actions are a nullity *ab initio*, and have led to unlawful use of public resources to cater for the perks that come with the office, including a vehicle, driver, bodyguard and allowances. The matters disclosed in the Petitioner cannot be said to be frivolous and have indeed been the subject of previous litigation in **Douglas Bundi Karimi v Joseph Kaberia Arimba and 2 Others [2018] e KLR**. In that case the court agreed with the position canvassed by the Petitioner that the Constitution does not envisage the office of the deputy speaker of a county. In a more recent case however, **Amos Muthui Muchiri v Speaker, County Assembly of Nyeri and 3 others [2019] e KLR, Ngaah J**, found otherwise.

12. Regarding the element of prejudice, it appears that the Petitioner’s concern is not that he will suffer prejudice in his personal capacity as such. Rather that public resources will be wasted in funding what he considers an unconstitutional or illegal office. One of the prayers in the Petition seeks a declaration that **“the allowances enjoyed and costs incurred courtesy of the so-called Deputy Speaker by virtue of his purported position ... be quantified”** (sic) and refunded. 13. On their part the Respondents have asserted that the benefits attaching to the office have been approved by the Salaries and Remuneration Commission pursuant to the exercise of their mandate under Article 230(4) of the Constitution, and have attempted to demonstrate the role that the deputy speaker plays in facilitating the business of the County Assembly. Public interest in this case is not only about application of public resources but the proper functioning of institutions.

13. That the Petitioner has disclosed an arguable case does not necessarily mean he will be successful in the main case and as the two previous decisions of the High Court on the issue raised in this petition have shown, the question for determination herein is far from settled. The court must therefore consider the more proportionate remedy by balancing between the public interest element concerning the proper application of public funds and on one hand, and the smooth operation of the County Assembly on the other. The lesser evil in the circumstances of this case, the justice of the case and the more prudent recourse is to allow the *status quo* to be maintained pending the final determination of the Petition. For these reasons, the motion is rejected. Costs will abide the outcome of the Petition.

DELIVERED AND SIGNED AT KIAMBU THIS 6TH DAY OF FEBRUARY 2020

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C. MEOLI

JUDGE

In the Presence of:

Mr. Njehu holding brief for Mr. Ngetich for the Applicant

Ms Wamaitha holding brief for Mr. Karugu for the Respondents

Court Assistant - Ndege