



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CONSTITUTIONAL PETITION NO. 13 OF 2018

IN THE MATTER OF ARTICLES 2,3,10,19,20,21,22,23,25,27,28,38,47,50 AND 117,185(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 THE PROVISIONS OF THE FAIR ADMINISTRATIVE ACTIONS ACT, 2015

AND

IN THE MATTER OF THE PROVISIONS OF THE COUNTY ASSEMBLIES POWERS AND PRIVILEGES ACT 2017

AND

IN THE MATTER OF THE COUNTY ASSEMBLY STANDING ORDERS

BETWEEN

MARGARET LORNA KARIUKI.....1ST APPLICANT/PETITIONER

HON. TERRY C. WANJA.....2ND APPLICANT/PETITIONER

VERSUS

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

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

NATIONAL FORUM FOR

COUNTY ASSEMBLIES.....INTERESTED PARTY

RULING

A. Introduction

1. This is a ruling on the respondents' preliminary objection dated 6th November 2018.
2. The aforementioned preliminary objection was filed by the respondents after being served with the petitioner's Notice of Motion dated 23rd October 2018 which sought to prohibit the respondents from hearing, investigating, interrogating or conducting any proceedings against the petitioners.
3. The preliminary objection is against the petition in its entirety on the basis that the petition seeks to challenge the proceedings of the County Assembly and its committees against the express provisions of Section 10 of the County Assemblies, Powers and Privileges Act 2017

as read with Article 196 (3) of the Constitution of Kenya.

4. This court directed that the preliminary objection be dealt with first as it raised an issue on the court's jurisdiction to handle this petition.

5. Parties agreed to dispose off the preliminary objection by way of written submissions but surprisingly, only the respondents have filed their submissions.

B. Respondents' Submissions

6. In support of their Preliminary Objection, the respondents submitted that the same was founded on Section 10 of the County Assemblies Powers and Privileges Act as well as Article 196 (3) of the Constitution that ousted this Court's jurisdiction to hear and determine any dispute with regard to proceedings, processes and decisions of a County Assembly.

7. The respondents submitted that the said immunity is provided to allow the respective county assemblies perform their legislative functions smoothly without interference.

8. The respondents submitted that since the constitutionality of Section 10 of the County Assemblies Powers and Privileges Act as well as Article 196 (3) of the Constitution had not been challenged, the court was inclined to decline jurisdiction where the subject matter is a proceeding or decision of a County Assembly or its committees. They relied on the case of **Peter O. Ngoge v Francis Ole Kaparo & 4 Others [2007] eKLR, Hon. Ibrahim Swaleh v The Speaker , County Assembly of Embu & 2 Others [2015] eKLR** and that of **Hon. Justus Kariuki Mate & Another v Martin Nyaga Wambora & Another [2017] eKLR**.

9. Counsel for the respondents further submitted that a cause of action could only arise upon determination by the County assembly as in the instant case all the County Assembly had recommended was for the 1st Applicant to step 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. The Determination

10. I have perused the pleadings before me as well as the written submissions filed by the respondents and the facts emerging from the petition are as follows.

11. Following allegations by a fellow member of county assembly, the petitioners were summoned to appear before the Committee on Powers and Privileges to shed light on the matter.

12. The petitioners being dissatisfied with the invitation to appear before the committee on powers and privileges instituted this petition seeking to stay the same. The respondents on their part filed a preliminary objection to the petition on the ground that this court lacked jurisdiction to interfere with actions of the respondents which were protected by Section 10 of the County Assemblies Powers and Privileges Act as well as Article 196 (3) of the Constitution.

13. The main issue for determination is whether this court has jurisdiction to hear and determine the petition.

14. The issue of jurisdiction is now settled by the authorities of the Court in the landmark case of **The Owners of Motor Vessel Lilian S. Vs Caltex Kenya Ltd. (1989) KLR**. In the case of **Samuel Kamau Macharia & Another Vs Kenya Commercial Bank Limited and 2 Others (2010) eKLR**, the Court held in part that: -

"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.

15. 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. Further, that 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.***

16. 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.

17. Section 10 and 11 of the County Assemblies Powers and Privileges Act provide;

“10. Proceedings not to be questioned in courts

No proceedings or decision of a county assembly or the Committee of Powers and Privileges acting in accordance with this Act shall be questioned in any court.

11. Immunity from legal proceedings

(1) No civil or criminal proceedings shall be instituted against any Member for words spoken before, or written in a report to a county assembly or a Committee, or by reason of any matter or thing brought by him or her therein by a report, petition, Bill, resolution, motion or other document written to a county assembly.

(2) No civil suit shall be commenced against the Speaker, the leader of the majority party, the leader of the minority party, a chairperson of a committees or any member for any act done or ordered by them in the discharge of the functions of their office.

(3) The Clerk or other members of staff shall not be liable to be sued in a civil court or joined in any civil proceedings for an act done or ordered to be done in the discharge of their functions relating to proceedings of a county assembly or its committees.”

18. The Supreme Court in Judicial Service Commission v Speaker of the National Assembly & 8 Others [2014] eKLR, the Court remarked:

“The Constitution disperses powers among various constitutional organs. Where it is alleged that any of these organs has failed to act in accordance with the Constitution, then the Courts are empowered by Article 165 (3)(d)(ii) to determine whether anything said to be done under the authority of the Constitution or of any law is inconsistent with, or in contravention of the Constitution” [emphasis supplied].

19. The High Court in, Republic v. National Assembly Committee of Privileges & 2 Others ex-parte Ababu Namwamba, JR Case No. 129 of 2015, [2016] eKLR, while dealing with a matter that concerned an alleged violation of the Standing Order of the National Assembly, and whether such violation called for the *Judicial Review jurisdiction* of the Court. **Korir, J.** being satisfied that the actions taken by the National Assembly were procedural and lawful, declined to assume jurisdiction in the matter, holding that **the responsibility devolved to the National Assembly to proceed as it did, free of any direction from the Court.**

20. The Supreme Court in Speaker of the Senate & Another v. Attorney General & 4 Others, Reference No. 2 of 2013; [2013] eKLR signalled that it would be reluctant to question parliamentary procedures, *as long as they did not breach the Constitution*. In reference to Article 109 of the Constitution, which recognizes that Parliament is guided by *both the Constitution and the Standing Orders* in its legislative process, the Court thus held:

“Upon considering certain discrepancies in the cases cited, as regards the respective claims to legitimacy by the judicial power and the legislative policy – each of these claims harping on the separation-of-powers concept – we came to the conclusion that it is a debate with no answer; and this Court in addressing actual disputes of urgency, must begin from the terms and intent of the Constitution. Our perception of the separation-of-powers concept must take into account the context, design and purpose of the Constitution; the values and principles enshrined in the Constitution; the vision and ideals reflected in the Constitution...

It is clear to us that it would be illogical to contend that as the Standing Orders are recognized by the Constitution, this Court, which has the mandate to authoritatively interpret the Constitution itself, is precluded from considering their constitutionality merely because the Standing Orders are an element in the ‘internal procedures’ of Parliament. 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.”

21. The Court went on to state as follows:

“It makes practical sense that the scope for the Court’s intervention in the course of a running legislative process, should be left to the discretion of the Court, exercised on the basis of the exigency of each case. The relevant considerations may be factors such as: the likelihood of the resulting statute being valid or invalid; the harm that may be occasioned by an invalid statute; the prospects of securing remedy, where invalidity is the outcome; the risk that may attend a possible violation of the Constitution.”

22. The Supreme Court, however, cautioned against undue interference with running processes in other arms of Government. The Court thus pronounced itself: -

“This Court will not question each and every procedural infraction that may occur in either of the Houses of Parliament. The

Court cannot supervise the workings of Parliament. The institutional comity between the three arms of government must not be endangered by the unwarranted intrusions into the workings of one arm by another” [emphases supplied].

23. My understanding of the decision above is that it was the Supreme Court’s stand that no arm of Government is above the law as the Constitution is the guiding light for the operations of all State Organs. Consequently, the Court’s mandate, where it applies, is for the purpose of *averting any real danger of constitutional violation*.

24. The petitioners’ main grievance is that they were issued with summons to appear before the court assembly to answer to allegations of which their accusers will sit as prosecutor, judge, investigators and complainants. In effect, the petitioners alleged that the process of accusing and investigating them is an infringement of their constitutional rights. Various articles of the constitution have been cited in respect of the alleged infringement.

25. It was further alleged that the matter complained of was referred for investigation by the Powers and Privileges Committee which has no power to handle it. In this regard, I wish to state that the committee is an internal organ of the County Assembly in a court of law.

26. The committee is empowered to make recommendations in their report which must be adopted and ratified by the County Assembly. It is after a resolution has been made by the Assembly that it may be challenged in court.

27. As the matter stands, the county assembly has not made any resolution on the matter which would provide this court with material to interrogate as to its compliance with the Constitution. Article 165(3) of the Constitution confers to this court jurisdiction to interpret the constitution including the determination of the question whether anything said to be under the authority of the Constitution or any law is inconsistent with or in contravention of the Constitution.

28. County Assemblies are obligated to operate in compliance with the Constitution and where a violation occurs, this court has powers to assert its authority and the supremacy of the Constitution.

29. I have carefully perused the allegations and the prayers in the petition and I find that the petitioners have not demonstrated any violation or infringement of their constitutional rights or fundamental freedoms by the County Assembly. The assembly issued summons to the petitioners which was purposed to kick start a certain process of the assembly.

30. The petitioners ought to wait for the process to be finalised and a decision made which they may choose to challenge for its unconstitutionality.

31. The petitioners have not demonstrated how the summons constitute a violation of their constitutional rights. Assertions by the petitioners that the respondents were infringing on their rights on the basis of their gender have not been substantiated.

32. Having regard to all the above, it is my opinion that indeed this court has jurisdiction to handle any matter where 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. The same is enshrined in Article 165 (3) of the Constitution as well as in the Supreme Court decision in **Judicial Service Commission v. Speaker of the National Assembly & 8 Others** (supra).

33. Having found that the respondents were carrying out their legislative role in summoning the petitioners, I am of the opinion that the petitioner’s jumped the gun in filing this petition and that the jurisdiction of this court cannot be invoked herein.

34. I find the preliminary objection merited and it is hereby upheld.

35. The petition is hereby struck out with costs for want of jurisdiction.

36. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 1ST DAY OF APRIL, 2019.

F. MUCHEMI

JUDGE

In the presence of: -

Mr.Mwangi for Njenga for 1st and 2nd Respondents