



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PET. NO. 20 OF 2019

LONGIT RENSON.....PETITIONER

=VERSUS=

THE SPEAKER WEST POKOT COUNTY ASSEMBLY.....1ST RESPONDENT

THE CLERK WEST POKOT COUNTY.....2ND RESPONDENT

RULING

Ruling on sine die adjournment of the County Assembly of West Pokot

1. This is a ruling on a motion on notice by the applicant Member of the County Assembly of West Pokot for an order for resumption of the Assembly which he contends was illegally adjourned by the 1st respondent Speaker of the County Assembly *sine die*. By a Notice of Motion dated 29th August 2019, the Petitioner seek substantive orders as follows:

- 1) ***THAT*** this Application be certified urgent and be heard on priority basis.
- 2) ***THAT*** this Honorable Court be pleased to grant orders **compelling the 1st and 2nd Respondents to reconvene the County Assembly West Pokot County immediately for purposes of conduction house business** pending the hearing and determination of the application herein.
- 3) ***THAT*** this Honorable Court be pleased to grant orders **declaring the decision by the 1st and 2nd Respondents to adjourn the County Assembly West Pokot County null and void.**
- 4) ***THAT*** the Court be pleased to issue any or further orders and/or direction in exercise of this decision.
- 5) ***THAT*** the Court be pleased to issue any other or further orders and or directions in its discretion.
- 6) Costs be provided for.

2. The grounds of the Application were set out in the Notice of Motion as follows:

1. ***THAT*** the applicant is a member of West Pokot County Assembly elected by voters of Siyoi Ward to represent them in the County Assembly of West Pokot.
2. ***THAT*** on the 8th of August 2019 the 1st and 2nd Respondents without any justifiable reason backed by Law caused the house to be adjourned *sine die* since having the operations of the house at stand still.
3. ***THAT*** up to date the County Assembly West Pokot County remains adjourned *SINE DIE* contrary to its calendar which indicates that the house shall resume this recess as from 6th December 2019 thus the adjournment in itself is unprocedural, unlawful and illegal.
4. ***THAT*** the 1st and 2nd Respondents have failed to give reasons as to why the house should continue with the *sine die* adjournment which in itself is illegal and irregular having regards to the fact that there are pending urgent bills such as **Finance bill, Community health bill 2019, Supplementary 1 budget, and Approval of Annual Development plan** which are necessary and

essential for smooth operation of County affairs and are yet to be approved.

5. **THAT** the action by the 1st and 2nd Respondents to adjourn the house sine die without a motion by the members of County Assembly is in itself Contrary to the standing order No. 29 of the West Pokot County Assembly which requires that an adjournment of the house business shall be by way of motion by either the Majority Leader or the Minority Leader or any member of the house business committee, thus the decision by the 1st and 2nd Respondent to adjourn the house business without following the outlined legal procedure is null and void.

6. **THAT** the 1st and 2nd Respondents adjourned the house when it was clear that the assembly's calendar indicated that the house was active and alive to continue conducting their normal house business and/or was not on a recess and neither was there any circumstance as shown in the hansard to demonstrate the need to adjourn the house business.

7. **THAT** the pendency of Finance bill, Community health bill 2019, Supplementary 1 budget, and Approval of Annual Development plan is in itself unfair as the same stalls the smooth operations of the County Executive in terms of revenue collection and expenditure as the County Executive cannot operate smoothly without having the two bills approved.

8. **THAT** it is the duty of the applicant as legitimately expected by those who elected him to conduct and perform his legislative duties in the assembly thus to adjourn the assembly sine die infringes the right of the citizens of West Pokot County thus the same is unconstitutional.

9. **THAT** in the premise the decision by the 1st and 2nd Respondents is unfair, irregular and unjust thus the same is null and void.”

The application was also supported by the affidavit of the Petitioner to like effect.

3. The respondents objected to the jurisdiction of the court urging the principle of separation of powers and the powers and privileges of the Speaker and the members of the Assembly under the County Assembly Powers and Privileges Act for any acts done in the course of the proceedings thereof.

4. In urging ouster of the Court's jurisdiction, the respondent pointed to the Constitutional Principle of separation of powers and provisions of the Powers and Privileges Act 2017 in their Replying Affidavit sworn by the Speaker of the County Assembly as follows:

“3. THAT I am advised by our advocate on record which advice, I verily believe to be true, that the doctrine of separation of powers is a part of the architect of our Constitution and is enshrined under articles 10 and 185 thereof and that therefore, unless an action or a decision of a County Assembly is in violation of the Constitution, this Honorable Court would defer to the authority of the Assembly within its area of exclusive jurisdiction.

4. **THAT** I am advised by our advocate on record which advice, I verily believe to be true that under common law upon which this Honorable Court's exercise of its Supervisory jurisdiction is premised under the inherent powers doctrine each state agency is the master of its own procedure and processes.

5. **THAT** I am advised by our advocate on record, which advice I verily believe to be true, that in the exercise of discretionary powers conferred upon an office the judiciary would be loath to interfere unless it is unlawful and/or blatantly unreasonable.

6. **THAT** art. 178 (2) of the Constitution provides that the County Assembly shall be presided over by the Speaker. Section 14 of the County Government Act, 2012 as read together with the Second Schedule thereof makes provision for the making of Standing Orders by the County Assembly.

7. **THAT** under s. 10 of the County Assembly Powers and Privileges Act (No. 6 of 2017) it is provided that the actions and the decisions of the County Assembly are not susceptible to a challenge in a Court of Law. Section 11 thereof clothes the Speaker, Members of the Assembly and the County Assembly as a whole with immunity against criminal and/or civil action for any action or decision taken in their capacity as such.

8. **THAT** under West Pokot County Assembly Standing Order, Part 1, Standing Order NO. 1 (1) it is provided that in all cases not expressly provided for by the Standing Order, any procedural question shall be decided by the Speaker. Further, under Standing Order No. 122 (1) it is expressly provided that in the event of grave disorder arising in the County Assembly, the Speaker may adjourn the Assembly forthwith or suspend sitting for any period to be determined by her. The Speaker is also enjoined to enforce and maintain the integrity of the Assembly (Annex herein and marked 'CM1' is a copy of the relevant extracts of the West Pokot County Assembly Standing Order.)”

Issues for Determination

5. Counsel for the parties made oral submissions of their respective cases and two issues arose for determination as follows:

a) **Whether the Court has jurisdiction in the matter of the challenge of the Speaker of County Assembly decision to adjourn the sittings of the Assembly; and if so,**

b) **Whether the court will order the reopening of the Assembly adjourned by the Speaker sine die.**

Determination

Jurisdiction of the Court

6. Section 10 of the County Assembly Powers and Privileges Act 2017, which provides as follows:

“10. 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.”

7. The County Assembly Powers and Privileges Act provides under section 11 thereof immunity for the speaker and members of the County Assembly against legal proceedings as follows:

“11. (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.”

8. In accordance with the authority of the Court of Appeal in the **Owners of Motor Vessel “Lillian S” v. Caltex Oil (Kenya) Ltd**, (1989) KLR 1, a question of jurisdiction of the Court must be determined forthwith *in limine*.

9. As I understand the matter, there is no bar to review by the court of the acts of the said officers. The powers and privileges are for the protection for the purposes of effective exercise of their mandate without fear of running foul of the law *so long as their actions and decisions are taken in accordance with the Constitution and the law*. By analogy, Article 117 of the Constitution which expressly permits enactment of law on powers and privileges of Parliament provides as follows:

“117. Powers, privileges and immunities

(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.”*

The provisions of powers and privileges do not authorise action and decisions ultra vires the law.

10. The power and privileges provisions cannot be construed to bar what is expressly allowed by the Constitution – that is the determination by the High Court of the legality of the action said to have been done in accordance with the Constitution. In acting as members of County Assembly, the Speaker and others named in section 11 of the County Assembly Powers and Privileges Act can only exercise authority given by the Constitution. As Article 2 (2) thereof is clear that no exercise of shall be valid if exercised contrary to the Constitution, as follows:

“2. (2) No person may claim or exercise State authority except as authorised by this Constitution.”

It is also clarified under Article 1. (3) (a) of the Constitution that Parliament and the legislative assemblies in the county governments have delegated sovereign power which they perform in accordance with the constitution. Specifically with regard the County Assembly, Article 185. (1) provides that *“the legislative authority of a county is vested in, and exercised by, its county assembly.”*

11. Agreed, Article 185 of the Constitution grants the constitutional law making mandate at the county level to the County Assembly. It is, however, not an interference with the law making mandate of the County Assembly for the Court to review for its legality and constitutional integrity of a decision of the County Assembly or any of its offices or officers in relation to its compliance with the provisions, statute and applicable Standing Orders.

12. The Constitutional interpretative mandate of the High Court under Article 165 (3) (d) of the Constitution to determine whether anything purported to be done under the authority of the Constitution is valid puts paid any questions on the jurisdiction of the High Court. Article 165 (d) (ii) and (iii) specifically gives the High Court **“jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—**

(i)....;

(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;....”

13. The Constitution is the supreme law of Kenya and any law which is inconsistent thereto is to the extent of the inconsistency void. The High Court has the very power to determine whether the adjournment of the assembly which is said to have been done in accordance with the Standing Orders is consistent with the Constitution. Indeed the very question of judicial challenge of the actions and decisions of the County Assembly is justiciable under Article 165(3) (d) (iii) of the Constitution set out above.

14. The Supreme Court of Kenya has in a Reference *Speaker of the Senate & Another v. Attorney General & 4 Others*, Reference No. 2 of 2013; [2013] eKLR regarding the Parliamentary law making process upheld court’s intervention in the legislative process as follows:

“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.”

15. To the extent that section 10 and section 11 of the County Assembly Powers and Privileges act appear to restrict the court’s constitutional interpretative role under Article 165 (3) of the Constitution, the same is inconsistent with the Constitution and in accordance with Article 2 (4) of the Constitution **“(4) Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.”**

16. The question for determination before the Court is, therefore, whether the County Assembly Speaker has authority to adjourn *sine die* the proceedings of the Assembly. *Sine die* (Latin *without day*) simply means without a return date or in the words of Black’s Law Dictionary 8th ed. (2004) *“With no day being assigned (as for resumption of a meeting or hearing.)”*

17. The relevant Standing Order of the County Assembly of West Pokot adopted on 5th May 2017 provides for the adjournment of its proceedings in terms as follows:

“Grave disorder in the County Assembly

122. (1) In the event of grave disorder arising in the County Assembly, the Speaker may, adjourn the County Assembly forthwith or suspend any sitting for a period to be determined by him or her.

(2) In the event of grave disorder arising in the Committee of the whole County Assembly, the Speaker shall resume the Chair forthwith.”

18. The Speaker of the County Assembly has no authority to adjourn the Assembly *sine die*. The provision which curtails the exercise of the core mandate of the County Assembly must be construed strictly as requiring a determined date for return of the Assembly upon the exercise of the exceptional authority to stop debate and functioning of the Assembly for reasons of grave disorder. Such action may actually hinder rather than permit **effective discharge of the business of the Assembly. The requirement for a determined date is therefore part of a system of checks and balances that while the Speaker may adjourn the Assembly, it must be to a determined date and in terms of the Standing Orders No. 29(40 it requires the resolution of the Assembly to alter its calendar, ultimately the Assembly has power to impeach the Speaker.**

19. The Speaker does have authority to adjourn to a determined date where there has been gross misconduct of the members. If the Speaker had adjourned to determined date, the only question would have been whether there were circumstances in this matter to warrant a conclusion of gross misconduct to adjourn the House. There having been no date determined for the return of the Assembly after the adjourned by the Speaker, this Court find and declare that the action of Speaker of the County Assembly of West Pokot on to adjourn the proceedings of the County Assembly was unlawful, *ultra vires*, null and void.

20. In her response to the prayer for reopening of the Assembly, the respondent Speaker averred that the County Assembly is scheduled to reopen on 17th September 2019 following consultative meetings with the members of the Assembly, as follows:

9. **“THAT the County Assembly of West Pokot will resume on the 17th of September, 2019. (Annex herein and marked ‘CM2’ is a copy of the gazette notice sent to the Government Printers for publication).**

10. **THAT the resumption of the sittings of the Assembly was agreed upon after consultation between the Leader of the Majority, the Leader of Minority and I. (Annexed herein and marked ‘CM3’ are copies of the letters from the leader of Majority and Minority calling for the resumption of the sitting on the Assembly on the 17.09.2019)**

11. **THAT in deed I adjourn the Assembly on the 08/08/2019. The decision to adjourn the House was necessitated by extreme hostilities and confrontation between the different sections of the Assembly. Assembly staff members have in recent days complained of gross mistreatment at the hands of some Members of the Assembly. The acrimony between Members of the Assembly themselves has also spiraled out of control. I shared these reasons with the Assembly and they are capture in the Hansard copy for the day supplied in the Applicant’s Affidavit. All of these matters are being handled as per the provisions of the County Assembly Powers and Privileges Act, 2017.**

12. **THAT also the Assembly has instituted ADR mechanism to address the grievances by the Members and Staff of the Assembly (Annexed herein and marked ‘CM4’ are copies of the letter inviting different parties for ADR and the minutes thereof).**

13. **THAT** from the foregoing it is clear that I exercised my discretion reasonably and lawfully and that therefore this matter is not susceptible to this Honorable Courts intervention.

14. **THAT** in the premise, the Respondents pray that the application herein be dismissed with costs.”

21. The Petitioner in argument before the court denied that the Members of the Assembly were consulted on the issue of reopening of the Assembly and expressed a fear that without a publication in the official Kenya Gazette, the reopening may not occur as alleged on the 17th September 2019.

Resolution of the matter

22. The Speaker has no power to adjourn the County Assembly *sine die* on any occasion for any reason. Adjournment must be for a determined period, to determined date not *sine die*, without a day. The court does not have evidence to conclude that the adjournment of the Assembly was wrongly and undemocratically calculated to obstruct debate on any pending matter. It may have been the result of a genuine but mistaken exercise of a power to adjourn the Assembly in the face of disorder among the members of the Assembly purportedly pursuant to Standing Order No. 122 of the Standing Orders of the County Assembly of West Pokot.

23. It did appear to the Court on the evidence presented before it by Petitioner through the Hansard report and the respondent by way of Minutes of various meetings of the County assembly Service Board with members of the County Assembly in attendance that there had been some disturbances, which may have occasioned the adjournment. The Minutes of 30th August 2019 being the third of such consultative meetings particularly noted “that the Board to convene the whole House meeting to resolve pending matters” and “that the house be reopened ONLY after the conflicts descalate and more especially when the situation calms.” Of course, this meeting was held after the petition herein was filed on 29th August 2019, and the same have given additional impetus to the resolution to reopen the House.

24. To be sure, despite the fears of the petitioner that the reopening of the Assembly has not been gazetted, the Government Printer may publish the Gazette Notice today being a Friday on which regular publication of the Kenya Gazette is done.

25. The Court does not act in vain and in view of the published notice of resumption of the Assembly, the Court does not find it **necessary** to make any order, as sought by the Petitioner, compelling the reopening of the Assembly, which is already set to reopen as shown by the Speaker’s notice the publication of which has been sought from the Government Printer.

26. However, for the reasons given above, it follows that the recalling of County Assembly to resume proceedings on the 17th September 2019, as intimated to this court by copy of letter dated 2nd September 2019 addressed to the Government Printer to publish a notice therefor in the Kenya Gazette does not cure the illegality of the adjournment *sine die* for which the Speaker had no authority, and therefore a Declaration to that effect will issue in this clear case of *ultra vires*.

27. The resumption of the Assembly would, however, resolve the issue of the disputed closing. Other matters raised in the Petition and the interlocutory motion may be addressed by the Court if, upon resumption of the proceedings of the Assembly, they are not resolved by debate in the Assembly.

28. For that purpose, the Petitioner is granted leave of the Court to file a further affidavit, as necessary, to update the Court as to any developments on the matter, if or when the Assembly resumes on of 17th September 2019, which are relevant to the Petition before the Court.

Costs

29. The question whether the Speaker of the County Assembly has authority to adjourn the Assembly *sine die* is one of public interest and the petitioner obviously have standing under Article 258 of the Constitution to file the Petition before the Court. On the other hand, it would appear, with respect, that the respondent Speaker, in ordering an adjournment of the Assembly, acted under a mistaken interpretation, now corrected, that she had authority under the Standing Orders so to do and, therefore, the court does not make any order as to costs at this stage.

30. At the hearing of the Petition, if it ever comes to that, the court may, bearing in mind the manner of prosecution of the same, make such order on costs as appropriate.

Order accordingly.

DATED AND DELIVERED THIS 13TH DAY OF SEPTEMBER 2019.

EDWARD M. MURIITHI

JUDGE

Appearances:

M/S Akenga Kimutai & Associates Advocate for the Petitioner.

M/S Philip Magal & Co. Advocates for the Respondents.