



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

PETITION NO. 15 OF 2018

IN THE MATTER OF ARTICLE 1, 2, 3 (1), 6, 10, 12 (1), 19, 20, 22, 23 (1) & (3), 38 (1) (b) (c), 47, 48, 160 (1), 165 (3) (b), 174, 175 (a), 176, 178, 191, 201 (a), 235 (1), AND 258 (1) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF RULES 4, 10, 11, 13, 20, 23 AND 24 (1) OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013

AND

IN THE MATTER OF SECTION 12 OF THE COUNTY GOVERNMENT ACT NO. 17 OF 2012, LAWS OF KENYA

AND

IN THE MATTER OF SECTION 3, 4, 8, 9, 12 (b), 35, 46 (a) AND 48 (1) OF THE COUNTY ASSEMBLY SERVICE ACT NO. 14 OF 2017

AND

IN THE MATTER OF SECTION 3, 4, 7 AND 8 OF THE PUBLIC APPOINTMENTS (COUNTY ASSEMBLY APPROVAL) ACT NO. 5 OF 2017, LAWS OF KENYA

AND

IN THE MATTER OF THE STANDING ORDER NO. 48 OF THE COUNTY ASSEMBLY OF NAKURU STANDING ORDERS

AND

IN THE MATTER OF THE ALLEGED CONTRAVENTION AND /OR APPREHENDED CONTRAVENTION OF ARTICLE 2, 3, 10 (1) (b) & (c), 10 (2) (a), (b), (c), 38 (3) (c), 47, 174 AND 258 (1) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF SECTION 12 OF THE COUNTY GOVERNMENT ACT AND CONTRAVENTION OF SECTION 46 OF THE COUNTY ASSEMBLY SERVICE ACT AND CONTRAVENTION OF SECTION 8 OF THE PUBLIC APPOINTMENTS (COUNTY ASSEMBLIES APPROVAL) ACT

BETWEEN

WILBUR AMARA ONYANGO.....PETITIONER

VERSUS

THE NAKURU COUNTY

ASSEMBLY SERVICE BOARD.....1ST RESPONDENT

THE SPEAKER, NAKURU

RULING

1. The Petitioner brought a Petition dated the 14th of August 2018 seeking the following orders:

- a. *A declaration that the Nakuru County Assembly Service Board as currently constituted is in breach of the law and illegal*
- b. *A declaration that failure to appoint the Petitioner as a member of the service board breached the petitioner's constitutional rights under Article 3 (1), 10 (1) (c), (2) (c), 22 (1), 38 (1) (b), (2) (c), 47 (1), 174, 175 and 76 of the Constitution of Kenya, 2010.*
- c. *A declaration that the appointment of the members of the County Assembly Service Board by the 2nd respondent was a clear violation of Section 9, 46 and 48 of the County Assembly Services Act No. 24 of 2017.*
- d. *A declaration that the appointment of the members of the County Assembly service board by the 2nd respondent was a clear violation of sections 3, 4, 7 and 8 of the Public Appointments (County Assemblies Approval) Act no. 5 of 2017.*
- e. *An order to disband and/or dissolve the current Nakuru County Assembly Services Board.*
- f. *A declaration that the current members of the Nakuru County Assembly Service Board, who have come, by reason of being in office illegally, be surcharged for all the personal income/ allowances they received by virtue of being in office and the said money to be recovered and returned to the Nakuru County Revenue Fund accounts.*
- g. *An Order for Judicial Review orders of Mandamus to remove in to this hounourable court and compel the 2nd and 3rd respondents to immediately reconstitute the County Assembly Service Board as provided by section 46 of the County Assembly Service Act No. 27 of 2017 and include the petitioner as a member therein*
- h. *An order of Judicial review order of Certiorari to quash the decision of the 2nd and 3rd respondent announcing the members to serve in the service board representing the minority party which decision is contained in the communication from the chair and recorded in the Hansard report dated 4th of October 2017.*
- i. *Cost of and incidental to the suit*
- j. *Any other orders that this honourable court deems fit and just to grant in the circumstances.*

2. Contemporaneously with the Petition, the Petitioner filed a Notice of Motion seeking interlocutor reliefs. When the matter first came for inter partes directions, the Court directed that the interlocutory application be compromised and that the matter be disposed off by way of written submissions followed by oral highlighting. The matter was set for oral highlighting on 11/12/2018.

3. On that day, the Advocate for the Petitioner Mr. Muchela informed the Court that the Petitioner had been sworn in and that therefore the substratum of the case had been determined. He, however, asked for the costs of the suit. The Respondents, through their advocate, Mr. Kipkoech Ng'etich, took the position that it was not fair for them to be saddled with the costs of the suit in the circumstances of the case. Though I urged the parties to reach a compromise on the issue of costs, they could not. They proposed to file affidavits on the issue of costs to enable the Court to determine who should pay the costs. Each party filed an affidavit. The Court's singular if simple and unusual task is to pronounce who should pay the costs.

4. The Petitioner insists that he is entitled to costs because he had a filed a petition to enforce his constitutional rights because the Respondents had refused, declined, neglected and /or ignored the obligation tie install him as a member of the Nakuru County Assembly Service Board without lawful justification. He says that the instruction fee for his advocate for drafting the pleadings was Kshs 700,000 which excluded the getting up fees. He says that the Respondents only swore him in after he filed the suit hence necessitating the decision to withdraw the suit.

5. The Respondents insist that it is the Petitioner's party which had not complied with directives of the 2nd Respondent's in nominating the Petitioner as a member of the Nakuru County Assembly Service board. They further depone that the Petitioner cannot be paid for their non-compliance.

6. The relevant rule application is Rule 26 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (Mutunga Rules). It provides that:

- a. *The award of costs is at the discretion of the Court.*
- b. *In exercising its discretion to award costs, the Court shall take appropriate measures to ensure that every person has access to the Court to determine their rights and fundamental freedoms.*

7. As a general matter, Courts have interpreted Rule 26(b) of the Mutunga Rules as directing Courts to pay attention to the potential impact of an award of costs on litigants wishing to access Courts to advance constitutional arguments or causes of action. Generally, therefore, Courts have not awarded costs in constitutional petitions absent exceptional circumstances. Exceptional circumstances include considerations whether the Petition filed was frivolous; whether the party aggrieved had attempted, in good faith, to resolve the matter outside Court; and whether any of the parties to the litigation, through their conduct, increased the costs of litigation.

8. In the present case, the Respondent insists that the suit would have been unnecessary if the Petitioner and his party had followed the directives by the 2nd Respondent to comply with the provisions of the law in communicating the Petitioner's nomination. The Respondent insists that the Petitioner was duly sworn in as soon as the Petitioner's party wrote officially to the 2nd Respondent a letter dated 07/11/2018 making its official nomination.

9. In his affidavit, the Petitioner does not directly respond to this line of reasoning by the Respondent. However, in his Supporting Affidavit to the Petition, he had included a letter dated 13/03/2018 from his party nominating him for the position. However, a quick perusal of the documents filed in the case indicates that the matter was discussed on the floor of the Assembly and a decision reached that the parties needed to nominate members afresh. It would appear that the Petitioner's party only did this subsequent to the filing of the Petition.

10. Suffice it to say that I find no eminent self-evident reason to saddle the Respondents with the costs of this Petition. I do not think that they conducted themselves maliciously or unreasonably. I note that they swore in the Petitioner as soon as the letter from the Petitioner's Party was received. I do not find the Respondents' conduct in this matter to have in any way unreasonably lengthened the suit. Each party conceded that the suit needed not proceed at the earliest instance. In my view, there are no good reasons to impose costs on either party. It is only fair that each party bears its own costs.

11. Orders accordingly.

Dated and delivered at Nakuru this 6th day of June, 2019

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JOEL NGUGI

JUDGE