



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CONSTITUTIONAL PETITION NO. 7 OF 2020

MOSES KITHINJI.....PETITIONER

VERSUS

H.E. DR. MOHAMMED ABDI KUTI.....RESPONDENT

JUDGMENT

1. The petitioner herein filed petition dated 20th May 2020 seeking the following Orders;

- a) A declaration that the Respondent abdicated and or failed to uphold its duties as envisaged under Article 179 (4) of the Constitution of Kenya, 2010.
- b) A declaration that the Respondent using his position and/or power has involved himself in corrupt ways and activities.
- c) A declaration that the Respondent had failed to comply with, and./or breached the provisions of the constitution, Public Finance Management Act, Integrity Act Public Procurement and Disposal Act in discharging his duties as the Governor of Isiolo County Government and thus in gross violation of the law.
- d) A declaration that the actions of the Respondent amounts to gross misconduct by a person holding the office of the governor.
- e) A declaration that the Respondent herein should be surcharged for all the public funds lost as per the auditor general's reports, by the Isiolo County Government during his tenure as the governor in light with the provisions of Article 179 (4) of the Constitution of Kenya, 2010.
- f) A declaration that the Respondent is unfit to hold any public office.

Major grounds of the petition

2. The petitioner averred that there has been notable dereliction of duty by the Respondent and the Ethics and Anti-Corruption Commission in addressing the open corruption highlighted by the Auditor General Report and for the financial year ended 30th June 2017 and that no action has been taken against county officers who were implicated by the said report of participating in massive corruption practices.

3. That the Respondent has violated the provisions of the **Constitution, County Government Act, Leadership and Integrity Act and the Public Finance and Management Act** by deliberately bypassing the County Public Service Board and without advertisement filling employment positions within the county. That the Respondent has continued to use family members to trade with the county government using various registered companies, like Netflix Developers Limited which belongs to a close family member. That the conduct of the Respondent further contravenes the principles of devolution enshrined under **Article 174 of the Constitution** on the following grounds captured in the Audit report of 2017 which include; a) *discrepancies between county financial statement and IFMIS*, b) *transparency and accountability* c) *failure to establish audit committee and county budget Forum* d) *unexplained expenditure (monies unaccounted for)* e) *dollar accounts held in commercial bank contrary to the law* f) *Executive expenditure on travel* g) *Revenue raised by County government*.

Preliminary objection

4. The Respondent filed a Notice of Preliminary Objection dated 3rd June 2020 raising the following grounds;

- a) **The Court has no jurisdiction to hear the matter because the issues raised are in exclusive jurisdiction of other constitutional bodies.**

b) The petition offends the provisions of Article 181 (2) and 229 (7) (8) of the Constitution, Section 33 of the County Governments Act, Section 4 (20 and 41 (2) of the Leadership and Integrity Act.

Submissions

5. On 4/6/2020 the court directed the parties to canvass the preliminary objection through written submissions. Both parties have since filed their respective submissions.

6. The Respondent submitted that the Court lacks jurisdiction to delve into the integrity and suitability of holding of office by the Respondent courtesy of **Sections 4 (2) and 41 (2) of the Leadership and Integrity Act**. That in the aforesaid Act Section 4 (2) mandated the Ethics and Anti-Corruption Commission as the body exclusively charged with state officers who have breached the same. Further Section 41 (2) stipulates the manner in which the state officer if found culpable can be removed while **Section 42 (8)** provides the various disciplinary measures and procedures which the Ethics and Anti-Corruption Commission may undertake. He cited the case of **William Kabogo Gitau versus Ferdinand Ndungu Waititu [2016] eKLR, Micheal Jojo Otieno & Another versus County Government of Homabay, Michael Wachira Nderitu & 3 others versus Mary Wambui & 4 others (2013) eKLR** to espouse that the first point of call by the petitioner would be the Ethics and Anti-Corruption Commission and that this court cannot sit to investigate matters of alleged corruption as this would be usurping the roles of EACC.

7. As for the auditor's report the Respondent submitted that Articles 229 (7) and (8) are couched in mandatory terms to the effect that the audit report must be first submitted to Parliament and the county assembly and within three (3) months debate and consider the report. That the court lacks jurisdiction as the report is yet to be presented before parliament and the county assembly. The Respondent also submitted that **Section 93 of the Public Procurement and Disposal Act** stipulates that a dispute in respect of a tendering procurement does not fall within the jurisdiction of the court. The aggrieved party must first submit himself to the jurisdiction of the tribunal set up under section 8 of the Public Procurement and Disposal Act 2015. He cited the case of **John Makindu Makau versus County Government of Makueni & 6 Others [2018] eKLR**. Lastly that moreover Article 181 and the provisions of Section 33 of the County Government Act provides for the grounds and the procedure for the removal of the governor.

8. The petitioner submitted that the preliminary objection is not anchored on a pure point of Law. He cited **Mukisa Biscuits Company versus WestEnd Distributors Limited (1969) EA 696**. That under **Article 165 (3) of the Constitution** this court has jurisdiction to entertain constitutional violations that cut across the statutes citing; **Samuel Kamau Macharia & Another v Kenya Commercial Bank Ltd & Another**. That the Preliminary objection therefore seeks to oust the jurisdiction of this court and confer it to the Ethics and Anti-Corruption Commission. Lastly that under **Article 1 and 23 of the Constitution and under the United Nations Conventions against Corruption (2003)** the court is called upon in the public interest to protect and uphold the constitutional questions raised in the petition.

ANALYSIS AND DETERMINATION

Nature of preliminary objection

9. According to **Law, J.A.** in the case of **Mukisa Biscuits Manufacturing Company Limited -vs- West End Distributors (1969) EA 696**: -

“...a Preliminary Objection consists of a point of law which has been pleaded or which raises by clear implication out of pleadings, and which if argued as a preliminary point, will dispose of the suit. Examples are an objection to jurisdiction of the court, a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the matter to arbitration.....”

10. I will apply this test to the preliminary objection raised herein. The main Preliminary objection relates to the jurisdiction of the Court to try and determine this petition. If it succeeds, the objection should determine the entire petition. I need not overemphasize that a court of law will only adjudicate over a matter it has the power to do so. Thus, the famous canticle goes; *jurisdiction is everything*, and was buttressed by the Court of Appeal in more recent case of **Kakuta Maimai Hamisi -vs- Peris Pesi Tobiko & 2 Others (2013) eKLR** as follows: -

“So central and determinative is the jurisdiction that it is at once fundamental and over-arching as far as any judicial proceedings is concerned. It is a threshold question and best taken at inception. It is definitive and determinative and prompt pronouncement on it once it appears to be in issue in a consideration imposed on courts out of decent respect for economy and efficiency and necessary eschewing of a polite but ultimate futile undertaking of proceedings that will end in barren cui-de-sac. Courts, like nature, must not sit in vain...”

11. And, by the Supreme Court of Kenya in the case of **Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & others (2012) eKLR** as follows: -

“A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsels for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality, it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings ... where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law...”

12. The jurisdiction of this court is set out in **Article 165 of the Constitution** as follows;

“(3) Subject to clause (5), the High Court shall have—

(a) unlimited original jurisdiction in criminal and civil matters;

(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;

(c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;

(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—

(i) the question whether any law is inconsistent with or in contravention of this Constitution;

(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;

(iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and

(iv) a question relating to conflict of laws under Article 191; and

(e) any other jurisdiction, original or appellate, conferred on it by legislation.”

13. **Article 23 of the Constitution** gives this court the jurisdiction to hear and determine matters involving violation of fundamental rights under the Bill of Rights. It states as follows:

23. (1) The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

(2) Parliament shall enact legislation to give original jurisdiction in appropriate cases to subordinate courts to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

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

(a) a declaration of rights;

(b) an injunction;

(c) a conservatory order;

(d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;

(e) an order for compensation; and

(f) an order of judicial review.

14. I will look at the pleadings. Accordingly, the petitioner is seeking for a declaration that the petitioner has abdicated and neglected and or failed to uphold his duties under Article 179 (4) of the Constitution of Kenya which establishes the Respondent as the chief executive officer of the County. He has cited gross violations of the **Constitution, County Government Act, Leadership and Integrity Act and the Public Finance and Management Act**. These allegations hinge on integrity and corruption. The preliminary objection questions; whether the High Court has Jurisdiction to determine such complaints which fall within the mandate of other Constitutional Bodies. I should therefore examine the mandates of the state organs concerned as a way of proving or denying the hypothesis in the objection.

Vibrant debate

15. I am aware that there has been and still there is a vibrant debate on this subject among the judicial, legal as well as other disciplines. Some posit that, matters of investigative character lie with state organs with investigative function. This school of thought view a court of law as least competent- if at all- to carry out investigations on alleged crimes. And therefore, vouch for the principle of avoidance. I will revisit this principle.

16. For instance, in **William Kabogo Gitau v Ferdinand Ndung’u Waititu [2016] eKLR** the Court held as follows;

“In my view, while this Court enjoys unlimited original jurisdiction in criminal and civil matters by dint of Article 165 (3) (a) of the Constitution, that is not a substitute for other first ports of call in determining such civil and criminal matters. In the present case, the Petitioner alleges the commission of various criminal offences and thus concludes that the Respondent is guilty of the same and hence in violation of Articles 10 (2) and 73 of the Constitution.

49. I hold the view that the Petitioner’s contentions in regard to the commission of the alleged offences must be raised with the relevant authorities and this Court cannot at this juncture usurp the powers of such authorities. This Court cannot for instance sit to investigate matters of alleged forgeries of academic documents as invited by the Petitioner and neither can the Court make conclusions pertaining to those allegations in the absence of evidence for instance that the investigating agencies have made investigations and the relevant Court has made a finding as to the innocence or otherwise of the Respondent on those allegations.....”

17. I am also aware of a more progressive approach that courts are competent to decide on allegations on lack of integrity, corruption and gross violation of the Constitution. This school of thought envisages straight-forward cases or cases which do not necessarily require investigation or intense inquiry of investigative nature. Commentators say that, such are cases of which ordinary analysis of evidence should suffice to determine the subject matter. However, the debate continues.

The various mandates

18. Having stated the foregoing, I will consider the various mandates subject of these proceedings.

Ethics and Anti- Corruption Commission & Leadership and Integrity Act

19. The petitioner has made specific allegations, that the *Ethic and Anti-Corruption Commission (hereafter EACC)* has reneged on its duties in not addressing the corruption addressed in the Auditors General report. EACC was established under **Section 3 of the Ethics and Anti- Corruption Commission Act** in accordance with **Article 79 of the Constitution**. EACC is and has the same status and power of a commission under Chapter fifteen, for the purpose of ensuring compliance with and enforcement of, the provisions of Chapter Six of the Constitution. According to **Article 249 (b)** of the Constitution, EACC is independent and not subject to direction or control by any person or authority. **Section 11 of the EACC Act** gives EACC additional functions which include;

(d) investigate and recommend to the Director of Public Prosecutions the prosecution of any acts of corruption, bribery or economic crimes or violation of codes of ethics or other matter prescribed under this Act, the Anti-Corruption and Economic Crimes Act or any other law enacted pursuant to Chapter Six of the Constitution;

20. The Leadership and Integrity, in particular, **Section 4 (2)** states that the Commission (EACC^[1]) is responsible for overseeing and enforcing the implementation of this Act.

21. Faced with similar situation, Omondi J. in *Micheal Kojo Otieno & another v County Government of Homa Bay & 9 others* [2017] eKLR stated;

“Article 10 of the Constitution binds all State organs, State officers and public officers to uphold national values and principles of governance which include integrity, transparency and accountability and what I can decipher is that this forms the basis of the applicants’ contention. Yet the question which begs to be answered is whether the applicants have ever raised their various concerns to any investigative agency and been ignored or denied audience. I say this because the 9th respondent owes its existence to Article 79 of the Constitution of Kenya, and its functions are clearly set out under the Anti Corruption and Economic Crimes Act.....”

22. Similarly, the same court in *Micheal Kojo* in its Ruling cited as *Michael Kojo Otieno & another v County Government of Homa Bay & 9 others* [2018] eKLR held as follows;

“Certainly Article 258 (1) grants every person the right to institute court proceedings claiming that the constitution has been contravened, or is threatened with contravention. I think the petitioners had a valid concerns following the sectoral reports and the audit queries, but they were in haste and did not await the structural modes set in place to play their role.

61. This court cannot proceed to declare that the respondents have engaged in acts of corruption while at the same time it is being asked to compel the EACC to commence investigations and prosecution-that proposition is contradictory. The respondents in law remain innocent until they go through a proper court process and the court finds otherwise-only after analysing the evidence and hearing both sides.....”

23. Accordingly, the Constitution has clothed EACC as a state organ, with specific functions on matters of corruption and integrity. Most of these functions facilitate or feed into the justice system. And therefore deference to these constitutional mandates is not abdication of judicial duty. It therefore makes sense that matters complained of should be lodged with EACC. It is also material consideration that matters complained of and which fall within the mandate of EACC were not lodged with the relevant state organ and no justifiable reason was offered by the applicant on the failure.

24. Be the as it may, nothing shows that the petitioner herein lodged the matters complained of with EACC. Notably, the petitioner has levelled charges of de-relegation of duties by EACC. Yet, EACC is not a party in these proceedings and there is no evidence of a report of the matters complained to them that was produced. These matters only augment the argument by the respondent that EACC is the proper forum for these allegations.

Public Finance and Management Act & Public Procurement and Disposal Act

25. The petitioner has raised issues in relation to the Public Finance and Management Act and the public Procurement and Disposal Act (PPAD Act 2015). The alleged actions of the Respondent in using family members and family owned companies to trade with the County Government hinge on integrity and corruption which falls within the Leadership and Integrity Act as well as EACC Act.

26. Even under PPDA the Authority may refer such matters complained of herein to relevant authorities. See Section 9(2) of the PPDA which provides that;

“If in the course of monitoring in accordance with section 9(1)(a), the Authority is of the opinion that civil or criminal proceedings ought to be preferred against a State Organ, public entity, state officer or public officer, the Authority shall refer the matter to the relevant authorities.”

27. Section 9 as read with Sections 167 and 175 of the PPDA 2015 lay an elaborate mechanism for making a complaint either to the Public Procurement Authority or the Ethics and Anti-Corruption Commission. In this instance such procedures were not invoked or remedies exhausted. See also **John Kakindu Makau v County Govt of Makueni & 6 others [2018] eKLR**.

Audit reports

28. According to **Article 229 (7) and (8)** of the Constitution;

“(7) Audit reports shall be submitted to Parliament or the relevant county assembly.

(8) Within three months after receiving an audit report, Parliament or the county assembly shall debate and consider the report and take appropriate action.”

29. There is nothing to show the report has been debated by parliament or relevant county assembly. These reports are also useful source materials for investigative or actionable information; and I am sure EACC has not forgotten this.

County Government Act

30. The ultimate declaration sought by the petitioner is that the Respondent herein is unfit to hold any public office which includes the office of Governor of Isiolo. This is important as he is the Governor of Isiolo. As such, this kind of declaration if sought against a serving governor is essentially a quest for the removal from the office of the Governor of Isiolo County. I am content to cite the case of **Martin Nyaga Wambora & 3 others v Speaker of the Senate & 6 others [2014] eKLR** where the Court of Appeal the Court held as follows on the jurisdiction of the Court in relation to the removal of a governor under Article 181 of the Constitution and Section 33 of the County Government Act;

31. Our reading and interpretation of Article 181 of the Constitution as read with Section 33 of the County Governments Act shows that removal of a Governor is a constitutional and political process; it is a sui generis process that is quasi-judicial in nature and the rules of natural justice and fair administrative action must be observed. The impeachment architecture in Article 181 of the Constitution reveals that removal of a Governor is not about criminality or culpability but is about accountability, political governance as well as policy and political responsibility. Section 33 of the County Governments Act provides for the procedure of removal of an erring Governor. The organ vested with the mandate at first instance to move a motion for the removal of a County Governor is the County Assembly. Neither the Courts nor the Senate have the constitutional mandate to move a motion for the removal of a County Governor. The Senate’s constitutional mandate to hear charges against a Governor is activated upon receipt of a resolution of the County Assembly to remove a Governor. Upon receipt of such a resolution, the Senate shall convene a meeting to hear the charges against the Governor and may appoint a Special Committee to investigate the matter. It is our considered view that the jurisdiction and process of removal of a Governor from office is hierarchical and sequential in nature. There are three sequential steps to be followed: first is initiation of a motion to remove the Governor by a member of the County Assembly; second there is consideration of the motion and a resolution by two thirds of all members of the County Assembly and third, the Speaker of the County Assembly is to forward the County Assembly’s resolution to the Senate for hearing of the charges against the Governor.

32. In all the sequential steps identified above, courts have neither been vested with jurisdiction to initiate a motion, consider a resolution nor to hear the charges levied against the Governor. This position is in tandem with the core function test and the concept of separation of powers. The constitutional and statutory mandate to initiate and consider a motion to remove a County Governor is vested in the County Assembly and the Senate. Section 33 of the County Governments Act which is an implementing legislation for Article 181 of the Constitution does not vest the courts with the jurisdiction to hear charges relating to the removal of a Governor from office. From the dicta in *Marbury – vs- Madison*, – 5 US. 137, it is our considered view that in so far as the process of removal of a Governor from office is concerned; the province of the court is solely to decide on the rights of individuals and not to enquire how the County Assembly and Senate perform duties in which they have discretion.

.....

34. Our reading of Article 165 (6) of the Constitution reveals that the role of the High Court for purposes of removal of a Governor from office is inter alia supervisory in nature to ensure that the procedure and threshold provided for in the Constitution and the County Governments Act are followed. If the process for removal of a Governor is unconstitutional,

wrong, un-procedural or illegal, it cannot be said that the court has no jurisdiction to address the grievance arising therefrom. (See *Mumo Matemu – vs- Trusted Society of Human Rights Alliance & 5 Others* (supra)). In its supervisory role, the jurisdiction of the High Court is dependent on the process and constitutionality of the action taken. In the instant case, in its supervisory role, the High Court is to examine whether any procedural law was violated by the County Assembly or Senate in arriving at their decision. We are of the view that Article 181 of the Constitution as well as Section 33 of the County Governments Act can neither be interpreted as clauses that oust the supervisory jurisdiction of the High Court, nor limit the power of the High Court to interpret Article 181 nor be construed as provisions that prohibit the right of a citizen to access a court of law where there is an allegation of infringement of a constitutional right to hold a public office under Article 38 (3) (c) of the Constitution.

31. As the court exercise jurisdiction, care should be taken not to usurp the role of the County Assembly to remove a governor in the name of a constitutional declaration. The procedure provided in the Constitution and the County Government Act cannot be supplanted by constitutional petitions. The procedure in Section 33 as read with article 181 of the Constitution is the apt recourse here.

The principle of Avoidance

32. Time has come to repay my scholarly debt. The principle of avoidance is primarily viewed by courts from the position that, although a court could take up a matter and hear it, it would still decline to do so if there is another mechanism through which the dispute could be resolved at first instance. I do not think this is purely as a result of judicial self-restraint. But, rather, it is as a result of due deference to the sovereignty of the people delegated to particular state organs to carry out specific constitutional mandates and functions. See *Council of County Governors v Attorney General & 12 others* [2018] eKLR. The Supreme Court stated in *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR (at para 256) that the principle of avoidance means that a Court will not determine a constitutional issue when a matter may properly be decided on another basis.

33. The above principles have been adopted in *John Harun Mwau Vs. Peter Gastrow & 3 Others* [2014] eKLR where the court stated –

“Courts will not normally consider a constitutional question unless the existence of a remedy depends on it; if a remedy is available to an applicant under some other legislative provision or some other basis, whether legal or factual, a court will usually decline to determine whether there has been in addition to a breach of the other declaration of rights.

... It is an established practice that where a matter can be disposed of without recourse to the Constitution, the Constitution should not be invoked at all. The court will pronounce on the constitutionality of a statute only when it is necessary for the decision of the case to do so.”

34. See Majanja J in *Francis Gitau Parsimei & 2 others v National Alliance Party & 4 others* [2012] eKLR where he held;

“It is against this background that the Court of Appeal established the principle that where the Constitution and or statute establish a dispute resolution procedure, then that procedure must be used....”

Conclusions

35. The discussion on the various mandates and procedures provided for other state organs in respect of matters complained of herein is important in showing the constitutional justification for this court to decline jurisdiction in this petition. It bears repeating that the move is not merely to render due deference to mandates vested in other state organs, but also to enable harmony amongst state organs in the discharge of their respective functions.

36. Before I close, I must commend the petitioner for raising valid queries and he is admirably a whistle-blower of the alleged offences of corruption. But, it would do justice to all if these complaints are lodged with the relevant bodies especially EACC for investigations and appropriate action. And, if these matters are not investigated, a party will always have recourse in court for appropriate orders. Nonetheless, I doubt responsible commissions like EACC would refuse to consider such serious allegations. And, if for good reason, it decides not to investigate, it is obligated to inform the complainant in writing of such decision.

37. In the upshot, the Preliminary Objection succeeds. The petition is struck out. I however, make no order as to costs given these proceedings are in the nature of public litigation. It is so ordered.

Dated, signed and delivered at Meru this 14th day of October 2020

F. GIKONYO

JUDGE

Representation

Muriuki for respondent

Kiogora Mugambi for petitioners – absent

F. GIKONYO

JUDGE
