



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CONSTITUTIONAL PETITION NO. 1 OF 2019

IN THE MATTER OF: ARTICLES 20(3) & (4), 21(1) & (3), 22(1), 23(1) & (3), 25(c), 50(1), 159(2)(a), & (e), 165(3) (b) & (d), and 258(1) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: INFRINGEMENT AND VIOLATION OF ARTICLES 1 (3) & (4), 2(1), (2) & (4), 3(1), 10(1) & (2), 24 (1) & (2), 27, 38 (3), 40, 41(1) & (2), 48, 54, 55 (b), 56 (a), 57(a), 73(2), 174, 175, 177(1)(b), (c) & (2), 185, 196(1)(b), and 232(1)(b), (c), (d), (e), (i) & 2 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF: SECTIONS 5, 7A, 9, 12, 14, 2, 87, 97, 116 AND 117 OF THE COUNTY GOVERNMENTS ACT, NO. 17 OF 2012

AND

IN THE MATTER OF: SECTIONS, 4, 5, 12 AND 35 OF THE COUNTY ASSEMBLY SERVICES ACT NO. 24 OF 2017

AND

IN THE MATTER OF: AN AMENDMENT OF THE KISII COUNTY ASSEMBLY STANDING ORDERS VIDE THE MOTION DATED 3RD MAY 2017, PURPORTING TO LIMIT VOTING RIGHTS OF NOMINATED MEMBERS WITHIN THE COUNTY ASSEMBLY, IN AN UNCONSTITUTIONAL AND UNLAWFUL MANNER

AND

IN THE MATTER OF: NON-COMPLIANCE BY THE 1ST, 2ND AND 3RD RESPONDENTS WITH THE COMMISSION OF REVENUE ALLOCATION CIRCULAR REF.CRA/FA/01 VOL II(22) DATED 28TH JUNE 2018, TO THE PETITIONERS' DETRIMENT

BETWEEN

HON. KAREN NYAMOITA MAGARA.....1ST PETITIONER
HON. BATHSEBA GESARE SANAYA 2ND PETITIONER
HON. RISPER KEMUNTO ONGUTO.....3RD PETITIONER
HON. CLAIRE MORAA OBINO.....4TH PETITIONER
HON. JOSEPHINE KERUBO OMBATI5TH PETITIONER
HON. MARY GOIMA MICHIEKA6TH PETITIONER
HON. BEATRICE MONGINA DOYLE7TH PETITIONER
HON. LOICE MWONGELA 8TH PETITIONER

HON. EDMOND MOKUMI ANTONY.....9TH PETITIONER
HON. ISABELLA NYABOKE OIGARA.....10TH PETITIONER
HON. CAROLINE MOKOBI OTACHI.....11TH PETITIONER
HON. JOYCE KWAMBOKA OMBASA.....12TH PETITIONER
HON. MARGARET BONARERI ATINA.....13TH PETITIONER
HON. BEATRICE MORAA KAYAGA14TH PETITIONER
HON. AGATHA BOSIBORI MAYORA15TH PETITIONER

VERSUS

KISII COUNTY ASSEMBLY SERVICES1ST RESPONDENT
THE COUNTY ASSEMBLY OF KISII2ND RESPONDENT
THE SPEAKER, COUNTY ASSEMBLY OF KISII3RD RESPONDENT

AND

HON. ATTORNEY GENERALINTERESTED PARTY

RULING

The Petition before me was brought by 15 Members of the County Assembly of the **COUNTY ASSEMBLY OF KISII**.

1. All the Petitioners are Nominated Members of the County Assembly.
2. It is their contention that the County Assembly of Kisii had inserted Standing Order Number **65B** into the Kisii County Assembly Standing Orders, which has the effect of restraining and preventing the Nominated Members of the County Assembly from **VOTING IN THE ASSEMBLY ON ANY QUESTION**.
3. If the Nominated Members of the County Assembly were prevented from voting, that would imply that at the County Assembly, voting would only be done by the elected Members of the County Assembly.
4. It was the Applicants’ view that they were being subordinated to the elected Members of the County Assembly.
5. By being barred from taking part in voting on matters which were being conducted at the County Assembly, the Applicants felt that they had been reduced to “ceremonial individuals.”
6. As there were 45 elected members and 24 nominated Members of the County Assembly, the Applicants believe that if they were shut out from voting, that would amount to tyranny and domination by the elected members.
7. The Applicants asserted that Nominated **MCAs** have equal duties, responsibilities, and are entitled to full remuneration and benefits as the Elected **MCAs**.
8. Therefore, if there was an amendment to the County Assembly Standing Orders, which had the effect of giving rise to discrimination against the Nominated **MCAs**, the Applicants describe such an amendment as being patently illegal and unconstitutional.
9. Why do the Applicants so believe?
10. The Applicants’ answer is that when the amendment in question barred or restrained them from voting, that meant that they could not discharge their legislative mandate in the County Assembly.
11. At the moment, the matter before me is of an interlocutory nature. It is a request that the court should issue a Conservatory Order to compel the Respondents from Segregation and Discrimination of the Applicants, through differential and adverse treatment.
12. Specifically, the Applicants asked the court to suspend Standing Orders Numbers **65** and **65B** of the County Assembly of Kisii, to the extent that they seek to limit the Applicants’ entitlement to Introduce Bills; make contributions on Bills or Motions; and to Vote on such Bills or Motions.

13. A second issue which was raised by the Applicants was in relation to the implementation of the **Commission on Revenue Allocation** Circular Ref. **CRA/FA/01 VOL. II (22)** dated **28th June 2018**.
14. The Applicants asked that the said circular be implemented in relation to Nominated Members of the County Assembly, in the same manner as it was being implemented in relation to their elected counterparts.
15. As far as the Respondents were concerned, the reliefs being sought by the Applicants was a cunning attempt to obtain injunctive orders, disguised as conservatory orders.
16. I am alive to the fact that when the Court is called upon to determine whether or not to grant conservatory orders, the court must make every effort to ensure that it did not make definite or conclusive findings of fact or of law.
17. Consequently, I will steer clear from definitive determinations, which could prejudice the hearing and determination of the substantive Petition.
18. Secondly, I take cognizance of the fact that the decision I arrive at, whether I award or I deny the reliefs sought, should enhance rather than stifle Constitutional Values and the rights or freedoms in the Bill of Rights.
19. The Applicants were required to demonstrate that they have a prima facie case with a probability of success and that unless a conservatory order was granted, there was a real danger that they would suffer prejudice as a result of the violation of the Constitution.
20. Of course, that test is the same as the one applicable in an application for an interlocutory injunction. However, that does not mean that when the test was applied, the relief being sought was of an injunction.
21. A conservatory order was so named because it was intended to maintain a particular state of affairs, so that the rights or freedoms of the Applicant could be secured and protected during the period when the court was determining the substantive Petition.
22. The courts recognize that if there would be such a change to the existing circumstances that by the time the substantive Petition was determined, the situation which was in existence at the commencement of the case was irretrievable, it is probable that the Court would be acting in vain.
23. The subject matter of the case ought to be in existence throughout the life of the said case.
24. If a case were to proceed to substantive hearing after the subject matter had either changed altogether or had ceased to exist, the exercise being undertaken would, most probably, be nothing more than an academic one.
25. In this case the Applicants would not be allowed to participate in voting on matters which were before the County Assembly if such matters were deemed to relate specifically to the wards represented by elected leaders.
26. The said bar came about due to the amendment of two Standing Orders of the County Assembly of Kisii. In effect the law was changed by the organ which is lawfully mandated to enact laws.
27. When laws are passed by the legislature, whether at the national level or at the county level, there is a presumption of legality as it would have been passed by the organ to which the people of Kenya had delegated authority to.
28. In this instance, the Applicants submitted that the amendments in issue had imposed a restriction on their rights.
29. At paragraph 8 of the Replying Affidavit sworn by **JAMES OMARIBA NYAOGA**, (who is the Clerk of the Kisii County Assembly), the 1st and 2nd Respondents stated expressly that;
- “..... the Respondents herein have never, are not, and do not intend in any manner, way or form to segregate, discriminate or accord any preferential treatment whether expressly or impliedly to either nominated or elected to the County Assembly as neither the Constitution nor any other legislation creates distinction between nominated Members of the County Assembly on the one hand, and elected Members of the County Assembly on the other hand.”***
30. It is thus common ground that the elected and the nominated Members of the County Assembly ought to be accorded the same rights.
31. Notwithstanding that clear understanding, the Respondents expressed the view that the amendments in question were;
- “..... necessitated by the need to effectively determine questions affecting only wards with regard to the provisions of Article 177(1)(a) being:***
- (a) members elected by the registered voters of the wards, each ward constituting a single member constituency, on the same day as a general election of Members of Parliament being the Second Tuesday in August in every fifth year.”***
32. By whatever name, that amendment makes a distinction between elected and nominated Members of the County Assembly.

33. The Respondents believe that the said distinction is justifiable pursuant to the provisions of **Article 177 (1) (a)** of the **Constitution**.

34. Whether or not the said amendments are justifiable is a matter for determination after hearing the substantive Petition.

35. It was the view of the Respondents that the amendments in issue were justified as they were exclusively limited to matters affecting wards.

36. Whereas the Applicants were not elected to represent any particular wards, they definitely represent specific segments of persons who hail from within the wards.

37. Therefore, I hold the view, on a prima facie basis, that if the County Assembly were to proceed to deal with issues

“exclusively limited to matters affecting wards”,

whilst the Applicants were locked out of such deliberations, the voice of the Applicants’ “constituents” would not have been accorded an opportunity to be heard.

38. Yet, any laws that are passed by the County Assembly would affect all persons in the wards, whether or not any of those persons were members of the special interest groups represented by the nominated Members of the County Assembly.

39. And if the laws were then given effect whilst the Petition had not been determined, it may be very difficult, if not impossible, to undo what had already been done.

40. Having given due consideration to the interests of all parties, I find that justice demands that a conservatory order does issue, so as to preserve the Applicants’ rights to equal treatment as their elected counterparts.

41. The Respondents would not be prejudiced if the Applicants were allowed to continue to take part in deliberations within the County Assembly, even if such deliberations were specifically in relation to wards.

42. Meanwhile, as regards the implementation of the Commission on Revenue Allocation Circular Ref. **CRA/FA/01/VOL.II (22)**, I find that the Applicants have not demonstrated that they have a prima facie case with a probability of success.

43. They have not shown that the Respondents have implemented the said circular so as to benefit the elected Members of the County Assembly, whilst withholding the said benefits from the nominated Members of the County Assembly.

44. The court is well aware that it is a very serious step to suspend the operation of a statute, statutory provisions or regulations which had been formulated by the body which is mandated to do so.

45. Therefore, I have reminded myself about the need to be cautious and very slow to give orders that would have the effect of suspending the operation of the Standing Orders which had been passed by County Assembly.

46. But at the same time, it must be restated, that pursuant to **Article 21 (1)** of the **Constitution**;

“It is a fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights.”

47. Therefore, when an Applicant demonstrates that his rights or freedoms in the Bill of Rights have been violated or had been threatened with violation, the court would not hesitate to grant an appropriate conservatory order.

48. In this case, the County Assembly may have complied with the procedural dictates when passing the amendments to the Standing Order, however, it does appear that the end product does not stand well on the question of constitutional principles.

49. Furthermore, I find that the danger in the implementation of the amended Standing Orders is imminent and evident, as decisions may be made by the elected Members of the County Assembly, in the absence of the nominated members, yet such decisions would impact all persons, including the Applicants if they are members of the wards in respect to which the said decisions had been made.

50. The decisions would also impact on persons who belong to the special interest groups who are represented by the nominated members.

51. Therefore, I am satisfied that the Applicants have made out a case for a conservatory order. In the result, I do now issue a conservatory order, suspending **Order 65** and **Order 65B** of the **County Assembly** of **Kisii** Standing Orders, to the extent that the same limit the nominated members from contributing to, voting on or introducing Bills and Motions deemed to be limited to wards only. In effect, the nominated members have the right to participate in all the Bills and Motions within the County Assembly of Kisii.

52. However, I reject the request that the Court does compel the Respondents to immediately implement the Commission on Revenue Allocation Circular Ref. **CRA/FA/01 VOL. II (22)** dated 28th June 2018 in respect of the nominated Members of the County Assembly of Kisii.

53. As the Ruling is on an interlocutory application, and because it has partially succeeded and partially failed, I order that each party will bear his or her own costs.

DATED, SIGNED and DELIVERED at KISUMU

This 4th day of **March** 2019

FRED A. OCHIENG

JUDGE