



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 62 OF 2017

OKIYA OMTATAH OKOITI.....PETITIONER

VERSUS

NATIONAL ASSEMBLY OF KENYA.....1ST RESPONDENT

SPEAKER OF THE NATIONAL ASSEMBLY.....2ND RESPONDENT

HON. ATTORNEY GENERAL.....3RD RESPONDENT

EMMANUEL MWAGAMBO MWAGONAH.....4TH RESPONDENT

AND

EDWARD OUKO.....1ST INTERESTED PARTY

DIRECTOR OF PUBLIC PROSECUTIONS.....2ND INTERESTED PARTY

NATIONAL POLICE SERVICE.....3RD INTERESTED PARTY

ETHICS & ANTI-CORRUPTION COMMISSION...4TH INTERESTED PARTY

SENATE OF KENYA.....5TH INTERESTED PARTY

JUDGMENT

1. *Emmanuel Mwangambo Mwagonah*, the 4th respondent lodged a Petition with the National Assembly, **Petition No. 006 of 2017** seeking the removal from office **Edward Ouko**, the 1st Interested Party, as holder of an independent constitutional office, pursuant to Article 251 of the Constitution.
2. By letter dated 3rd February, 2017, the Director of Public Prosecution, the 2nd Interested Party, had cleared the 1st Interested Party of three charges of corruption the 4th interested party had recommended that he be charged with. Following this development, the 4th respondent lodged the petition with the National Assembly on 14th February, 2017. The petition was placed before the relevant Committee for consideration.
3. *Okiya Omtatah Okiiti*, the petitioner filed the present petition challenging the decision by the National Assembly to take up that petition by the 4th respondent terming it a violation of the constitution and the law. According to the Petitioner, the petition to the National Assembly is a clear case of double jeopardy; that the petition to the National Assembly relies on the same facts that formed the basis of the allegations earlier made against the 1st Interested Party and which the 4th interested party had relied on and that the issue had already been determined by another independent institution.
4. The Petitioner avers that the decision of the National Assembly to take up and consider a matter already determined by another organ is

unconstitutional and a violation of the law. The petitioner filed this petition and sought the following reliefs;

- a) *A declaration that the impugned actions of the 1st, 2nd and 4th Respondents have threatened and violated the Constitution of Kenya 2010.*
- b) *A declaration that the timelines in National assembly Standing Order 230 are inadequate for purposes of effectively discharging Parliament's mandate pursuant to Article 251 of the Constitution, and therefore, is unconstitutional, null and void.*
- c) *A declaration that contrary to Articles 236 and 249 of the Constitutional of Kenya 2010, National Assembly Petition No. 006 of 2017, presented by Emmanuel Mwagonah, seeks to punish the 1st interested party for discharging his mandate according to the law and, therefore, is unconstitutional encroachment on the independence of the Office of the Auditor General.*
- d) *A declaration that National Assembly Petition No. 006 of 2017, presented by Emmanuel Mwagambo Mwagonah, seeking the removal of the 1st Interested Party, was filed in bad faith to achieve a collateral purpose of hounding the 1st Interested Party out of office and, therefore, is unconstitutional, null and void.*
- e) *A declaration that the 2nd Respondent's decision to fast track National Assembly Petition No. 006 of 2017, presented by Emmanuel Mwagambo Mwagonah, seeking the removal of the 1st Interested Party, was fatal to the Petition as it violated sections 4(3) & (4) and 5(1) of the Petition to Parliament (Procedure) Act 2012, and Standing Orders 220(3), (4) & (5) of the House.*
- f) *A declaration that for purposes of establishing grounds for removal of a member of a constitutional commission or a holder of an independent office, pursuant to Article 251 of the Constitutional of Kenya 2010, the 2nd, 3rd and 4th Interested Parties must be involved in investigating on the allegations, and Parliament an only determine the fate of such a petition based on the finding of the interested parties.*
- g) *A permanent order of prohibition prohibiting the Respondents, whether by themselves, or any of their employees or agents or any person claiming to act under their authority from proceeding to interrogate the 1st Interested Party pursuant to Petition No. 006 of 2017.*
- h) *An order of Certiorari to remove to the High Court and quash National Assembly Petition No. 006 of 2017, presented by Emmanuel Mwagambo Mwagonah, seeking the removal of the 1st Interested Party.*
- i) *An order of Certiorari to remove to the High Court and quash the proceedings before the Departmental Committee on Finance, Planning & Trade seeking the removal of the 1st Interested Party, pursuant to National Assembly Petition No. 006 of 2017, presented by Emmanuel Mwagambo Mwagonah.*
- j) *An order of Certiorari to remove to the High Court and quash any resolution of the National Assembly to forward Petition No. 006 of 2017 to the President, the same being null and void in law having been made in breach of the constitution*
- k) *An order that the costs of this suit be provided for.*
- l) *Any other relief the court may deem just to grant.*

1st & 2nd respondents' response

5. The 1st and 2nd Respondents filed grounds of opposition dated 10th March, 2017, contending that Article 251 of the Constitution provides for the removal from office of a member of an independent office; that the right to petition Parliament on any matter is a right enshrined in Article 119 of the Constitution and that under Article 95(5) of the Constitution, the National Assembly exercises oversight over State officers and may initiate the process of their removal from office. It is the 1st and 2nd respondents' further contention that the role of the Parliamentary Committee is to conduct an inquiry, gather evidence in exercise of its oversight role and determine whether there are sufficient grounds disclosed for removal, but does not sit as a court of law or a tribunal.

3rd Respondent and 3rd Interested Party's Response

6. The 3rd Respondent and 3rd Interested Party filed grounds of opposition dated 26th April, 2017 in opposition to the petition. They contended that the petition offends the doctrine of separation of powers by encroaching on the constitutional oversight role of Parliament and that the Petition offends the *sub judice rule* due to the fact of existence of another suit **JR No. 108 of 2017** that deals with substantially the same issue. It is important to observe here that JR No. 108 of 2017 has since been determined. In view of the 3rd respondent and 3rd interested party, the petition is an abuse of court process. They contended that the Petitioner lacks the requisite *locus standi* to maintain the Petition in view of the fact that the Auditor General, in whose interest this petition was filed, was struck out off these proceedings.

4th Respondent's Response

7. The 4th Respondent filed a replying affidavit sworn on 27th March, 2017. He deposed that the 1st Interested Party's rights would not be threatened or infringed in any manner by appearing before the Parliamentary Committee; that double jeopardy would only arise if one is

formally charged in a court of law which is not the case here and that the checks and balances envisaged by the doctrine of separation of powers demand that the three arms of government should provide checks and balances on the exercise of powers by each other. According to the 4th respondent, the court should only interfere with the exercise of Parliamentary mandate where improper procedure has been followed and is threatening or infringing on the rights of a person.

2nd Interested Party's response

8. The 2nd Interested Party filed a replying affidavit by **Nicholas K. Mutuku** sworn on 24th March, 2017, deposing that the decision to clear the 1st Interested Party of all the charges recommended by the 4th Interested Party was arrived at upon independent review of the 4th interested party's investigation file. He deposed that given the nature, magnitude and complexity of the matters in issue, a thorough and comprehensive review of the file was undertaken by a team of three Deputy Directors and the Director of Public Prosecutions who exercised the mandate bestowed on him by the Constitution and the law with regard to dealing with the matter in issue.

9. He further deposed that the decision not to charge **Edward Ouko** as recommended by the 4th Interested Party was arrived at independently due to insufficiency of evidence.

4th Interested Party's response

10. The 4th Interested Party filed a replying affidavit by **Abdi Mulki Umar**, sworn on 13th March, 2017 in opposing the petition. She deposed that the 4th Interested Party received a letter dated 8th April, 2014 from the Permanent Secretary, Treasury over allegations of corruption in the Office of the Auditor General; that the Director of Internal Audit carried out an audit and established that the Office of the Auditor General was operating without an approved procurement plan for the year 2013/2014 financial year and that even when the plan was obtained, the procurement of audit vault was not provided for. She stated that the Auditor General personally approved single sourcing of the vault yet there were other companies that could supply the equipment. It is her contention that the evidence gathered showed that the 4th Interested Party made recommendations to the 2nd Interested Party a required by law to have the Auditor General charged but the 2nd Interested party did not agree with those recommendations.

Petitioner's submissions

11. Okiya Omtata, the Petitioner acting in person, submitted highlighting his written submissions, that removal of 1st Interested Party from office is to be done pursuant to Article 251 of the Constitution. He reiterated the averments contained both in his petition and the supporting affidavits. He argued that he had *locus standi* pursuant to Articles 22 and 258 of the Constitution to file and maintain the petition and that the Petition meets the tests of *bona fide* and public interest litigation.

12. On whether the petition meets the constitutional threshold as a constitutional pleading, he submitted that under the Constitution, the court is bound to inquire and determine matters on their merit, and where the matter in issue could be deciphered from the pleadings, the court is bound to determine such matters even when the particulars of breach had not been specifically pleaded. He relied on **Trusted Society of Human Rights Alliance v Attorney General & 2 others** [2012] eKLR.

13. The Petitioner further submitted that there are no particular threshold for determining the removal from office of a member of a constitutional commission or holder of an independent office pursuant to Article 251 of the Constitution. He relied on **Republic v Kenya National Examination Council**, (Miscellaneous Civil Application No. 328 of 2015) among other decisions.

14. In a nutshell, he submitted that petitioning Parliament to remove the Auditor General from office after he had been cleared by the Director of Public Prosecution is outside the confines of Article 251(2) of the Constitution.

1st & 2nd Respondents' submissions

15. Miss Thanji, learned counsel for the 1st and 2nd Respondents and holding brief for Mr. Ogosso for the 3rd Respondent, submitted that the inquiry by the National Assembly is not a quasi-judicial process that is subject to judicial review, but a Parliamentary process protected by Article 117 of the Constitution and the National Assembly (Powers and Privileges) Act, Cap 6, Laws of Kenya. Counsel contended that failure to consider a petition presented to any House of Parliament in line with Article 119 of the Constitution, will be a violation of a Petitioner's constitutional rights. She further submitted that under Article 251(3) of the Constitution, Parliament has an oversight role to consider a petition for removal of an independent office holder to determine whether a petition discloses grounds for removal as stipulated under Article 251(1) of the Constitution.

16. Counsel further submitted that the orders sought in the Petition violate Article 117 of the Constitution which provides that Parliament may, for the purpose of the orderly conduct of its committees, provide for the powers and privileges of the Committees. It is their further submission that Article 117 as read with Article 19(3) (c) of the Constitution has the effect of suspending the application of the Bill of Rights and by implication the application of Article 165(3) (b) in relation to matters undergoing active consideration by any House or Committee of Parliament.

17. It was also their contention that the Speaker of the National Assembly had reviewed the Petition and certified that it met the legal requirements and Standing Orders. In their view, the present petition seeks to subject the Speaker's decision to judicial scrutiny contrary to Article 107 of the Constitution. In the circumstances, they contended, the Petition violates the doctrine of separation of powers by seeking to have the court to interfere with the role of the National Assembly and internal management of Parliament and its committees. They relied on **John Harun Mwau v Dr. Andrew Mullei & others**, (Civil Appeal No. 157 of 2009), among others. She therefore urged court to dismiss the Petition with costs.

2nd & 4th Interested Parties' submissions

18. Miss Jemutai, appearing on behalf of the 2nd and 4th Interested Parties, submitted that the 4th Interested Party and the National Assembly are independent organs with respective mandates which they have to discharge as required by the Constitution and respective statutes. Counsel submitted that the 4th Interested Party conducted investigations and made recommendations to the 2nd Interested Party who made an independent decision not to prosecute the Auditor General.

19. According to counsel, the National Assembly is called into action upon receipt of a Petition presented to it by any person. It is her submission that inquiries by the National Assembly are not trial processes and, therefore, the issue of double jeopardy would not arise. She relied on ***Republic v The Public Service Commission of Kenya Ex-parte James Nene Gachoka*** [2013] eKLR.

20. Miss Jemutai argued that the threshold for removal of a state officer is not limited to criminal culpability necessitating investigations by a law enforcement agency. She however made it clear that the 2nd Interested Party neither supports nor opposes the Petition.

Submissions by Amicus Curiae

21. Dr. Khaminwa who was joined in the proceedings together with Mr. Harun Ndubi and Kenya Human Rights Commission as ***Amicus Curiae***, submitted that they were in these proceedings because of public interest. He submitted that Article 1 of the Constitution delegates sovereign powers to Parliament, Executive and the Judiciary branches in order to perform their functions as the constitution dictates. He also submitted that there are other constitutional independent commissions and offices set out in Articles 248-254; that the Constitution sets out structures, appointments and removal of state officers from office. According to Dr. Khaminwa, taking into account the provisions in Article 251(2) of the Constitution, presentation of the petition to the National Assembly was not in furtherance of upholding the rule of law in the country. It was his submission that Parliament had no jurisdiction to deal with the matter and it would not be fair to dismiss the present Petition and ask Parliament to assume jurisdiction it does not have.

22. He further submitted that pursuant to Article 1 of the Constitution, all arms of government have limited powers and it is up to the court to give interpretation as to who has or does not have the powers. He went on to submit that a proper construction of the Constitution would show that the National Assembly had no jurisdiction to deal with the issue of the Auditor General and invited court to consider Articles 94 of the Constitution on the role of Parliament and 95 on the role of the National Assembly.

23. Lastly, Dr. Khaminwa contended that independent commissions and offices are serious offices and allegations against any of the holders of such offices must be serious in nature. In his view, the allegations against the Auditor General were not serious and that is why the 2nd Interested Party upon examining the evidence found it unsustainable.

Analysis and Determination

24. I have considered the petition, responses, submissions and the authorities relied on. The issues that arise for determination are, first; whether this court has jurisdiction to hear and determine this petition and, second; whether the National Assembly acted properly in entertaining the petition presented before it for consideration on the removal of the Auditor General.

Whether the court has jurisdiction

25. The respondents have submitted that this court lacks jurisdiction to hear and determine the petition in so far as it related to the functions of the National Assembly. According to the respondents, who are supported by the 4th Interested Party, the National Assembly conducts its affairs in accordance with the Constitution and, therefore, once seized with the petition, it had a constitutional duty to dispense with it. They also contended that the National Assembly was not exercising a quasi-judicial mandate hence its actions could not be reviewed by the court.

26. The petitioner, on the other hand, has contended that the court exercises a constitutional mandate to ensure that all actions are done in accordance with the Constitution. He also pointed out that the Parliamentary Committee was exercising quasi-judicial powers hence the court is in order in considering its actions. Reliance was placed on Article 165(6) of the Constitution.

27. In ***Samuel Macharia Kamau & another v Kenya Commercial Bank Limited***. [2012] eKLR, the Supreme Court observed that “[68] 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.”

28. In ***Re The Matter of the Interim Independent Electoral Commission*** [2011] eKLR the Supreme Court again observed that:

“Assumption of jurisdiction by Courts in Kenya is a subject regulated by the Constitution, by statute law, and by principles laid out in judicial precedent... jurisdiction flows from the law, and the recipient-Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours...”

29. And in ***Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd*** [1989] KLR 1, the court held that;

“Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

30. This court is established by the Constitution and has jurisdiction conferred on it by the same Constitution. Under Article 165 (3) (d) (ii), this Court has jurisdiction to determine whether anything said to be done under the authority of the Constitution or any other law, is inconsistent with, or in contravention of, the Constitution.

31. In that regard, whenever there is a challenge to actions of a state organ and more so where it is alleged that the state organ, including the National Assembly, is not acting in accordance with the Constitution, this court has the sole jurisdiction to determine whether the state organ concerned is indeed acting in accordance with the Constitution.

32. Secondly, the issue the subject of this petition, was being handled by a Committee of the National Assembly, acting not as the National Assembly exercising its legislative mandate, but as a quasi-judicial body. This is so because according to the Speaker's communication when forwarding the petition to the House Committee, he drew the Committee's attention to the fact that it was to act as "*a quasi-judicial body*". That fact, therefore, brought the matter within the jurisdiction of this Court.

33. In that respect, Article 165 (6) confers on this Court supervisory jurisdiction over subordinate courts and any person, body or authority exercising judicial or "*quasi-judicial*" functions. The fact that the Committee was performing a quasi-judicial function, the matter fell within the jurisdiction of this Court and, therefore, this Court has jurisdiction to deal with this petition.

Whether the National Assembly acted properly in entertaining the petition on the removal of the Auditor General

34. The next issue for determination is whether the National Assembly acted properly in accepting the petition on removal of the Auditor General and purporting to act on it. The petitioner has questioned the National Assembly's decision to accept and deal with the petition by Emmanuel Mwangi Mwangonah on the basis that the matter had been dealt with by another independent institution and that another matter was pending in court.

35. According to the petitioner, the National Assembly was not exercising its mandate properly thus acted against the constitution and the law. In the view of the Petitioner, the National Assembly could not act as an appellate body against a decision of the 2nd Interested Party that he had made over the same matter. The respondents' argument is that the National Assembly acted properly in taking up the petition and that it acted in accordance with its constitutional mandate.

36. The National Assembly is a state organ that exercises constitutional mandate. One of the mandates is to receive and consider petitions for removal of state officers. In the present petition the National Assembly had been moved by way of a petition by the 4th respondent to remove the Auditor General in accordance with Article 251 of the Constitution.

37. Article 251(1) provides for circumstances that can lead to removal of a member of a commission or an independent office. They include ***serious violation of this Constitution or any other law, including a contravention of Chapter Six; (b) gross misconduct, whether in the performance of the member's or office holder's functions or otherwise; (c) physical or mental incapacity to perform the functions of office; (d) incompetence; or (e) bankruptcy.*** Sub Article 2 provides that a person desiring the removal of a member of a commission or of a holder of an independent office on any ground specified sub Article 1, may present a petition to the National Assembly setting out the alleged facts constituting that ground, and (3) ***The National Assembly shall consider the petition and, if it is satisfied that it discloses a ground under clause (1), shall send the petition to the President***

38. When a petition is filed with the National Assembly for removal under Article 251 (2) the National Assembly would have mandate to consider such a petition and make a determination on it. However, in every case where a constitutional body is to exercise its mandate it should do so in accordance with the Constitution and the law. If such an organ were to ignore or violate the law, the court would be called upon to intervene.

39. The Petitioner argued that the 4th Interested Party had investigated the Auditor General and made recommendations to the 2nd Interested Party to prosecute him on allegations of corruption. The 2nd Interested Party considered the matter and made a determination that there were no grounds for prosecuting the Auditor General and rejected the 4th Interested Party's recommendations. According to the Petitioner, taking up the matter again, the National Assembly was acting improperly and in violation of the Constitution.

40. The Petitioner further argued that prior to lodging the petition with the National Assembly, the 4th respondent was acting as counsel for one Martin Nkaari, who had filed a suit before the High Court, being ***Misc. Application No. 14 of 2017 Martin Nkaari v the Director of Public Prosecutions*** seeking an order to compel the 2nd Interested Party to act on the recommendations by the 4th Interested Party to prosecute the Auditor General. At the same time, Martin Nkaari, who was the Applicant in Misc. Application No. ***14 of 2017***, lodged a petition with the National Assembly seeking the removal of the Auditor General. The 2nd Interested Party however declined to prosecute the Auditor General. At the same time, Martin Nkaari withdrew his petition to the National Assembly. It is not clear however, whether Nkaari withdrew his case pending in the High court.

41. The petitioner further argued that notwithstanding the above facts, the 4th respondent lodged his own petition with the National Assembly on 13th February 2017, seeking the removal of the Auditor General from office without disclosing to the National Assembly that he was the Advocate to Martin Nkaari and that they had a matter pending court in Misc. Application No. 14 of 2017 which he considered double jeopardy to the Auditor General

42. When the petition to the National Assembly was lodged, it is not clear whether the suit had been withdrawn or concluded. The fact that the 4th respondent was counsel to the party in court was also not disputed. Petition to Parliament (Procedure) Act (No 22 of 2012) is clear on

the form of a petition to Parliament. For example, section 3 (f) states that the petition should *indicate whether any efforts have been made to have the matter addressed by a relevant body and whether there has been any response from that body or whether the response has been unsatisfactory* and (g) *indicate whether the issues in respect of which the petition is made are pending before any court of law or other constitutional or legal body.*

43. Standing Order No. 230 of the National Assembly Standing Orders further provides how the National Assembly should process and handle a petition presented for removal of a member of a commission or independent office under Article 251 of the Constitution.

44. The petition that was lodged with the National Assembly indicated that the matters raised in the petition had been dealt with by the 2nd and 4th Interested Parties but the results were unsatisfactory. The petition did not however disclose that the petitioner had filed a matter in court on behalf of a client or disclose the fate of that matter as required by the Act. Throughout these proceedings, the 4th respondent did not disclose the fate of the matter in court either.

45. From the reading of the Act, the National Assembly has to be informed whether a matter is pending in court and may not, therefore, take up petitions on matters that are active and pending before court. There is no denial that this matter had been dealt with by other independent bodies, 2nd and 4th Interested Parties. The petitioner stated that the results were unsatisfactory, as was required by the law. although the fact of the matter being in court was not disclosed, I do not think that failure to disclose the matter in court would invalidate the petition to the National Assembly given that the application had sought to compel the 2nd Interested Party to Act on the 4th Interested Party's recommendations which he eventually did.

46. The National Assembly exercises mandate bestowed on it by the Constitution to consider petitions for removal of a member of the commission or independent office. I have carefully gone through this petition and I do not find where the petitioner alleges that the right to fair administrative action was being violated. I also note that although the Auditor General was joined in these proceedings, he declined to participate in them and opted out.

47. It is also my view that the issues raised in the present petition could be raised before the relevant committee of the National Assembly for its consideration before it made its decision. In the circumstances, taking into account the provisions of Article 251(2) and the Petition to Parliament Act, I am not persuaded on the merit of this petition.

48. Consequently, the petition dated 24th February 2017 is declined and dismissed with an order as to costs.

Dated, Delivered and Signed in open court this 7th day of June 2019.

E C MWITA

JUDGE