



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CONSTITUTIONAL PETITION NO. 16 OF 2018

IN THE MATTER OF ARTICLES 2, 3, 10, 19, 20, 21, 22, 23, 47, 165, 177, 185(3) AND 235 OF THE CONSTITUTION OF KENYA

AND

SECTION 7, 55, 58, 59 AND 76 OF THE COUNTY GOVERNMENT ACT

AND

IN THE MATTER OF CONTRAVENTION OF ARTICLE 2, 3, 10, 47, 117, 185, 235 AND 236 OF THE CONSTITUTION OF KENYA

AND

SECTION 4, 6 AND 12 OF THE FAIR ADMINISTRATIVE ACTIONS ACT NO. 4 OF 2015

AND

IN THE MATTER OF THE MOTION AND RESOLUTION PASSED AND ADOPTED BY COUNTY ASSEMBLY OF EMBU ON 29/11/2018

AND

IN THE MATTER OF A NOTICE DATED 30TH NOVEMBER 2018 BY 1ST RESPONDENT TO 3RD RESPONDENT

BETWEEN

RUTH WAMBUI NDIRANGU.....1ST PETITIONER/APPLICANT

GRACE WANJA MURIITHI.....2ND PETITIONER/APPLICANT

SAMUEL WACHIRA NJUE.....3RD PETITIONER/APPLICANT

VERSUS

CLERK COUNTY ASSEMBLY OF EMBU.....1ST RESPONDENT

SPEAKER COUNTY ASSEMBLY OF EMBU.....2ND RESPONDENT

COUNTY ASSEMBLY OF EMBU.....3RD RESPONDENT

COUNTY PUBLIC SERVICE BOARD EMBU COUNTY.....4TH RESPONDENT

RULING

A. Introduction

1. The petitioners filed a joint petition dated 3rd December 2018 against the respondents seeking for several reliefs. Firstly, was a declaration that the 2nd and 3rd respondent's motion passed and adopted on 29/11/18 and resolutions made subsequent thereto are unconstitutional, null and void *ab intio*.
2. Secondly, the petitioners sought a declaration that the 3rd respondent violated the petitioners' constitutional rights of fair administrative action enshrined under Article 47 of the Constitution.
3. Thirdly, a declaration that the 3rd respondent violated Articles 185(3) and 235 of the Constitution.
4. Fourthly, that the 1st, 2nd and 3rd respondent violated the principle of separation of powers and that of natural justice in passing the resolution of 29th November 2018.
5. Fifthly, an order of certiorari to quash the resolution of 29th November 2018 was sought as well as that of prohibition prohibit the 4th respondent from implementing the 1st respondent's notice dated 30th November 2018. Finally, the petitioners seek general damages plus costs of the petition.
6. The petition was accompanied by a notice of motion seeking for conservatory orders to restrain the 4th respondent from implementing or taking any further step on the resolution dated 30th November 2018.
7. On the 19th December 2018 the respondents entered appearance and filed a notice of preliminary objection which is the subject of this ruling. The objection challenges the jurisdiction of this court in determining this petition.

B. Respondent's Case

8. In support of their preliminary objection, Mr. Njenga for the respondents submitted that the same was founded on the County Assemblies Powers and Privileges Act as well as Article 196 (3) of the Constitution. Mr. Njenga quoted section 10 and 11 of the act and submitted that the same provisions provided immunity for the County Assembly and thus ousted this court's jurisdiction.
9. Mr. Njenga relied on **Petition No. 15 of 2015**, where he submitted that the court found that the proceedings of the County Assembly should not be interfered with. He further submitted that what the 1st applicant was challenging was the motion proposed and voted for in the County Assembly.
10. Counsel for the respondents further submitted that a cause of action could only arise upon a determination by the County assembly and that in the instant case all the County Assembly had done was to recommend that the 1st Applicant steps aside pending investigations after which a final determination would be made. He thus submitted that the suit by the applicants was speculative and ought to be dismissed.

C. Applicant's Case

11. In reply to the respondents' notice of preliminary objection, the applicants through their advocate made oral submissions that Article 165(3) of the Constitution gives this court unlimited jurisdiction to determine whether a right or a fundamental freedom has been breached.
12. Mr. Mwangi for the applicants further submitted that sections 10 and 11 of the County Assembly Powers and Privileges Act relied on by the respondents, must be balanced with the bill of rights in the Constitution and thus must act in accordance with it. Mr. Mwangi further submitted that only the courts could check on the actions of the County Assembly and thus had jurisdiction. To hear this petition.
13. Mr. Mwangi for the applicants further submitted that the court was not being asked to stop proceedings of the assembly but to check the constitutionality of its decision and thus when an assembly passes a resolution and recommends that an action be taken against a chief officer, this may be tantamount to violation of the Chief Officer's constitutional rights. The counsel did submit that the court was the only source of remedy for the applicants.
14. The applicants deposed that the preliminary objection by the respondent amounted to a technicality and urged this court to grant the petitioners audience for Article 159 (d) of the Constitution provides that justice shall be administered without undue regard to technicalities.

D. The Determination

15. The facts of this petition as contained in the supporting affidavit challenge a resolution of the 1st, 2nd and 3rd respondent recommending that the petitioners do step aside from their offices to pave way for investigations into their conduct in respect of their respective offices. The motion was passed in the normal conduct of proceedings of the 3rd respondent on the 30th November 2018. This was followed by a letter from the 3rd respondent to the 4th respondent informing them of the resolution for purpose of implementation.
16. The applicants being dissatisfied with the actions of the respondents instituted this petition. The respondents have now filed a preliminary objection on the ground that this court lacked jurisdiction to interfere with actions of the 3rd Respondent which are protected by the County Assemblies Powers and Privileges Act as well as Article 196 (3) of the Constitution.
17. The Respondents have urged that this Court is not the forum to deal with the Applicants' claim on account of the doctrine of separation of powers. It was further contended that the Court should not impede their constitutional functions on this account.

18. Jurisdiction is always granted by law or other like instrument as held by the Court of Appeal in The Owners of the Motor Vessel "Lilian S" –VS- Caltex (Kenya) Ltd [1989] KLR 1.

“By jurisdiction is meant the authority which a court has to decide matters presented in a formal way for its decision. The limits of this authority are imposed by the stature, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but except where the court or tribunal has been given power to determine conclusively whether exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given”

19. The Applicants’ have in this respect argued that their rights were infringed by the Respondents, and more specifically their rights to a fair hearing under Articles 47 and 50 as well as under the Fair Administrative Act, 2015.

20. **Article 165 (3) (d) of the Constitution** in this respect provides that the High Court shall have jurisdiction to hear any question respecting the interpretation of the Constitution including the determination of: -

- i. *the question whether any law is inconsistent with or in contravention of the 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 Article 22 (1) provides that every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened. Article 23(1) specifically gives jurisdiction to the High Court 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.*

21. The Respondents have argued in this respect that Article 165 of the Constitution is inapplicable to them for reasons that the investigation for removal of a member of the county assembly is a legislative function, protected under Sections 10 and 11 of the County Assemblies Powers and Privileges Act as well as Article 196 (3) of the Constitution and further that the suit by the applicants is speculative. Courts have held on this issue that it is indeed the correct position that courts should not ordinarily interfere with the exercise of the legislative authority or executive functions of a constitutional body in line with the doctrine of separation of powers. It is only in cases where there is a well-founded allegation that a fundamental right or freedom has been violated that the courts will be called to intervene under Article 165(3). The respondent relied on **Section’s 10 and 11 of the County Assemblies Powers and Privileges Act** which provides: -

Section 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.

Section 11 - Functions of the Board

(1) The Board shall—

- (a) direct and supervise the administration of the services and facilities provided by, and exercise budgetary control over, the Service;*
- (b) determine and review the terms and conditions of service of persons holding or acting in the offices of the Service;*

(c) initiate, co-ordinate and harmonize policies and strategies relating to the development of the Service; (d) initiate programmes—

(i) for training and capacity building of members and staff of the county assembly and other persons;

(ii) that promote ideals of parliamentary democracy as set out in Article 127(6)(d) of the Constitution; and

(iii) that promote public awareness and participation in the activities of the county assembly; and

(e) do such other things as may be necessary for the well-being of the members and staff of the county assembly.

(2) In the performance of its functions under this Act, the Board shall apply—

(a) the national values and principles of governance set out in Article 10 of the Constitution; and

(b) the values and principles of public service set out in Article 232(1) of the Constitution.

22. This provision is based on **Article 196(3) of the Constitution** which provides that Parliament shall enact legislation providing for privileges and immunities of County Assemblies and their committees and members. The law was later enacted and is now the County Assemblies Powers and Privileges Act.

23. It was further argued that what the petitioners are challenging in the petition is a motion of the County Assembly that was passed by way of a vote. It was further stated that it was argued that resolution was a recommendation by the County Assembly which the 4th Respondent may or may not follow. The resolution did not direct that the petitioners be removed from office as the petitioners are trying to put it.

24. It is imperative that this court examines the motion and the resolution complained of with a view of determining the merit of the preliminary objection. The 3rd respondent's proceedings of 29/11/2018 show that a member moved a motion that culminated in the following resolution: -

“That pursuant to section 149 of the Public Finance and Management Act, 2012 as read together with section 148(2) of the Public Finance and Management Act, 2012 and Section 45(4) of the County Government Act, 2012 this County Assembly resolves that the following Public Officers step aside from their current official positions pending investigations into their conduct by this County Assembly;

1. Ruth Wambui Ndirangu – Chief Officer Finance

2. Grace Wanja Muriithi – Chief Officer Health

3. Samuel Wachira Njue – Chief Officer Youth Empowerment,

On the following allegations;

1. Incompetence

2. Abuse of office

3. Breach of the Public Finance Management Act, 2012

4. Breach of the County Government Act, 2012

5. Breach of the Constitution of Kenya, 2010

25. The procedure is that following debate on a motion, the County Assembly passes a resolution by a vote. A resolution means “a thing resolved or a formal decision of a legislative body or a public meeting. To “resolve” is to make up one’s mind, to decide firmly thereto. The resolution passed on 20/11/2018, was a decision of the assembly on the issues that had been put to debate. Having made that decision, the assembly was done with it that the County Public Service Board Embu County effects the resolution to the effect that three petitioners step aside from their respective offices.

26. The petitioners are challenging the constitutionality of the said resolution on whether it complied with the provisions of the constitution cited in the petition. The petitioners claim that their constitutional right of administrative action was violated by the 1st, 2nd and 3rd respondents who condemned them unheard and denied them the right to rebut the allegations.

27. **Article 2(1) of the Constitution** provides that the constitution binds all persons and all state organs at all government levels. Article 2(3) emphasizes on the observance of constitution provisions by any state organ or state officer in exercising the functions of their respective offices.

28. The provisions of ouster clauses like Section 10 and 11 of the Act were examined by the court in the case of *Apollo Mboya Vs Attorney General & 2 others [2018] eKLR* regarding decisions made by Parliament. It was observed: -

“Decisions made by Parliamentary committees can have serious impacts on citizens fundamental rights and freedoms. The import of section 7 is that Parliamentary decisions have been put out of reach of Court scrutiny. The provision falls under the category of what is described as “ouster clauses. An ouster clause or privative clause, in countries with common law legal systems, a clause or provision included in a piece of legislation by a legislative body to exclude judicial review of acts and decisions of the executive by stripping the courts of their supervisory judicial function. According to the doctrine of the separation of powers, one of the important functions of the judiciary is to keep the other organs of the State in check by ensuring that their actions comply with the law, including, where applicable the constitution. Ouster clauses prevent courts from carrying out this constitutional function.”

29. The observation of the court is applicable to Section 10 and 11 of the County Assemblies Powers and Privileges Act which is a replica of Section 11 of the Parliamentary Powers and Privileges Act.

30. The same court the further in the *Apollo Mboya case (supra)* made a further observation of Section 11 that: -

“It is an ouster or finality clause which restricts or eliminates Judicial Review. In our constitutional dispensation, it is not Parliament, or the executive or the Judiciary that are Supreme, but the Constitution.”

“A decision rendered by a Parliamentary Committee in the exercise of its judicial functions can be quashed for being ultra vires, an error of the law, unreasonable, illegal, arbitrary or for violation of the Bill of Rights. That is the mandate and sacred duty of the Court”

31. In the case of *Hon. Protus aramba Moindi & Another Vs The Speaker of County Assembly of Kisii and 2 others (2016)eKLR* the court in examining a similar provision Section 12 of the National Assembly Power & Privileges Act observed:-

“The Act applies ‘Mutatis Mutandis’ to all the County Assemblies now that we are in the era of devolution and County Governments. On the face of it, S.12 of the act purports to exclude interference of the courts in matters of the National assembly or for that matter County Assemblies. However, Article 2 of the Constitution proclaims the supremacy of the Constitution to the effect that it is Supreme Law of the Republic and binds all persons and all state organs at both levels of Governments. So that no person may claim or exercise State authority except as authorized under the Constitution and any law that is inconsistent with the Constitution is void to the extent of the inconsistency and any act or omission in contravention of the Constitution is invalid.”

County Assemblies are thus behoved to operate under the Constitution which is the Supreme Law of the Land and if they violate the procedural requirements of the Supreme Law, it is for the Courts of Law to assert the authority and supremacy of the Constitution (Speaker of the Senate and Another Vs. Attorney General & Others, Supreme Court of Kenya Advisory Opinion No. 2 of 2013).

32. In that case J.R. Karanja J. was dealing with a case seeking declarations and injunctions against the County Assembly of Kisii where a preliminary objection had been raised. It was held: -

“In the end result, it is the finding of this court that the Preliminary Objection by the second respondent dated 26th May 2016 is devoid of merit and is hereby dismissed in its entirety with costs to the petitioners and the interested party to be borne by the second respondent.”

33. The respondent relied on the Supreme court decision of *Justus Kariuki Mate & Another vs Martin Nyaga Wambora & Another [2017] eKLR* in its argument that the court should not interfere with the legislative functions of the County Assembly. I have perused the decision and find that it does not support that position.

34. The court observed: -

“We would state, as a legal and constitutional principle, that courts have the competence to pronounce on the compliance of a legislative body, with the processes prescribed for the passing of legislation”.

35. The Supreme Court in that petition was dealing with the issue of the constitutionality of a standing order of the County Assembly among other issues.

36. The petition before this court seeks for reliefs and orders based on the allegation that the Constitutional rights of the applicants were violated by the 1st, 2nd and 3rd respondent. It also seeks for judicial review orders to quash the resolution of the respondents.

37. Article 165(3) of the Constitution confers jurisdiction to this court to hear any question for interpretation of the Constitution including the determination of whether any law in question is inconsistent or in contravention with the constitution.

38. I am in agreement with the findings and observations made in the *Protus Moindi case (supra)* that the High Court has jurisdiction to deal with all matters of alleged constitutional violations by the respondents or any other state organs within its jurisdiction.

39. I find no merit in the preliminary objection and hereby find that this petition is within the jurisdiction of this honourable court.

40. The objection is accordingly dismissed.

41. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 17TH DAY OF JANUARY, 2019.

F. MUCHEMI

JUDGE

In the presence of: -

Mr. Gichuhi for Mwangi for Petitioner

Mr. Muthomi for Mr. Njenga for 1st, 2nd, 3rd respondent

Mr. Ngige for 4th respondent