



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CONSTITUTIONAL PETITION NO. 7 OF 2020

WILBER KHASILWA OTICHILO.....PETITIONER

VERSUS

SPEAKER, COUNTY ASSEMBLY OF VIHIGA.....1ST RESPONDENT

COUNTY ASSEMBLY OF VIHIGA.....2ND RESPONDENT

CLERK, COUNTY ASSEMBLY OF VIHIGA.....3RD RESPONDENT

RULING

1. The petition herein, dated 2nd March 2020 was brought by Wilberforce Otichilo, to be known hereafter as the petitioner, citing several constitutional violations of his rights. He is the Governor of the County of Vihiga. The respondents are the County Assembly of Vihiga and its principal officers.

2. The factual background to the matter is that the petitioner believes that the respondents have colluded to eject him from office, through a flawed process. He charges that they have condemned him unheard and are charging him in the public domain by circulating alleged charges of misconduct, and a motion in those terms was circulating in social media platforms. He says that the respondents have collected signatures in the process of causing the motion for his removal to be debated on 3rd March 2020 in due disregard of his rights. He fears that if the said actions of the respondents are not checked they would result in gross violation of his constitutional rights and freedoms, and public harassment and amount to a trial by ambush.

3. The legal and constitutional foundations of the petition are set out in the petition, to be Articles 1, 2, 3, 10, 19, 20, 22, 23, 47, 48, 50, 73, 159, 160, 165, 181, 182 and 259 of the Constitution of Kenya and section 33 of the County Government Act, 2012; relating to sovereign power of the people of Kenya, power being exercised only in accordance with the Constitution, the obligation to respect uphold and defend the Constitution, the principles of national governance respect for rule of law equity equality and justice, the Bill of Rights, fair administrative action, the right to a fair hearing, among others.

4. The petitioner seeks only one relief, a declaration that the respondents are in violation of Articles 19, 47, 48, 50, 159 and 181 of the Constitution.

5. The petition is supported by a three paragraph affidavit sworn by the petitioner on 2nd March 2020, where he basically says that he has read the petition and he verifies its contents to be true and correct.

6. Contemporaneously filed with the petition is a Motion, dated 2nd March 2020, seeking that the respondents be restrained from receiving the motion, transmitting it, moving it, debating it, removing or impeaching the petitioner and circulating the alleged charges and signatures in the social media. The grounds on the body of the Motion are that the petitioner had learnt through social media that members of the County Assembly were to move a motion at the County Assembly on 3rd March 2020 to impeach him, he was not party to it and had not been served or informed of the charges, the actions of the respondents were malicious, ill-thought out and totally disregarded his rights and he was bound to suffer loss should they not be restrained.

7. In the supporting affidavit, sworn on 2nd March 2020, the petitioner says that he saw stories circulating on social media relating to threats by members of the County Assembly of Vihiga to impeach him. He states that he had not received any complaints or formal charges, and he dismissed the rumours as media propaganda. He later saw a motion circulated in social media with detailed and weighty charges indicating that the motion would be moved in the 4th session of the assembly. He avers that he later on learnt that members of the County Assembly had gone ahead to collect signatures for moving the motion to impeach him. He complains that the actions of the respondents were malicious

devoid of merit, and designed to tarnish his reputation. He argues, on advice from his advocate, that if the respondents were to go ahead with his plans his constitutional rights would be violated, and he fears that he could be removed from office before he gets a chance to defend himself. Attached to that affidavit are two documents. One is an unsigned draft Notice of Motion, on Vihiga County Assembly logo, for removal of the petitioner as Governor of Vihiga. The second document is a form bearing signatures of 23 individuals alleged to be members of the County Assembly of Vihiga.

8. The Motion was filed in court under certificate of urgency, and was placed before me on 2nd March 2020. After perusing the same I was not persuaded that the same demonstrated any urgency, and I directed that the petition and the Motion be served on the respondents.

9. Upon being served, the respondents filed grounds of opposition and a list of authorities. It is argued in the grounds that the application was misconceived, bad in law, an abuse of court process, frivolous, vexatious, trivial, did not meet the mandatory requirements for grant of the orders sought, was incredibly and fatally defective and the orders sought were vague.

10. The petitioner swore and filed a further affidavit, in which he avers that, even if the respondents had not signed or moved the motion for impeachment, there was imminent danger that he would be illegally removed from office. He claims that he had knowledge that the 3rd respondent had been prevented from endorsing financial documents on account of a court order. He argues that he was aware that due to the court orders the 3rd respondent could not receive the motion nor transmit it to the 2nd respondent until determination of that suit. He argues that the act of respondents circulating the draft motion in social media was propagation of an illegality. Copies of the orders referred to in the affidavit are attached to the same.

11. The respondents on their part lodged a preliminary objection on a point of law raising an issue relating to jurisdiction of the court to hear and determine the petition.

12. The preliminary objection and the Motion were argued orally on 9th March 2020. Both sides breathed life to their respective filings, inclusive of the authorities that they relied on.

13. I will first deal with the issue of jurisdiction. The argument by the respondents was that the proper court to deal with the dispute was the Employment and Labour Relations Court, given that there was an element of employment relations, and the petitioner was seeking to retain his job through the petition and Motion. The petitioner countered that the High Court had jurisdiction over the matter as the issues raised were constitutional in nature.

14. The removal of a Governor from office is not as simple as a matter of employment. The office of Governor is elective, and any interference with the sovereign right of the people of Kenya to elect a Governor is a constitutional matter. The High Court is vested with power by the Constitution to handle constitutional questions, and the dispute before me is properly where it should be.

15. Secondly, I will deal with the Motion. It principally seeks restraining order against the respondents collectively. The principles for grant of injunctions were laid down a long time ago in *Giella vs. Cassman Brown (1972)EA 358*, in the terms that the person seeking the order should establish a *prima facie* with probability of success, that the loss that the applicant faces would not be compensable in damages, and while in doubt, the matter could be determined on the basis of balance of convenience.

16. With regard to the first ground, one has to look at the principal case, as articulated in the plaint or petition. In this case, the pleadings herein were commenced by way of petition. The question is, does the petition before me disclose a *prima facie* case with probability of success?

17. The courts have laid down what a person who seeks redress under the Constitution must state in their pleadings before the court can exercise discretion in their favour. It has been stated that the claim must be stated with precision, and must demonstrate the provisions of the Constitution that it is alleged have been violated or infringed, and the manner of the alleged violation. That position was initially articulated in *Anarita Karimi Njeru vs. Attorney General (1979) KLR 154*, where the High Court stated:

“We would however again stress that if a person is seeking redress from the High Court on a matter which involves a reference to - the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with reasonable degree of precision that of which he complains, the provision said to be infringed and the manner in which they are alleged to be infringed.”

18. *Meme vs. Republic [2004] eKLR*, followed, the Court of Appeal said:

“Where a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important that he should set out with a reasonable degree of precision that of which he complains, the provisions said to have been infringed and the manner in which they are alleged to have been infringed and that the applicant's instant application had not fully complied with the basic test of constitutional references, as it was founded on generalised complains without any focus on fact, law or Constitution, hence it had nothing to do with the constitutional rights of the appellants.”

19. The more recent decision is in *Trusted Society of Human Rights Alliance vs. AG. & 2 others [2012] eKLR*, where the Court of Appeal has stated the same principle, in these words:

“We do not purport to overrule Anarita Karimi Njeru as we think it lays down an important rule of constitutional adjudication; a person claiming constitutional infringement must give sufficient notice of the violations to allow her adversary to adequately prepare her case and to save the court from embarrassment on issues that are not appropriately phrased as justiciable controversies. However we are of the opinion that the proper test under the new Constitution is whether a Petition as stated raises

issues which are too insubstantial and so attenuated that a court of law properly directing itself to the issue cannot fashion an appropriate remedy due to the inability to concretely fathom the constitutional violation alleged.

The test does not demand mathematical precision in drawing constitutional Petitions. Neither does it require talismanic formalism in identifying the specific constitutional provisions which are alleged to have been violated. The test is a substantive one and inquires whether the complaints against the Respondents in a constitutional petition are fashioned in a way that gives proper notice to the Respondents about the nature of the claims being made so that they can adequately prepare their case.”

20. The principle is that a party moving the High Court by way of a constitutional petition for relief arising from a contravention or violation of the Constitution must state their case in such terms as would assist the court fashion a relief suitable to the facts and circumstances of the case.

21. Has the petition in the instant cause met that test? The principal challenge that I have with respect with this cause is that the factual background to the matter has not been set out in the petition and the supporting affidavit. There is no narrative of the facts. Bare facts are set out in two or three paragraphs in the petition about the respondents collecting signatures to move the impeachment motion, and that is what the petitioner complains could violate his rights. Who are the respondents? The Speaker and Clerk of the County Assembly, and the County Assembly itself. Impeachment motions are moved by members of the County Assembly not by the Speaker and the Clerk. The role the two is merely to facilitate debate on the Motion, the Speaker by receiving the motion and the Speaker presiding over the debate. It cannot be that they would be the ones collecting the signatures. The County Assembly itself is an institution, an entity, a corporate body, that cannot possibly collect signatures. Perhaps individual members of the County Assembly can collect signatures, but the members as individuals are not the County Assembly. The members consist the County Assembly when they act corporately. There is no evidence that the collection of the signatures was coordinated corporately in a manner that can said to amount to the County Assembly itself collecting signatures.

22. The affidavit in the petition does not narrate any facts. It a three paragraph affidavit, which merely says that the petitioner has read the petition and was verifying its contents to be true and correct. The question is, which facts are these that are true and correct? The petition merely carries generalised allegations that are not supported by any facts.

23. The ideal situation is that law is not applied in a vacuum. A factual basis must be laid, to which the law is then applied, for the law is applied to the facts. Where there are no facts, there would be nowhere to apply the law. A party who alleges a legal violation must present the facts that provide the background to that violation. It is the facts that bring out or demonstrate the alleged violation. The violation is based on a certain set of facts. There must be that intersection between fact and law, and one cannot begin to argue or submit about violations where no facts have been presented. The facts must be placed on record through the pleadings, they must not remain in the minds of the parties only.

24. My view is that the case for the petitioner, as presented in his petition and the affidavit in support, is that the same is so attenuated as to make it impossible for me to concretely appreciate the violations alleged. The pleadings are so bare and thin on the facts, that they do not give a fair amount of detail of the facts surrounding the actions in question or alleged. It is not surprising, therefore, that the respondents did not file any affidavit in reply, since there was really nothing to reply to by way of affidavit evidence.

25. The petitioner’s case is founded on speculation, rumour and conjecture and make belief. A court of law does not grant orders on the basis of such. A concrete case must be made out, based on solid facts, not fiction. The petitioner is relying on social media material. There is nothing to connect the Speaker and Clerk of the County Assembly and the County Assembly itself, with the alleged social media materials. They could have come from anyone. The mere fact that they bore a logo similar to that of the County Assembly did not mean that they were from the County Assembly. He relies on an unsigned document. Execution of documents authenticates them. A document that is unexecuted has no authenticity, and no value should be attached to it all. I am surprised that a petitioner could rush to court on the basis such a document.

26. The other point is that the petitioner moved to court after he saw on social media material suggesting that members of the County Assembly were collecting signatures in readiness to initiate a process for his removal. It has not been demonstrated that the respondents are responsible for that. In any event there is nothing wrong with members of a County Assembly collecting signatures for such an exercise. It within their mandate to do that. The exercise of collecting signatures is not regulated by the law and it is not barred either. The process of impeachment only starts officially when a proper motion is submitted to the Clerk in accordance with the Standing Orders, anything else done prior to that is unofficial and the officers of the County Assembly would have no control over it.

27. There is, therefore, no foundation at all for the Motion that I am called upon to determine. A case has not been made out against the respondents to warrant orders of any colour being made against them. The Motion dated 2nd March 2020 is wholly without merit, and I hereby dismiss the same. This being a constitutional matter, I shall not make any order on costs.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 9TH DAY OF APRIL, 2020

W. MUSYOKA

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic, and in light of the directions issued by His Lordship, the Chief Justice, on 15th March 2020, this ruling/judgment has been delivered to the parties online with their consent. They have waived compliance with Order 21 rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159 (2) (d) of the Constitution which requires the court to eschew technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the

provisions of Section 18 of the Civil Procedure Act, Cap 21, Laws of Kenya, which impose on this court the duty to use, inter alia, suitable technology to enhance the overriding objective, which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

W. MUSYOKA

JUDGE