



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MILIMANI (NAIROBI)

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO.61 OF 2020

IN THE MATTER OF ARTICLES 23, 27, 47 OF THE CONSTITUTION OF KENYA

IN THE MATTER OF ARTICLES 181 AND 182 OF THE CONSTITUTION OF KENYA

IN THE MATTER OF COUNTY GOVERNMENT ACT 2012

IN THE MATTER OF IMPEACHMENT OF THE GOVERNOR OF NAIROBI CITY COUNTY

BY THE COUNTY ASSEMBLY

IN THE MATTER OF VIOLATION OF THE RIGHT TO EQUAL PROTECTION BY THE LAW

BETWEEN

GEORGE BUSH.....PETITIONER

VERSUS

THE COUNTY ASSEMBLY OF NAIROBI CITY COUNTY.....RESPONDENT

AND

H.E MIKE MBUVI SONKO.....1ST INTERESTED PARTY

RULING

1. The Petitioner/Applicant through a chamber summons dated 24th February 2020 pray that conservatory orders be issued suspending the commencement of impeachment proceedings against H.E. Mike Sonko, the governor of Nairobi City County Government that was filed on 20th February 2020 by the MCA for Makongeni Ward Nairobi City County.

2. The application is based on the grounds on the face of the application inter alia; that the impeachment proceedings against the governor shall be actuated in 7 days if the threshold for initiating the process is met; that the **MCA** moving the motion has set 15 grounds for removal of the governor from the office; that the governor is facing charges in the anti-corruption court similar to the grounds cited for his impeachment by the **MCA** for Makongeni Ward of Nairobi City County; that the governor is out on bail on condition not to access his office pending the hearing and determination of the case; that if impeachment is allowed to commence, this shall amount to victimization; that given the allegation made in the impeachment motion against the governor are being tried in the anti-corruption court, if impeachment proceedings commence in County Assembly on account of similar facts the governor might suffer double jeopardy and that the law must protect the governor from other process that might be prejudicial to him.

3. That the governor in absence of the bail terms barring him from accessing his office, he would have executed his administrative duties to the satisfaction of the **MCA** for Makongeni and others who filed the motion for impeachment. It is contended the impeachment charges arose after the governor was barred from accessing his office. It is urged the issues which arose in absence of the governor would have been handled by the Deputy Governor had her vetting been completed. It is urged that it would be wrong for the governor to be victimized by the

assembly for complying with the bail conditions set by the anti-corruption court.

4. The application is not supported by affidavit of the petitioner. However the petitioner seeks to rely on the attached affidavit in support of the petition by one George Bush, a voter in Nairobi. The petitioner relies on attached annexures as evidence that the petitioner is facing anti-corruption charges. Annexure 2 is similarly photograph of the governor with other people. It is clear from the contents of the affidavit the petitioner has not alluded to matters different from those in grounds in support of the application.

5. The interested party H.E. Mike Sonko Mbuvi has not filed any response to the petition nor has he indicated his position as regards the application.

6. The Respondent filed grounds of opposition dated 26th February 2020 setting 26 grounds in opposition. It is Respondent's contention that the application as drawn is bad in law, misconceived, incompetent, vexatious, mischievous and an abuse of the court process and urge the court to dismiss the same in limine at the earliest opportunity.

7. The issues arising for determination in this application are as follows:-

a. Whether the application is incompetent?

b. Whether the petitioner has met the conditions to warrant grant of conservatory orders sought?

A. Whether the application is incompetent?

8. The law is clear that an application is required to be accompanied by supportive affidavit. In the instant application the same is not accompanied by any affidavit in support. That even if the petitioner was to rely on affidavit in support of the petition, the same is also not in support of the application. I find the chamber summons to be defective and incompetent as the chamber summons is not duly signed nor is it supported by an affidavit.

B. Whether the petitioner has met the conditions to warrant grant of conservatory orders sought?

9. The application seeking conservatory orders to stop legal process was filed after commencement of a legal process and is intended to subvert the due process of the law as envisaged in constitution; County Government Act, 2012 and the Nairobi City County Assembly standing orders. It is urged by the Respondent that the application is in violation of constitutional principles and objects of devolution set out under Article 174 and 175 of the constitution.

10. In the instant application, the motion having been filed, the Respondent through the speaker of the County Assembly was merely performing the second level of a process, as mandated by **section 15 of the County Government Act**; thus once a motion has been staged, it must proceed to the next step within the given period of 7 days. It is very clear that the law expressly prescribes constitutional timelines for the process of impeachment of a County Governor which is mandatory on the governance process in place. That once the process commences there is no stoppage; as time must be given room to pass.

11. The petitioner is seeking conservatory orders to suspend the commencement of impeachment proceedings; when procedures are on motion and time has started running. I find the petitioner has not demonstrated the provisions allowing stoppage of impeachment motion after its commencement, given that it has a lifespan that it has to run.

12. In the instant application the motion for impeachment of the governor, was delivered by **MCA** for Makongeni Ward of Nairobi to the clerk in writing stating the grounds and particulars upon which the proposal was made as required in law on 20th February 2020. The motion was approved by the Speaker of County Assembly of Nairobi on the 20th February 2020; served upon the interested party notifying him of the motion. This I find kick-started and/or commenced the process of impeachment of the interested party. The orders sought by the Petitioner/Applicant have been overtaken by the commencement of the process. The orders sought cannot be granted due to the time having started running and as a process it has to be let to run its time.

13. In the case of **Speaker of Senate & another vs Attorney General & 4 others Reference No. 2 of 2013, (2013) eKLR** the court stated that it would be reluctant to question parliamentary procedures, as long as they did not break the constitution.

14. For the Petitioner/Applicant to be granted conservatory orders as sought herein at this stage, he is required to demonstrate a *prima facie* case with likelihood of success and also demonstrate prejudice that shall be suffered if the orders sought are not granted. In the instant application the Petitioner/Applicant has not demonstrated nor disclosed *prima facie* arguable issues for trial and/or demonstrated a *prima facie* case with likelihood of success. The application was filed after commencement of impeachment proceedings, which proceedings have constitutional timelines which cannot be stopped. The applicant has further failed to demonstrate any prejudice that he or the public will suffer or is likely to suffer if the orders sought in the application are not granted. He has not filed any affidavit in support, to which he could rely in support of existence of a *prima facie* case and also demonstrate prejudice or the public interest or the interested party's interest that would suffer if the application is not granted.

15. The Petitioner/Applicant in seeking the orders in the application, seeks to stop the Respondent from discharging its constitutional mandate. The petitioner has not demonstrated through an affidavit that the impeachment process has violated the constitutional provision or any statute. He urges the impeachment process is not in good faith, without any evidence in support. He further contends that the interested party will suffer double jeopardy because he is being tried before anti-corruption court and before the County Assembly on same charges. This allegation has not been proved as the petitioner has not attached copies of the charges before the anti-corruption court and before the County Assembly. The interested party has not been shown to have been served with the application and of great significance there is no

affidavit by the interested party to show his position as regards this matter.

16. I find that it would not be properly for a party to fail to file evidence in support of his case and urge the court to rely on evidence that is not on record as the petitioner purports to do.

17. I therefore find that there are no sufficient grounds and basis to warrant interference with constitutional mandate of the Respondent to proceed with impeachment process which has not been shown to be against any provision of the constitution and/or any statute. I am of the view that it would be proper for Petitioner/Applicant to await the Respondent to complete its constitutionally ordained process and ensure compliance with the law in so far as impeachment process is concerned before intervening and testing the constitutionality of a legislative body's actions or commissions. I am not satisfied that it has been demonstrated the Respondent are acting contrary to the constitution. The Petitioner/Applicant has not therefore demonstrated that he has a prima facie case with likelihood of success.

18. The petitioner alleges the interested party's action or omissions, to which he is sought to be impeached are due to the court's order barring him from accessing his office and secondly failure of the Respondent to vet the Deputy Governor. It should be noted that the interested party who is the governor sought to be impeached has not filed any affidavit in response. The petitioner is fronting the interested party's defence without any affidavit in support. This cannot be accepted. Secondly whatever defence the governor has on whatever charges before the Respondent, should be tabled there. The interested party has not filed any document to demonstrate the prejudice likely to be suffered if he appears before the Respondent nor has the petitioner demonstrated what prejudice he or the public would suffer if the orders sought are declined.

19. The application is dismissed but as the petition is in public interest each party to bear its own costs.

Dated, signed and delivered at Nairobi this 2nd day of March, 2020.

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J .A. MAKAU

JUDGE