



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT ELDORET**  
**JUDICIAL REVIEW 9A OF 2018**

REPUBLIC.....APPLICANT

VERSUS

THE SPEAKER, COUNTY ASSEMBLY

OF ELGEYO MARAKWET.....1<sup>ST</sup> RESPONDENT

THE LEADER OF MAJORITY,

COUNTY ASSEMBLY OF ELGEYO MARAKWET.....2<sup>ND</sup> RESPONDENT

COUNTY ASSEMBLY OF ELGEYO MARAKWET.....3<sup>RD</sup> RESPONDENT

AND

LAWI KIBIRE

DAVID KIPKETER.....EX PARTE APPLICANTS

**JUDGMENT**

1. The applicants (**LAWI KIBIRE and DAVID KIPKETER**) filed a Notice of Motion seeking the following orders;

- a) **An order of certiorari quashing the resolution of the majority whip made on 27<sup>th</sup> September 2018 and the subsequent decision of Elgeyo Marakwet County made on the same date adopting the resolution to remove the ex parte applicant from the Elgeyo Marakwet County Assembly service board.**
- b) **An order of prohibition preventing the Elgeyo Marakwet County assembly from replacing the ex parte applicants from the county assembly service board.**
- c) **An order of mandamus compelling the Elgeyo Marakwet county assembly to reinstate the ex parte applicants to the county assembly service board.**

2. The applicants are members of the **Elgeyo Marakwet County Assembly**, as well as the Elgeyo Marakwet County Assembly service board having been nominated by the **JUBILEE** party. Their complaint is that on 27<sup>th</sup> September 2018, the Majority Chief Whip in the Assembly County unilaterally revoked their nomination to serve as members of Elgeyo Marakwet County Assembly service board citing a resolution passed by the Jubilee party members in the Assembly. It is their contention that the purported resolution by the Jubilee party members of the county assembly on the material date was a one-man unilateral decision of the majority whip without any endorsement from the party leadership contrary to the Jubilee party constitution. Further, that there was no petition presented by any person to the County Assembly for the removal of the ex parte applicants as required by the provisions of **Section 10(2) of the County Assembly Service Act**.

3. The applicants maintain that there is no valid resolution by Jubilee party members removing the ex parte applicants as the purported resolution is only signed by the majority whip who fraudulently extracted a list of members of the County Assembly, and attached it, to the purported resolution, instead of getting them to individually sign the resolution. As a result, there are no minutes of any meeting. Further, the reasons for removal are flimsy and vague and disclose no actionable claim. In any event, the reasons advanced are not those contemplated in **section 10 of the County Assembly Services Act** and as such the purported resolution is ultra vires and of no legal effect.

4. It is argued that by dint of **section 10(3) of the County Assembly Service Act** the procedure for removal of a member of the board ought

to be prescribed in the standing orders of the county assembly but they are yet to be prescribed in the standing orders thus the removal of the applicant without following due process renders the said act a nullity.

5. The removal of the ex parte applicants is contested on grounds that it offends the tenets of fair administrative action under **article 47 of the constitution**. That the county assembly removed the applicants without offering written notice and written grounds for the action in blatant violation of **article 47 of the constitution**.

6. The Elgeyo Marakwet county assembly deliberated on a special motion for the removal of the ex parte applicants in an illegal sitting as the speaker of the county assembly had already adjourned the sitting and no special sitting had been gazetted by the speaker in violation of **standing order no. 30** of the county assembly. The motion was not approved by the house business, rules and privileges committee and was not listed in the order paper.

7. The Elgeyo Marakwet county assembly flouted its **standing order no. 67** as it did not afford the ex parte applicants an opportunity to appear before its select committee as is required whenever the assembly is considering a petition for removal of a person from office. The assembly did not form a select committee for purposes of investigating the allegations and considering the removal of the ex parte applicants. The applicants were not afforded an opportunity to appear before such a committee to answer such allegations if any.

8. There was no report from the select committee for a motion to be considered by the county assembly in the illegal special session held on **27<sup>th</sup> September 2018 at 5.43 am** and the proceedings affronted section 23 of the County Assembly Services Act and **standing order 67(2)** of the county assembly. The motion was debated past working hours contrary to **standing order 31** of the county assembly. The action is arbitrary and without legal right and basis in law.

9. 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> respondent's cited the case of **Rahab Wanjiru Njuguna versus inspector General of police & Director of CIC. HCC Judicial Review Application No. 187 of 2013** on the ingredients of an application for judicial review to succeed. The respondents contended that they were doing their job and they followed procedure and the due process of the law. According to the minutes the members of county assembly sat down and by a unanimous decision of majority of the members, 23 of 33 of the members approved the removal of the ex parte applicant. The respondents insist that they did not act ultra vires as it was a unilateral decision by the members of the county assembly from the Jubilee party, after a discussion on the floor of the house.

10. They cited the case of **Kisumu HCCC Misc. No. 280 of 2003 – R v Mohammed Haji Issa** to support the argument on whether the respondents failed to consider relevant, pertinent and material facts. Further, that they acted in accordance with the trite principles of law. The decision was arrived at through voting of the elected members of the county assembly, who passed a resolution recalling the said nominees after they failed to represent the interests of the party and the public at large. They attached annexure JKM(i) as proof of the signed petition.

11. It is submitted that a perusal of the county assembly **Hansard** regarding the end session of 27<sup>th</sup> September 2018 indicates that the motion for removal of the ex parte applicant was brought and discussed on the floor of the house as a motion in review of membership of the board and supported by majority of the members in the house. The proceedings are contained in annexure JKM (ii).

12. That there were no specific standing orders flouted in discussing the motion on the floor of the house as it is not a mandatory requirement. The allegations that the house debated the motion past the official working hours is dismissed as being vague neither as reflected at page 1 of the Hansard. That in any event this was a clear manifestation of the goodwill of the speaker of the house and the house at large. The court is urged to consider page 8 of the Hansard, which shows that **Hon. Kibor** stood on the floor and made a prayer seeking leave of the house that the time and business of the house be extended. The said motion was allowed and time for the house was extended by one hour.

13. The respondents poke holes at *ex parte* applicants' saying they have failed to set out with reasonable degree of precision the provisions of the Constitution which they claim to have been infringed upon. That there was no breach of constitutional rights, as the respondents accorded the applicants a fair hearing which was well captured in the Hansard that the ex parte applicants were to be recalled on various grounds including the inability to perform their duties. That the motion was debated in the presence of the ex parte applicants who had the chance to persuade the honourable members of the county assembly that they had not failed on performance of their duties. This amounts to a fair hearing.

14. The respondents refer to section 103 of the County Assembly Act which provides that the procedure for removal of board members shall be provided in the standing orders to argue that the standing orders are silent on this issue and as such the members are not obligated to subject the removal to a select committee. That the only option is by resolution of party members who nominated the applicants to their position., Further that by the statutory provisions under section **12(3)(c) of the County Government Act 2013**, the power to interpret the standing orders is vested in the speaker as long as the interpretation is according to the law. The contention is that, the 1<sup>st</sup> respondent being the speaker had the capacity to lead motions in the house in a neutral manner. The 2<sup>nd</sup> respondent, being his duty recorded all the proceedings and the 3<sup>rd</sup> respondent passed the motion. The members of the County Assembly sat and by a unanimous decision of the majority approved the removal of the service board members. The 5<sup>th</sup> respondent also acted in capacity as it had jurisdiction.

The respondents point out that since costs of the suit follow the event, the applicants should be condemned to bear the costs.

#### **IS THE APPLICATION IS MERITED**

15. What arises for determination is the process required to remove the ex parte applicants as members of the board, and whether the correct process was followed.

In **Republic v Public Procurement Administrative Review Board & 2 others Ex Parte - Sanitam Services (E.A) Limited [2013] eKLR** the court held;

**Thus, the starting point in judicial review proceedings is that the remedy of judicial review is concerned with reviewing, not the merits of the decision in respect of which the application for judicial review is made, but the decision making process. The purpose of the remedies availed to a party under the judicial review regime is to ensure that the individual is given fair treatment by the authority to which he has been subjected. The purpose is not to substitute the opinion of the court for that of the administrative body in which is vested statutory authority to determine the matter in question.**

16. In the case of **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001**, the Court of Appeal set out the parameters of judicial review when it held as follows:

**Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters...** The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision.

17. Section 9 of the Fair Administrative Action provides;

9. (1) Subject to subsection (2), a person who is aggrieved by an administrative action may, without unreasonable delay, apply for judicial review of any administrative action to the High Court or to a subordinate court upon which original jurisdiction is conferred pursuant to Article 22(3) of the Constitution.

(2) The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.

(3) The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).

(4) Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.

18. Section 12 of the County Governments Act provides;

5. A member of the county assembly service board shall vacate office—

(a) if the person is a member of the county assembly—

(i) at the end of the term of the county assembly; or

(ii) if the person ceases to be a member of the county assembly; or

**(b) if the person is an appointed member, on revocation of the person's appointment by the county assembly;**  
**or**

(c) if the person is the Speaker, when the person ceases to be such Speaker.

Section 5(b) specifically states that a member of the board shall vacate office on revocation of appointment by the county assembly.

19. **What is the process for removal and revocation of the appointment of a member of the county assembly service board?**

Section 10 of the County Assembly Services Act provides; -

10. Removal from office

(1) A person who is appointed as a member of the Board under section 12(3)

(d) of the County Governments Act (No. 17 of 2012) may be removed from office on any of the following grounds —

(a) violation of the Constitution;

(b) inability to discharge duties for any reason;

**(c) bankruptcy; or**

**(d) if convicted of any offence with a sentence of more than six months' imprisonment.**

**(2) Any person may petition the county assembly for the removal of the member of the Board on the grounds specified under subsection (1).**

**(3) The procedure for the removal of a member of the Board under this section shall be as prescribed in the Standing Orders of the county assembly.**

20. The procedure is to be prescribed in the standing orders of the county assembly, yet the standing orders are silent on this process. The respondents submitted that the power to interpret the standing orders by the speaker is supported by the statutory provision on the procedure of the removal of the party members nominated to the position and that the only option is by resolution of party members who nominated said members of the board.

There is no statutory provision cited to support this submission. Further, subsection 2 above provides that any person may petition the assembly for removal of a member of the board, yet there is no evidence of any such petition. In the absence of standing orders, what then is the procedure for removal of the members of the board? I opine that there should be a petition involved as per the provisions of the County Assembly Services Act.

Section 58(5) of the County Governments Act provides;

**(5) The members of the Board may only be removed from office—**

**(a) on grounds set out for the removal of members of a constitutional commission under Article 251(1) of the Constitution; and**

**(b) by a vote of not less than seventy-five percent of all the members of the county assembly.**

21. Article 251 of the constitution provides;

**(1) A member of a commission (other than an *ex officio* member), or the holder of an independent office, may be removed from office only for—**

**(a) serious violation of this Constitution or any other law, including a contravention of Chapter Six;**

**(b) gross misconduct, whether in the performance of the member's or office holder's functions or otherwise;**

**(c) physical or mental incapacity to perform the functions of office;**

**(d) incompetence; or**

**(e) bankruptcy.**

**(2) A person desiring the removal of a member of a commission or of a holder of an independent office on any ground specified in clause (1) may present a petition to the National Assembly setting out the alleged facts constituting that ground.**

**(3) The National Assembly shall consider the petition and, if it is satisfied that it discloses a ground under clause (1), shall send the petition to the President.**

**(4) On receiving a petition under clause (3), the President—**

**(a) may suspend the member or office holder pending the outcome of the complaint; and**

**(b) shall appoint a tribunal in accordance with clause (5).**

**(5) The tribunal shall consist of—**

**(a) a person who holds or has held office as a judge of a superior court, who shall be the chairperson;**

**(b) at least two persons who are qualified to be appointed as High Court judges; and**

**(c) one other member who is qualified to assess the facts in respect of the particular ground for removal.**

**(6) The tribunal shall investigate the matter expeditiously, report on the facts and make a binding recommendation to the President, who shall act in accordance with the recommendation within thirty days.**

22. Judicial Review is not concerned with the merits for removal, but the procedure. Given that they occupied an independent office, the intention of the law is that their removal be instituted by way of a petition and in the event they have committed an offence there should at least be a tribunal formed or some way to afford them a fair trial. There was none. They were never given a chance to defend themselves. This also contravenes articles **47 and 50 of the constitution**.

The members of the county assembly resorted to voting the ex parte applicants out as contained in the Hansard record of 27<sup>th</sup> September 2018. The record shows that they were not present when the issue was heard, and a resolution passed. This violated the *audi al partam rule*, a basic principle in natural justice, even if there was no process prescribed in law for their removal.

23. I identify with the sentiments expressed in **County Assembly of Kisumu & 2 others v Kisumu County Assembly Service Board & 6 others [2015] eKLR** where the Court of Appeal held at para. 87;

**We are alarmed by the rampant actions of some leaders in this country in flagrant disregard of the rule of law. The impression we get in this case is that the Kisumu County Assembly thinks it can do anything under the sun as long as it passes a resolution to do it whether or not such an act is constitutional.**

**That happens only in dictatorships. In constitutional democracies like ours, the entire object of the doctrine of separation of powers, which the appellants harped on, albeit erroneously, is to limit the powers of each of the three arms of government. As stated, the mandate of the legislative authorities is limited to enactment of legislations. In addition, the Constitution has given the National and County Assemblies oversight roles. In the discharge of those mandates, as we have stated, the National and County Assemblies must act in accordance with the Constitution.**

24. In the premises it is evident that there was a disregard for basic procedural requirements in the removal of the ex parte applicants from the board. The application is merited and I make the following orders:

**a) An order of certiorari quashing the resolution of the majority whip made on 27th September 2018 and the subsequent decision of Elgeyo Marakwet County made on the same date adopting the resolution to remove the ex parte applicant from the Elgeyo Marakwet County Assembly Service Board.**

**b) An order of prohibition preventing the Elgeyo Marakwet County assembly from replacing the ex parte applicants from the County Assembly Service Board.**

**c) An order of mandamus compelling the Elgeyo Marakwet county assembly to reinstate the ex parte applicants to the County Assembly service board.**

**d) As correctly observed. Costs follow the event whose chips have fallen in favour of the applicants, so I award costs to the applicants.**

The circumstances under which the applicants in petition **No. 9B of 2018** were removed from office are identical to those in petition **No. 9A of 2018** and therefore they are also entitled to the orders sought.

**Delivered and dated this 12<sup>th</sup> Day of February 2020 at Eldoret**

**H.A. OMONDI**

**JUDGE**