



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

PETITION NO. 44 OF 2015

IN THE MATTER OF ARTICLES 2, 3, 10, 19, 20, 21, 22, 23, 27, 28, 29, 41, 48, 50, 106, 159, 165(3), 258 AND (E) AND 259 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE ALLEGED CONTRAVENTION OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF VIOLATION OF THE RIGHT TO FAIR HEARING, DIGNITY AND PROTECTION FROM DISCRIMINATION AND SECURITY OF PERSON

BETWEEN

SAMUEL TUNOI.....PETITIONER

VERSUS

THE SPEAKER NAKURU COUNTY ASSEMBLY...1ST RESPONDENT

THE CLERK, NAKURU COUNTY ASSEMBLY.....2ND RESPONDENT

MOSES KIPKOROS TUEL.....3RD RESPONDENT

JUDGEMENT

1The Petitioner is a resident of Nakuru County, within the Republic of Kenya and was at the time of instituting this suit a Member of the County Assembly (MCA) in the Nakuru County Assembly.

2. The 1st Respondent was an ex-officio member and employee of the County Assembly of Nakuru, seized with the duty of presiding over the sittings of the County Assembly.

3. The 2nd Respondent is tasked with administration of the County Assembly, accounting officer/authorized officer for the County Assembly, secretary to the County Assembly Service Board with the responsibility to implement all the decisions of the County Government Assembly Board.

4. The 3rd Respondent is a resident within Nakuru County and at the time the suit was instituted was a Member of the County Assembly of Nakuru and the elected Deputy Speaker.

Background and Pleadings

5. The Petitioner was the Deputy Speaker of the County Assembly of Nakuru having being duly elected by members of the Assembly by virtue of section 21(3) of the Elections Act. On the 10th March, 2015 one Hon. Warothe gave a Notice of Motion for the removal of the Petitioner as the Deputy Speaker. On the same day in the afternoon, one Hon. Stephen Muiruri moved a motion to amend various Standing Orders (SO) of the Assembly among them SO 64 to do with the removal of the Deputy Speaker on a simple majority instead of the required 75% of the members of the Assembly; and, SO 237(6) to do with the immediate implementation of the amended SO.

6. On the 11th March, 2015 in the morning session of the Assembly, the said Hon. Jonathan Warothe moved his motion for removal of the Petitioner as the Deputy Speaker and the same was slated for debate at 2:30 pm on the same day. Thereafter Hon. Muiruri's motion to amend the SO was debated and the motion was approved by a majority of the members of the Assembly thereby coming into force immediately.

7. The Petitioner alleges to have been served with the motion for impeachment at 1:00 PM, a mere one and a half hours before the motion to impeach him was debated and therefore was not afforded adequate time to prepare for the hearing of the motion. The motion was debated at 2:30PM the same day and the Petitioner was impeached. On the 12th March, 2015, the Petitioner alleges that a motion was un-procedurally moved and debated for the election of the 3rd Respondent herein as the Deputy Speaker.

8. The Petitioner claims that the amendment of the SO more precisely SO 64 and 237(6) were unconstitutional and therefore his removal as the Deputy Speaker was unconstitutional and that the appointment the 3rd Respondent as the Deputy Speaker was unprocedural; and, that the actions of the Respondents violated his Constitutional rights. He consequently filed this Petition dated 20th March, 2015 seeking for orders that:-

1. A declaration that the Respondents actions of manipulating the house as against the Petitioner and the vote to remove him not by way of secret ballot as the Deputy Speaker were illegal and unconstitutional.

2. A declaration that Kenya is a democratic republic under the rule of law and Constitutionalism and free from discrimination and everybody has a right to be heard.

3. A declaration that the amended standing orders number 64 and 237 (6) used to remove the Petitioner are unconstitutional and the same be quashed.

4. A declaration that the conduct of the election of the 3rd Respondent was not only unprocedural, egregious and illegal but also unconstitutional and the same be quashed and the Petitioner reinstated as the Deputy Speaker of the County Assembly with full salary, benefits and allowances from the 11th March, 2015.

5. A declaration that the conduct of the 1st and 2nd Respondents does not meet the provisions of Article 10 and Chapter 6 of the Constitution of Kenya hence unfit to hold public office.

6. An order of certiorari be issued to bring into court the motion and decision to amend standing orders number 64 and 237(6) and the same be quashed.

7. The Petitioner be paid general damages for violation of his rights under Article 27, 28, 29, 41, 47, 48 and 50 of the Constitution of Kenya.

8. The petitioner be paid costs of this Petition.

9. The Petition is opposed by the Respondents by way of the Replying Affidavit of one J.M. Malinda, the 2nd Respondent herein, dated 20th February, 2017 sworn on his own behalf and that of the 1st and 3rd Respondents.

10. The Respondents averred that power to remove the Deputy Speaker is vested in the members of the County Assembly and as such the Respondents were not responsible for orchestrating the removal of the Petitioner and further that the 1st Respondent cannot vote in a matter in accordance to SO 70. That the notice of motion to remove the Petitioner was initiated by the MCA of Hell's Gate ward which was duly signed by members of the County Assembly and which stated the grounds for his removal.

11. Further a motion amending the standing orders was lodged with the speaker on the 10th March, 2015 under SO 237 and was subsequently moved before the Assembly on the 11th March, 2015 by Hon. Stephen Kuria to amend among others Standing Order (SO) 64 on the procedure for removal of the Deputy Speaker and SO 237(6) for the amendments to take effect immediately and both amendments were duly approved.

12. The Respondents averred that it was only after the motion of amendment was approved that the motion to remove the Petitioner was moved and therefore the Petitioner was not subjected to retrospective application of the law. It was further averred that the Petitioner was afforded sufficient opportunity to defend himself under SO 64 and that under SO 70 there is no mandate that a vote in respect of a decision of the County Assembly be by way of secret ballot as it provides for voting by divisions at the discretion of the Speaker for convenience.

13. The Respondents further averred that the standing orders do not provide for the formation of an ad hoc committee to investigate and table a report within 21days and that the removal of the Petitioner was procedural. On the election of the 3rd Respondent it was averred that it was done in accordance with Section 21(3) of the Elections Act by the members of the County Assembly and that the courts should not interfere with the mandate of the County Assembly as that would amount to interfering with the autonomy of the County Assembly blurring the doctrine of separation of powers.

Submissions

14. Parties canvassed the petition by way of written submissions where the Petitioner filed his submissions dated 22nd March, 2017 on the same day whereas the Respondents filed their joint submissions dated 21st June, 2017 and Counsel for both parties highlighted their

submissions on the 17th October, 2017.

15. When the matter came up for highlighting of submissions, the Petitioner's advocate abandoned their prayer (d) as it had been overtaken by events as the Petitioner was the Deputy Speaker in the current County Assembly thereby effectively terminating the term of the 3rd Respondent.

16. The Petitioner identified three issues for determination namely:

1. Whether the process of amending the standing orders was procedural and in good faith.

2. Whether the rights of the Petitioner were infringed.

3. Whether the 3rd Respondent was validly elected.

17. On the first issue, Mr. Kipkoech, learned counsel for the Petitioner submitted that the Notice of Motion seeking to amend the standing order number 64 and 237(6) was tabled in the afternoon though it was not in the Order Paper. On 11th March, 2015, the motion to amend the standing orders was approved in the morning at 9:10 am and the motion to remove the Petitioner was heard on the same day at 2:30pm. Counsel submitted that the said amendments were tailor made to remove the Petitioner and therefore discriminatory and in contravention of Article 27.

18. On the second issue, Mr. Kipkoech submitted that the notice for the motion to remove the Petitioner as the Deputy Speaker was served upon him at 1:00pm yet the motion was to be debated at 2:30 pm the same day which and was therefore not afforded enough time and material to prepare for the hearing and was in violation of the provisions of standing order 68(2) and contravention of his right to fair administrative action and the right to a fair hearing under Article 47 and 50 of the Constitution, respectively.

19. It was further submitted that the Respondents applied the law retrospectively as the process to impeach him had commenced before. The Petitioner further submitted that the 1st Respondent was in the habit of silencing her critics and on the 13th March, 2015 used her privilege and kicked him out of the Assembly threatening his security contrary to Article 29 of the Constitution.

20. On the third issue, the Petitioner submitted that the election of the 3rd Respondent as the deputy Speaker was illegal as it was done on a Thursday morning, on which day the County Assembly does not usually sit and, that there was no notice in the gazette and that the motion was not publicized and circulated. Further, it was submitted that the manner and the environment in which the motion was deliberated was chaotic and the speaker and the clerk conducted the house business while standing in contravention of Standing Orders 97, 98, 99, 100, 101, 102, 103 and 105.

21. It was also the Petitioner's submission that the 3rd Respondent was the chief whip of the Assembly and he had not resigned from that position when elected and was therefore holding two positions which was an illegality; and, that the 3rd Respondent had not declared an interest in the position when he was elected.

22. The Petitioner prayed that the court quashes the amended standing orders number 64 and 237(6) and damages be awarded.

23. The Respondents were represented by learned counsel, Mr. Karanja, who identified three issues for determination:-

1. Whether the petition is to the required threshold for claim of breach of Constitutional rights.

2. Whether the doctrine of separation of powers should be upheld.

3. Whether the petition is overtaken by events.

24. On the first issue, learned counsel submitted that the petition did not meet the threshold in the **Anarita Karimi Njeru vs. Republic [1976-80] KLR 1272** as it failed to bring to the court's attention with specificity how the amendments violated his Constitutional rights and therefore the Petitioner was not entitled to the reliefs sought.

25. On the doctrine of separation of powers, it was submitted that the petition seeks to ask the court to overrule the County Assembly yet it is the County Assembly's task and mandate to remove the Deputy Speaker and the court should not interfere with the internal arrangements of the County Assembly regulated by the standing orders unless there is a violation of the Constitution.

26. On the third issue, Mr. Karanja, submitted that the petition was purely academic as the Petitioner had been re-elected as Deputy Speaker in the current County Assembly under the same Standing Orders. He also submitted that the petition sought to propagate personal interest to the detriment of the County Assembly as the 3rd Respondent was validly elected and that the Assembly cannot be held at ransom.

27. Counsel also submitted that the main reason for the amendments was to lower the requirement for removal of the Deputy Speaker from 75% to 50% as the Deputy Speaker was a member of the County Assembly and therefore not protected under the law.

28. The Respondents prayed that the petition be dismissed.

Analysis and Determination

29. I partially agree with the Respondents' submission that the petition has been overtaken by events as elections were held on 8th August 2017 and new leaders put in place. It is factual that the Petitioner was re-elected back to the position of Deputy Speaker and this is the reason why the Petitioner chose to abandon prayer (d). Nonetheless despite the fact that there is a new County Assembly in place and that the Petitioner has been re-elected back to the same position in the new Assembly, the court cannot overlook the allegations that the Petitioner's Constitutional rights were infringed and violated. To do so be akin to the court choosing ignore its duty under Article 23 and 165 (3) (b) of the Constitution and would be failing to uphold justice and the principles of the Constitution as it is called so to do under Article 159.

30. I have considered the Petition, the Replying Affidavit by the Respondents, the submissions by both sides and the authorities relied on by the parties. I see the following as the following issues for my determination:-

- 1. Whether the petition offends the doctrine of separation of powers.**
- 2. Whether the petition meets the required threshold.**
- 3. Whether the Constitutional rights of the Petitioner were violated.**
- 4. Whether the Petitioner is entitled to the reliefs sought.**

Whether the Petition offends the doctrine of separation of powers

31. The independence of Parliament is provided by Article 117 of the Constitution which states thus:-

- 1. There shall be freedom of speech and debate in Parliament.**
- 2. Parliament may, for the purpose of the orderly and effective discharge of the business of Parliament, provide for the powers, privileges and immunities of Parliament, its committees, the leader of the majority party, the leader of the minority party, the chairpersons of committees and members.**

With regards to County Governments Section 17 of the County Government Act provides:-

“The national law regulating the powers and privileges of Parliament shall, with the necessary modifications, apply to a County Assembly.”

The relevant law is the National Assembly (Powers and Privileges) Act. Section 12 provides:-

“No proceedings or decision of the Assembly or the Committee of Privileges acting in accordance with this Act shall be questioned in any Court.”

Section 29 of the same Act provides:-

“Neither the Speaker nor any officer of the Assembly shall be subject to the jurisdiction of any court in respect of the exercise of any power conferred on or vested in the Speaker or such officer by or under this Act or the standing orders.”

Section 4 of the same Act provides:-

“No civil or criminal proceedings shall be instituted against any member for words spoken before, or written in a report to, the Assembly or a committee, or by reason of any matter or thing brought by him therein by petition, Bill, resolution, motion or otherwise.”

32. From the understanding of the foregoing provisions, the court should not interfere with the legislative authority vested in Parliament by the Constitution which case also applies to the County Assemblies. The Court should be reluctant to question parliamentary procedures, debates, workings as long as they are in accordance with the Constitution. This view was stated in the case of **PETER O NGOGE V FRANCIS OLE KAPARO & 4 OTHERS [2007] eKLR** where the court held that:-

“The invitation to the court to intervene in the matter of the election of Speaker which is clearly regulated by the Standing Orders...the doctrine of separation of powers as regards the internal arrangements of Parliament demands that we do not interfere with any such internal arrangements. The internal arrangements are normally regulated by the Standing Orders of the House...”

33. However as pointed out by the Respondents, this is not an absolute privilege since the court is allowed to intervene where the actions of the County Assembly have breached the Constitution. In **Speaker of the Senate and Another and the Attorney General and Others (Advisory Opinion No. 2 of 2013)**, the Supreme Court observed thus:-

“We are persuaded by the reasoning in the cases we have referred to from other jurisdictions to the effect that Parliament must operate under the Constitution which is the Supreme Law of the land. The English tradition of Parliamentary Supremacy does not commend itself to nascent democracies such as ours. Where the Constitution decrees a specific procedure to be followed in the enactment of Legislation, both Houses of Parliament are bound to follow that procedure. If Parliament violates the procedural requirements of the Supreme law of the land, it is for the courts of law, not least the Supreme Court to assert the authority and supremacy of the Constitution. It would be different if the procedure in question were not constitutionally mandated. This court would be averse to questioning parliamentary procedures that are formulated by the houses to regulate their internal workings as long as the same do not breach the Constitution.”

34. The Petitioner contends firstly that, the process used to amend the standing order was un-procedural, he also claims that he was not accorded enough time to prepare himself before the hearing of his impeachment in contravention of Article 47 and 50 of the Constitution. It is trite that this court has the jurisdiction to hear and determine an issue in respect of the violation of the Constitutional rights of the Petitioner under Article 23 and 165 (3) of the Constitution. I find that this court is mandated to look at the claim by the Petitioner. It is a duty imposed on the court by the Constitution itself.

Whether the Petition meets the required threshold

35. The issue of competency of the petition was set out in the case of **Anarita Karimi Njeru vs. Republic [1976-80] KLR 1272** which laid out the principle that a person who alleges a violation of his Constitutional rights and freedom must plead such allegation with a degree of precision was laid out. This principle was restated by the Court of Appeal in the case of **Mumo Matemo v Trusted Society of Human Rights Alliance [2013] eKLR the court stated thus:-**

“The principle in Anarita Karimi Njeru (supra) underscores the importance of defining the dispute to be decided by the court. In our view, it is a misconception to claim as it has been in recent times with increased frequency that compliance with rules of procedure is antithetical to Article 159 of the Constitution and the overriding objective. Principle under section 1A and 1B of the civil procedure Act (Cap 21) and Section 3A and 3B of the appellate Jurisdiction Act Cap 9.

Procedure is also a hand maiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice as they give fair notice to the other party. The principle in Anarita Karimi Njeru (Supra) that established the rule that requires reasonable precision in framing of issues in Constitutional petitions is an extract of this principle.”

36. The above decisions clarified the necessity of clarity in constitutional litigation. However this court being a constitutional court has a duty to protect the rights of every individual as preserved in our Constitution and as such the court should not be quick to dismiss a petition on the ground that it has not been drafted with elegance. The strict approach established in the **Anarita Karimi Njeru** case has since been relaxed to some degree.

I agree with the holding in **Musili Mwendwa v Attorney General & 3 others [2016] eKLR Petition No. 321 of 2013**, where the court stated thus:-

“The rule in Anarita Karimi Njeru vs Republic (supra) ought not be applied hook line and sinker. It is not about absolute precision. If a party and, a priori, the court is able to painlessly identify the complainants’ case, then the matter ought to be determined substantively and on its merits.”

37. I have perused the petition together with the supporting affidavit and the written submissions by the Petitioner and find that the petition has not disclosed how the process of amending the standing orders was unconstitutional and which articles of the Constitution were violated in the process of amendment. Further the petition fails to show which laws or procedures as prescribed in the standing orders were wrongly undertaken, overlooked, misapplied or ignored by the County Assembly in the process of making the amendments.

38. In the premise I find that the question of whether the process of amending the standing orders was procedural has not been laid out in such a manner as to enable the Respondents to answer the allegations before it and falls short of the threshold. However, with respect to the claim that the Petitioner’s rights under Article 47 and 50 of the Constitution were violated, I find that there is sufficient particularity set out by the Petitioner to enable the court understand the issues in controversy. I therefore reject the Respondents’ invitation to reject the Petition on account of inelegant drafting.

Whether the Petitioner’s rights under Article 47 & 50 have been breached

39. The Petitioner averred that he was served with the a letter notifying him of the motion to impeach him at 1:00 pm being one and half hours before the motion to impeach him was to be heard and he was to defend himself.

40. On the right to be heard, Standing Order 68 of the County Assembly of Nakuru provides:-

1. Whenever the Constitution, any written law or these Standing Orders:-

requires the Assembly to consider a petition or a proposal for the removal of a person from office, the person shall be entitled to appear before the relevant Committee of the Assembly considering the matter and shall be entitled to legal representation;

2. The person being removed from office shall be availed with the report of the select Committee, together with any other evidence adduced and such note or papers presented to the Committee at least three days before the debate on the Motion.

41. Contrary to the Standing Order No. 68 aforesaid the amended Standing Orders No. 64(3) on the removal of the Deputy Speaker provides that:-

“The Deputy Speaker shall be served with the Notice of Motion to remove him or her from office at least two hours before debate on the motion.”

42. Standing Order 68 enshrines the spirit of Article 47 of the Constitution which provides for a right to fair administrative action and states that:-

“Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.”

The **Fair Administration Action Act No. 4 of 2015** was enacted in order to give effect to Article 47 of the Constitution and section 4 provides the parameters to be followed when dealing with an administrative action. On sufficient time Section 4 (3) provides:-

“Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision –

a. prior and adequate notice of the nature and reasons for the proposed administrative action.”

43. The right to be afforded sufficient time is a requisite for the right to fair administrative action to be achieved. In County Assembly of Kisumu & 2 others vs. Kisumu County Assembly Public Service Board & 7 Others the court held that:-

“The person charged is entitled to what, in legal parlance is referred to as the right to "notice and hearing." That means he must be given written notice which must contain substantial information with sufficient details to enable him ascertain the nature of the allegations against him. The notice must also allow sufficient time to interrogate the allegations and seek legal counsel where necessary.”

44. The question that is to be asked is whether the 2 hours envisaged under Standing Order 64 (3) would be sufficient time for the Petitioner to adequately interrogate the allegations and prepare to defend himself. I don't think so. In this regard I find that the notice of an hour and a half does not constitute adequate notice for the Petitioner to prepare to defend himself. Similarly there has been no evidence adduced by the Respondents that the Petitioner was furnished with the sufficient evidence that would allow him to defend himself.

45. Section 14 of the County Government Act has mandated County Assemblies to make Standing Orders consistent with the Constitution and the Act to regulate the Procedure of the County Assembly including orders for the proper conduct of its proceedings. I find that the amended standing order 64(3) shows a sharp contradiction to the Assembly's own Standing Order 68(2). It directly contravenes the provisions of section 4(3)(a) of the Fair Administration Act and Article 47 of the Constitution and must therefore be impugned.

Whether the Plaintiff is entitled to the relief sought

46. I note that apart from the declaratory orders, the petitioner also sought for general damages arising for violation of his rights, though he has not specifically pleaded the same. As already found in this judgment, the 1st and 2nd Respondent violated the Petitioner's right under Article 47 by failing to afford him reasonable time to prepare his defence and failing to furnish him with the necessary evidence.

47. **Article 23(3) of the Constitution** empowers the court to grant appropriate relief, including an order for compensation. The award for general damages is however at the discretion of the court and is dependent on the circumstances of each case and what is appropriate and just. On what is appropriate and just, was discussed by the privy council in the celebrated case of **Siewchand Ramanooop vs. The AG of T&T, PC Appeal No 13 of 2004** where **Per Lord Nicholls stated at Paragraphs 18 & 19:-**

“When exercising this Constitutional jurisdiction the court is concerned to uphold, or vindicate, the Constitutional right which has been contravened. A declaration by the court will articulate the fact of the violation, but in most cases more will be required than words. If the person wronged has suffered damage, the court may award him compensation. The comparable common law measure of damages will often be a useful guide in assessing the amount of this compensation. But this measure is no more than a guide because the award of compensation under section 14 is discretionary and, moreover, the violation of the Constitutional right will not always be co-terminous with the cause of action at law. . .”

48. In the case of **Kenya Human Rights Commission v Non-Governmental Organisations Co-Ordination Board [2016] eKLR PETITION NO. 495 OF 2015** in failing to issue general damages for breach of Article 47, Onguto J stated:-

“In principle, constitutional remedies should be forward-looking, community-oriented and structural. However, an award for damages is not a forward looking remedy. It requires the court to look back to the past in order to determine how to compensate the victim or even punish the violator. Further, there has to be a sense of justice in compensating a party. Such instances would, in my view, include where the administrative decision was taken in bad faith or under corrupt circumstances or completely outside the legitimate scope of the empowering provision. (Emphasis mine)

49. In the present case, I have found that the Petitioner's constitutional right to fair hearing was trampled on by the 1st and 2nd Respondents. I have looked at several cases in which the Petitioners were granted damages for violation of their rights. They include:- **Kenya Human Rights Commission & another v Non-Governmental Organizations Co-ordination Board & another [2018] eKLR; Douglas Moturi Nyairo v University of Nairobi [2018] eKLR; Kaimba Mangaara v Tharaka Nithi County Government [2018] eKLR.**

In view of the above and in light of the fact that the Petitioner was impeached by the County Assembly, I find an award of Kshs.200,000/= sufficient.

50. In the premises, I issue judgment for the Petitioner in the following terms:

- 1. A declaration that the amended Standing Order number 64(3) is unconstitutional for breach of Article 47 of the Constitution and the same is hereby declared null and void.**
- 2. A declaration that the Petitioner's right to fair administrative action has been breached by the 1st Respondent.**
- 3. The Petitioner is awarded general damages of Kenya shillings two hundred thousand only (Kshs.200,000/-) against the 1st Respondent.**
- 4. The Petitioner shall have costs of the Petition.**

Orders accordingly.

Judgement signed

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R.LAGAT KORIR

JUDGE

Judgment delivered, dated and signed at Nakuru

This 12th day of February, 2019

.....

JANET MULWA

JUDGE

In the presence of:

..... **Court Assistant**

..... **For the Applicants**

..... **For the Respondents**