REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 119 OF 2020 (COVID-19 O22)

HON. MAUREEN MUTHONI MWANGI…..……1ST APPLICANT/PETITIONER

HON. KEPHA MUGAMBI KARIUKI……..2ND APPLICANT/PETITIONER

VERSUS

THE SPEAKER COUNTY ASSEMBLY OF KIRINYAGA…..……1ST RESPONDENT

THE ATTORNEY GENERAL…….....……2ND RESPONDENT

RULING

1. The petitioners, Hon. Maureen Muthoni Mwangi and Hon. Kepha Mugambi Kariuki, filed their petition dated 30th March, 2020, together with a notice of motion application of the same date. Through the application they seek orders as follows:-

> **a. This application be certified urgent and heard *ex-parte* in the first instance.**
>
> **b. The petition herein be heard and determined on priority.**
>
> **c. A Conservatory Order be and is hereby issued, restraining the 1st Respondent from reconvening the County Assembly of Kirinyaga, pending the hearing and determination of this Application and Petition, or until further Orders of this Court.**

2. The application is supported by the grounds on its face and an affidavit sworn by the 1st Applicant in support of both the application and the petition. The applicants are members of the County Assembly of Kirinyaga ("the Assembly"). The 1st Respondent is the Speaker of the Assembly.

3. It is the applicants' case that the Assembly was set to reconvene for the Fourth Session on 30th March, 2020. They aver that the reason that occasioned the adjournment of the Assembly was the rapid spread of the Covid-19 disease in the country, and the need to protect Members of the County Assembly (MCAs) and staff as well as the public from infection and also prevent the spread of the disease. They also depose that the adjournment was effected in compliance with the directive issued by the Covid-19 National Emergency and Response Committee restricting large public gatherings.

4. It is the applicants' averment that there has been no change in the circumstances to justify the resumption of sittings at the Assembly and instead the spread of the virus has increased despite the deepening of the interventions to contain and control its spread. According to the applicants, reconvening the Assembly may seriously compromise the national government's efforts to contain and control the spread of the virus. Further, that the reconvening of the Assembly poses real and imminent danger of infection of the MCAs, staff and the public who interact with the Assembly.

5. It is the applicants' case that if the Assembly is reconvened and they elect to absent themselves from the Assembly in compliance with the directives of the World Health Organization and the Ministry of Health on social distancing and the need to avoid crowds and public gatherings, their right to sit and participate in the proceedings of the Assembly will be threatened in circumstances that are unjustifiable and avoidable.

6. It is further the applicants' averment that reconvening the Assembly during the Covid-19 pandemic, and at a time when the national government is implementing measures to contain and control the spread of the virus in the country, will threaten the right of the public to attend proceedings and present petitions and memoranda to the Assembly.

7. The applicants also state that reconvening the Assembly may compromise the nationwide curfew and other public emergency measures aimed at containing the spread of the coronavirus in the country. It is therefore the applicants' opinion that the 1st Respondent's decision to reconvene the Assembly is not in the public interest and safety.

8. The court is therefore urged to grant conservatory orders on the ground that unless orders are granted the public interest will be threatened and the applicants will suffer serious violation and infringement of their rights and fundamental freedoms. According to the applicants, they have made out a *prima facie* case and the reasons they have given in support of the application are genuine, legitimate, deserving and appropriate. Further, that it is just and proper that conservatory orders be issued to halt the real and imminent threat to public interest and violation and infringement of the applicants' rights and fundamental freedoms. The applicants aver that they will suffer irreparably if the 1st Respondent is not restrained in the manner sought in the application.

9. Anthony Gathumbi, the Speaker of the County Assembly of Kirinyaga ("the Speaker") swore an affidavit on 2nd April, 2020 in opposition to the application. His averment is that the Assembly continues to discharge its constitutional mandate despite the Covid-19 crisis. According to the Speaker, the Assembly has put in place various measures in order to address the challenges posed by the coronavirus. These measures include procurement and distribution of protective gear, masks and hand sanitizers to the MCAS. Other measures are the incorporation of the use of technology in its sittings and the designation and gazettement of special places outside the Assembly meeting hall in order to comply with the requirement by the Ministry of Health for social distancing.

10. The Speaker deposes that the Assembly has employed the use of the media to sensitize the public on the conduct of its business. Further, that members of the public are being requested to submit their views through written memorandum and this will allow them to comprehensively participate in the affairs of the Assembly.

11. It is therefore the 1st Respondent's case that the application has been instituted in bad faith and is an endeavor to stop the Assembly from discharging its constitutional mandate following the issuance of an impeachment notice against the Governor of the County of Kirinyaga. According to the Speaker, since the issuance of the impeachment notice on 30th March, 2020, there have been concerted efforts from various quarters to try and curtail the Assembly from undertaking its constitutional mandate. He avers that these efforts are driven by ulterior motives and are contrary to the interest of the public. A directive issued on 2nd April, 2020 by the County Commissioner to the Assembly not to have more than ten members in the House at any given time is cited as one of the attempts to derail the work of the Assembly.

12. It is Mr. Gathumbi's assertion that his office is established under Article 178 of the Constitution as read with Rule 23 of the Standing Orders of the County Assembly of Kirinyaga and he therefore presides over the functions of the Assembly as established by the law. Further, that the Assembly is established under Article 176 and granted legislative authority by Article 185 of the Constitution as read with Section 8 of the County Governments Act, 2012 (CGA). He also deposes that he is an *ex-officio* member of the Assembly by virtue of Article 177(1) (d) of the Constitution as read with Section 7 of the CGA.

13. According to the Speaker, the roles and functions of the Assembly are legislation, oversight and any other function as set out under the law. He also avers that Section 14(8) of the CGA provides for enactment of Standing Orders.

14. He points to Rule 24(1) of the Standing Orders as establishing regular sessions of the Assembly which commence on the second Tuesday of February and terminate on the first Thursday of December. This, he avers, entitles the Assembly to sit at any time inside that period.

15. Mr. Gathumbi deposes that pursuant to Rule 25 of the Standing Orders, the County Assembly Business Committee shall, with the approval of the Assembly, determine the calendar of the Assembly. Further, that as required by Rule 25(2), the calendar was approved by the Assembly and published in the gazette, county assembly website and a newspaper of national circulation.

16. Additionally, Mr. Githumbi avers that the current sitting is within the approved and publicized calendar of the Assembly and is therefore not a special sitting to which Rule 26 of the Standing Orders applies. The Speaker clarifies that the sitting is only special to the extent of the place where the proceedings will be held and this has been necessitated by the Covid-19 pandemic.

17. It is the Speaker's firm position that the Assembly is a constitutional organ and it is shielded from control by any other constitutional organ when performing its duties. This assertion is supported by the statement of the Supreme Court in the case of **Justus Kariuki Mate & another v Martin Nyaga Wambora & another [2017] eKLR** that where a county assembly is "**operating quite properly, within the constitutional scheme of devolution, and running its legislative processes within the ordinary safeguards of the separation of the powers"** there would be **"hardly any scope for the deployment of the Court's conservatory Orders."** The 1st Respondent consequently urges the court to dismiss the petition.

18. The 2nd Respondent, the Attorney General, did not participate in the proceedings. The advocates for the applicants and the 1st Respondent did indeed agree during the hearing of the application that the Attorney General is not a necessary party in these proceedings.

19. Due to the Covid-19 pandemic, the application was heard virtually on 2nd April, 2020. The advocates for the parties essentially reiterated their pleadings.

20. Counsel for the petitioners nevertheless stressed that the applicants had met the conditions for the grant of conservatory orders. He urged the court to be guided by the principles governing the grant of conservatory orders as enunciated in the cases of the **Centre for Human Rights & 2 others v the Judges and Magistrates Vetting Board & 2 others [2012] eKLR; Centre for Rights Education and Awareness (CREAW) & 7 others v Attorney General [2011] eKLR;** and **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR.** He pointed out that this case is about the exercise of this court's countervailing powers to protect and defend public interest which the 1st Respondent has neglected. He dismissed the suggestion by the 1st Respondent that the applicants are inviting this court to intrude into the mandate of the 1st Respondent.

21. On the other hand, counsel for the 1st Respondent entirely relied on the decision of the Supreme Court in **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR** and urged the court to keep off the exercise of the Assembly's constitutional mandate. In view of the decision of the Supreme Court it was therefore submitted that the application and the petition actually amounts to an abuse of the court process.

22. The question is whether the applicants have met the threshold for grant of conservatory orders. The principles for grant of conservatory orders have been stated in various cases within our jurisdiction. In **Michael Osundwa Sakwa v Chief Justice and President of the Supreme Court of Kenya & another [2016] eKLR,** the Court outlined the principles as follows:-

> **"68. What then are the circumstances under which the Court grants conservatory orders? It has been held that in considering an application for conservatory orders, the court is not called upon to make any definite finding either of fact or law as that is the province of the court that will ultimately hear the petition. At this stage the applicant is only required to establish a *prima facie* case with a likelihood of success. Accordingly in determining this application, the Court is not required-indeed it is forbidden- from making definite and conclusive findings on either fact or law. I will therefore refrain from making any determinations whose effect would be to prejudice the hearing of the main Petition. However, apart from establishing a *prima facie* case, the applicant must further demonstrate that unless the conservatory order is granted there is real danger which may be prejudicial to him or her. See Centre for Rights, Education and Awareness (CREAW) & 7 others vs. The Hon. Attorney General, Nairobi HC Pet. No 16/2011, Muslims for Human Rights (MUHURI) & 2 others vs. The Attorney General & Judicial Service Commission, Mombasa HC Pet. No. 7 of 2011 and V/D Berg Roses Kenya Limited & Another vs. Attorney General & 2 Others [2012] eKLR."**

23. The learned Judge also cited with approval the case of **The Centre for Human Rights and Democracy & others v The Judges and Magistrates Vetting Board & others, Eldoret HC Petition No. 11 of 2012**, where it was stated thus:-

> **"In our view where a legal wrong or a legal injury is caused to a person or to a determinate class of persons by reason of violation of any Constitutional or legal right or any burden is imposed in the contravention of any Constitutional or legal provision or without the authority of the law or any such legal wrong or injury is threatened, the High Court has powers to grant appropriate reliefs so that the aggrieved party is not rendered, helpless or hapless in the eyes of the wrong visited or about to be visited upon him or her. This is meant to give an interim protection in order not to expose others to preventable perils or risks by inaction or omission."**

24. The Supreme Court validated those principles in **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR** when it stated that:-

> **"[86] *"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."**

25. As stated in **Michael Osundwa Sakwa** (supra), in determining an application for conservatory orders the court should avoid delving into the merits of the case. In line with that principle of law, I will not dwell much on the issue as to whether the applicants have established a *prima facie* case. Exploring this question will tempt the court to make definitive findings on the law and facts. I will therefore pass this issue and proceed on the presumption that the applicants have an arguable case.

26. The fact that an applicant has demonstrated a *prima facie* case and established the prejudice to be suffered if orders are not granted does not automatically lead to the grant of conservatory orders. An applicant has to clear other hurdles before the court can grant orders. My understanding of the law is that the court is also required to take into account public interest, constitutional values, the priority levels attributed to the cause at hand and the magnitude of the issues in question. The court is therefore called upon to review the materials placed before it in order to arrive at a decision that upholds the applicant's rights and fundamental freedoms while at the same time taking into account the public interest prevailing in a particular case.

27. The decision of the Supreme Court in **Justus Kariuki Mate & another v Martin Nyaga Wambora & another [2017] eKLR** speaks to the circumstances of this case. In **Justus Kariuki Mate** (supra), the petitioner who was the Speaker of the County Assembly of Embu had presided over the impeachment of the Governor notwithstanding the existence of a High Court order retraining him from doing so. He was later found guilty for contempt of court. His appeal to the Court of Appeal was dismissed. A second appeal to the Supreme Court was successful.

28. In allowing the appeal, the Supreme Court held that:-

> **"[94] The effect is that, a methodical and conscientious inquiry would show the County Assembly to have been operating quite properly, within the constitutional scheme of devolution, and running its legislative processes within the ordinary safeguards of the separation of powers – and consequently, quite legitimately *outside the path of the ordinary motions of the judicial arm of State.* On that basis, there would have been hardly any scope for the deployment of the Court's *conservatory Orders* – more particularly without *first hearing the petitioners*.**
>
> **[95] It is our understanding that the *exceptional circumstance* of this case, with a complex scenario of justiciabilities from**

contrasted standpoints, would lend justification to the non-effectuation of contempt Orders at the beginning; and consequently, we would accommodate the reality of there not having been immediate compliance, as would otherwise be required."

29. The Supreme Court acknowledged the supervisory jurisdiction of the High Court but cautioned that:-

"[84] From the facts of this case, it is clear to us that the integrity of Court Orders stands to be evaluated in terms of their inner restraint, where the express terms of the Constitution allocate specific mandates and functions to designated agencies of the State. Such restraint, in the context of express mandate-allocation under the Constitution, is essential, as a scheme for circumventing conflict and crisis, in the discharge of governmental responsibility. No governmental agency should encumber another to stall the constitutional motions of the other. The best practices from the comparative lesson, signal that the judicial organ must practice the greatest care, in determining the merits of each case."

30. The Supreme Court also formulated the principles that should guide a constitutional organ when making a decision that is likely to intrude into the functions of another arm of government. Those principles, which are found at paragraph 63 of the judgement, are:-

"(a) each arm of Government has an obligation to recognize the independence of other arms of Government;

(b) each arm of Government is under duty to refrain from directing another Organ on how to exercise its mandate;

(c) the Courts of law are the proper judge of compliance with constitutional edict, for all public agencies; but this is attended with the duty of objectivity and specificity, in the exercise of judgment;

(d) for the due functioning of constitutional governance, the Courts be guided by restraint, limiting themselves to intervention in requisite instances, upon appreciating the prevailing circumstances, and the objective needs and public interests attending each case;

(e) in the performance of the respective functions, every arm of Government is subject to the law."

31. The applicants have told this court that they risk coronavirus infection if they attend Assembly proceedings during this time when the World Health Organization and the Ministry of Health have declared the Covid-19 disease a pandemic and recommended social distancing. They say they are faced with a dilemma because if they comply with the social distancing principle and fail to attend the sittings of the Assembly, their right to participate in the proceedings will be threatened in circumstances that are unjustifiable and avoidable. These are indeed genuine concerns.

32. The flipside of the coin is the undisputed fact that the 1st Respondent is executing his constitutional duty. He says that he has not stepped outside the boundaries of the Constitution and the law. His averment that he is operating within the calendar of the Assembly has not been rebutted.

33. The applicants are Members of the County Assembly of Kirinyaga. They must have aired their views on the motion that adjourned the sittings of the Assembly and the fixing of the date for its reconvening. Is it proper for them to seek the "vote" of a judge to overturn the decision of the majority? Should decisions arrived at by the Assembly within the confines of the Constitution and the laws of the land be overturned through judgements of the court? Those are pertinent questions to be answered during the substantive hearing of the petition. I, however, do not think that it is in the public interest that elected leaders who are defeated in the people's assemblies should urge the courts to overturn the majority vote.

34. It is appreciated that the Covid-19 pandemic poses an existential threat to the human race. However, no constitutional organ should use the disease as an opportunity for micromanaging the operations of other constitutional bodies. There is a rebuttable presumption that all public offices are occupied by reasonable men and women who will make reasonable decisions when faced with a crisis like the one brought by the Covid-19 pandemic. In my view, the Constitution and the laws should be respected even in time of a crisis.

35. What happens if this court closes the Assembly and a need arises to urgently convene the Assembly to debate measures in regard to the Covid-19 pandemic? The applicants who are members of the Assembly are inviting chaos by asking the court to interfere with the operations of the Assembly. I do not think that this court has powers to adjourn the sittings of a county assembly. I am therefore not convinced at this stage of the proceedings that the applicants are deserving of any orders. The proper order to issue is one dismissing the applicants' application and it is so issued. The application for conservatory orders is therefore dismissed with costs to the 1st Respondent. This matter will be mentioned on 14th May, 2020 for directions on the hearing of the petition.

36. I apologize to the parties and counsel for not delivering this ruling on 6th April, 2020 as scheduled. Due to the disruption of normal court operations by the Covid-19 pandemic, the advocates for the parties consented to the delivery of this ruling through email.

Dated, signed and delivered by email at Nairobi this 7th day of April, 2020.

W. Korir,

Judge of the High Court