



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT GARISSA
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO.6 OF 2019

BETWEEN

YUSUF ABDI GEDI.....PETITIONER

AND

THE COUNTY ASSEMBLY OF WAJIR.....1ST RESPONDENT

THE GOVERNOR OF WAJIR COUNTY.....2ND RESPONDENT

JUDGEMENT

Introduction:

1. The Petitioner before me is the Wajir County Executive member for Agriculture, Livestock, Fisheries and Alternative Livelihoods, the 1st Respondent is the County Assembly of Wajir and the 2nd Respondent the Governor of Wajir County.

2. Coming up for determination is the Petitioner Applicant Notice of Motion Application dated 31st May, 2019 brought under Section 3A of the Civil Procedure Act Chapter 21 Laws of Kenya, Rules 19 and 23 of the Constitution of Kenya(Protection of Rights and Fundamental Freedoms)Practice and Procedure Rules, 2013, Section 10 of the Judicature Act, Chapter 8 of the Laws of Kenya and all other enabling provisions seeking the following prayers and Orders:-

- 1) **THAT**, this application be certified as urgent and service hereof be dispensed with in the first instance.
- 2) **THAT**, this Honorable Court does grant a conservatory order staying and/or suspending the decision/resolution of the 1st Respondent f 29th May, 2019 requiring the 2nd Respondent to remove and/or dismiss the petitioner from his position as County Executive Member Agriculture, Livestock, Fisheries and Alternative Livelihoods pending the hearing and determination of the petition.
- 3) **THAT** this Honourable Court do issue a Conservatory order restraining the 2nd Respondent herein, the Governor Wajir County, from acting on and/or implementing the decision/resolution of the County Assembly of 29th May, 2019 or in any way commencing the process of selection and /or nominating a new nominee for County Executive Member to replace the Petitioner pending the hearing and determination of the petition.
- 4) **THAT** directions be given for expeditious hearing and determination of the substantive Petition owing to the urgency of the matter.
- 5) **THAT** cost of this Application be provided for.

3. In response to the application the 1st Respondent filed a Replying Affidavit sworn by the Assembly Clerk one Shalle Sheikh dated 11th July, 2019 and filed on even date in opposition to the application.

4. Both Parties filed their respective submissions. The Petitioner written submissions are dated 5th July, 2019 and filed on 24th July, 2019 whereas the 1st Respondent written submissions are dated 13th August, 2019 and filed on 17th September, 2019.

Background:

Applicant's Case:

5. In the herein Notice of Motion and submissions, the genesis of the instant application and petition by the Petitioner is a Notice of Motion dated 25th March, 2019 tabled before the 1st Respondent seeking the removal of the Petitioner on the grounds of Conflict of interest, abuse of office/gross misconduct and failure to show leadership.

6. Subsequent to the above, a select committee of five members of the 1st Respondent was constituted on 21st May, 2019 to investigate the allegations. The said motion was served upon the petitioner vide a letter dated 21st May, 2019 inviting him to appear before the committee on 22nd May, 2019. Since the Petitioner was away in Nairobi he protested the short notice and the same was rescheduled to the 27th May, 2019.

7. The applicant Petitioner alleges that he filed an elaborate and detailed response to the motion dated 26th May, 2019 and appeared before the committee on 27th May, 2019. He alleges that he was not given any evidence tendered in support of the motion or witness statement and that no witness testified on 27th May, 2019, and that he was requested to submit further information, which he did on 28th May, 2019.

8. The select committee in its report reached a finding that the allegations against the petitioner were substantiated and recommended the petitioners dismissal on grounds of incompetence, abuse of office, gross violations of the Constitution and other applicable laws. The select committee report was submitted to the 1st Respondent assembly on 29th May, 2019 at 2.30pm, where the members voted and adopted the report.

9. It is the applicant Petitioner allegation that the voting and adoption of the Report by the 1st Respondent assembly members violated Standing Orders 69(9) and 70 of the Wajir County Assembly Standing Orders which required the Petitioner to be served with the select Committee Report with other evidence adduced at least 3 days before the same was debated and considered. It is his assertion that he was condemned unheard by the 1st Respondent assembly contrary to standing order No. 70(2) which provides for a hearing before the 1st Respondent Assembly.

10. In regard to this court jurisdiction to grant conservatory orders, the applicant submits that the same emanates from Article 23(3) (c) of the Constitution and Rule 23 of the Constitution of Kenya(Protection of Rights and Fundamental Freedoms)Practice and Procedure Rules 2013. They submitted that at this stage they only ought to establish a prima facie case to warrant issuance of the same. They rely in the Supreme Court case of *Gatirau Peter Munya vs Dickson Mwenda Kithinji & 3 Others (2014) eKLR*, *Kevin Mwiti & Others vs Kenya School of Law (2015) eKLR* and *Kenya Association of Manufactures & 2 Others vs Cabinet Secretary - Ministry of Environment and Natural Resources & 3 others (2017) eKLR*.

11. The applicant Petitioner submitted that he has established a Prima facie case. In this regard The submits that the removal proceedings undertaken by the 1st Respondent County Assembly are quasi-judicial in nature as was held by the Court of appeal in *Martin Nyaga Wambora & 3 Others vs Speaker of Senate & 6 Others (2014) eKLR* and that the procedure for removal of the applicant is similar to that of a Governor although one is elective and another selective. And relying on Article 236 of the Constitution he submits that the Constitution protects public officers in that they cannot be removed from office without adherence to the due process of the law.

12. In this regard therefore the petitioner applicant submits that the 1st Respondent did not accord him a fair hearing before the adoption of the Committee report recommending his removal contrary to Article 47 , 236 and 183 of the Constitution, section 40 of the County Government Act and Wajir County Assembly Standing Orders section 69(9) and 70(2).

13. It is his position that the 1st Respondent ought to have given him 3 days minimum to study the select committee report, prepare his defence before the 1st Respondent Assembly as envisaged under Wajir County Assembly Standing Order 69(9) and 70(2). Standing Order 69(9) provides that in the event the committee finds that the allegations are substantiated the County assembly shall afford the member an opportunity to be heard and vote on whether to approve the resolution and 70(2) on the other hand is to the effect that the member sought to be removed ought to be given the select committee report and any evidence adduced at least 3 days before the motion is debated. They submit that this did not happen, and they rely in the case of *Stephen Mring'a Masamo and 4 Others vs County Assembly Taita Taveta & 2 Others (2017) eKLR*.

14. Additionally, the petitioner submitted that the procedure for his removal was conducted in breach of Article 196(1) of the Constitution which demands that public participation ought to be undertaken. In this case he argues there was no public participation in the hearing before the select committee and during the voting by the assembly on 29th May, 2019. In this they submit that conducting the proceeding in public is not enough but the members of public ought to be given an opportunity to participate as was held in *Martin Nyaga Wambora & 3 Others vs Speaker of Senate & 6 Others (Supra)*.

15. Further, the petitioner submitted that the entire procedure undertaken to remove him was prejudicial and meant to publicly embarrass and humiliate him, arguing that it was presented by disgruntled members of the 1st Respondent and done out of abuse of power and arbitrary exercise of authority.

16. In sum the applicant submitted that he has demonstrated and established a prima facie case to warrant this court to issue conservatory orders, arguing that failure to do so, the 2nd Respondent may commence the process of appointing a new County Executive committee member to replace him rendering this petition an academic exercise, submitting that this court has the power to quash improper impeachment proceedings.

1st Respondent Case:

17. The 1st Respondent opposed the Application and the petition arguing that they acted within the law in impeaching the Applicant. Their chronology of events is that the Assembly received a notice of motion from one Hon. Hussein Abdirahman Dahir, the Chairman Committee on Agriculture and Livestock and Fisheries, the motion was for impeachment of the applicant pursuant to section 40 of the County Government Act with the grounds of Conflict of interest, abuse of office and failure to show leadership. Thereafter the motion came up before the assembly on 21st May, 2019 where a vote was undertaken and five members were selected to form a committee to investigate the allegation as per the standing orders.

18. Subsequently, the applicant was notified of the motion on 21st May, 2019 as per Assembly standing order 69(7) directing that he appears before the select committee on 22nd May, 2019 at 10.00am. The applicant wrote back through his lawyer that he was not around as he was away in Nairobi and requested for another date, which they settled on 27th May, 2019. On 26th May, 2019 he filed a detailed response and on 27th May, 2019 the select committee proceeded with their hearing where the applicant appeared with his Advocate. The committee called witness where all issues were considered and further evidence requested.

19. The 1st Respondent notified the applicant vide a letter dated 28th May, 2019 that the report of the select committee would table for debate on 29th May, 2019 and he should attend if he so wishes. On 29th May, 2019 the select committee report was tabled before the house and adopted by all the 30 Members of the County Assembly present and that the petitioner was absent despite being invited.

20. The 1st Respondent submitted that the impeachment of the applicant was justified as he had grossly violated the Constitution, they allege that the petitioner breached Article 183(3) of the Constitution by failing to provide the County assembly with full and regular reports on matters relating to the county and standing order 201(5), that he neglected the fisheries department, he also willfully refused to accept recruitment of technical personnel for fisheries department and that he sat on some bills which ought to have been tabled before the assembly such as the Rangeland Management Bill, Livestock Production Bill and Sale Yard Bill and that he also undermined public participation by removing 19 projects from IFMIS system.

21. In addition, they submitted that it was also substantiated that the petitioner acted in conflict of interest contrary to Article 73 (2)(b) of the Constitution, section 176(a),(d) and (g) of the Public Procurement and Disposal Act, 2015 and Leadership and Integrity Act where he awarded tenders to his clansmen and proxies, hiring a driver when the department has over 20 drivers and using vehicle assigned outside office hours. They argued that the petitioner contravened the constitution which is a ground for impeachment as was held in ***Martin Nyaga Wambora & 3 others vs Speaker of Senate & 6 Others (Supra)***.

22. In regard the allegation that they did not conduct public participation, the 1st Respondent submitted that a notice was made pursuant to Article 196 of the Constitution, in that notices were issued to the members of the public over the motion and through local television alpha and that members of the public and media were allowed to attend to all the meetings and that an opportunity was availed to the public and relied in the case of ***Minister of Health vs New Clicks South Africa (pty) Ltd***. However, they submitted that on 29th May, 2019 when the assembly debated and adopted the report they did not invite members of public due to time constrains.

23. In respect to the petitioners claim that he was denied a fair hearing, the 1st Respondent submitted that the Petitioner was given an opportunity to defend himself of the allegations before the select committee where he appeared with his counsel and filed a response to the allegations. They submitted that they complied with Article 47 of the Constitution and section 4(4) of the Fair Administrative Action Act, where they even considered the applicants request to reschedule the hearing to the 27th May, 2019.

24. On the petitioner allegation that he was denied a opportunity before the county assembly where the report from the select committee was adopted and debated, they submitted section 40 of the County Government Act is silent whether the petitioner ought to have been given a chance before voting and adoption, however on their part they invited him to attend but chose not to, despite the stringent timelines. They admit that the standing orders provide for a hearing but do not state the manner in which it ought to be conducted.

25. Further, the 1st Respondent submitted that the grant of the sought conservatory orders would offend the doctrine of separation of powers, in this relied in the Court of appeal case of ***Mumo Matemu vs Trusted Society of Human Rights Alliance & 2 Others, Civil Appeal No. 290 of 2012(2013) eKLR*** that courts must exercise deference to the independence of the legislature. Additionally, they argued that the county governments are miniature of national government and therefore the doctrine of separation of powers would apply as was held in ***Simon Wachira Kagiri vs County Assembly of Nyeri & 2 Others (2013)***, and that courts should only interfere in clear circumstances as was held in ***Okiya Omtata Okoiti & 3 Others vs. Attorney General & 5 Others (2014) eKLR***. Additionally, the 1st Respondents relied in the following authorities in urging the court to restrain from issuing the conservatory orders as it would interfere with the running of the legislature as an arm of government, these are ***Speaker of the Senate & Another vs Attorney General & 4 Others, Reference No. 2 of 2013 (2013) eKLR*** and ***Justus Kariuki Mate & Another vs Martin Nyaga Wambora & Another (2017) eKLR***.

26. Furthermore, the 1st Respondent submitted that public interest favours the denial of the sought conservatory orders, arguing that no prejudice was occasioned to the petitioner as the report of the select committee was thorough, lawful and adopted by all the 30 members of the assembly. Additionally, they submitted that the applicant fundamental rights and freedoms are subject to limitation under Article 24(1)(d) of the Constitution as his actions led to loss of public funds which is contrary to public interest.

27. Moreover, they submitted that the only reason the applicant is focused on, is his resumption of office and not public service urging the court to deny the sought conservatory orders and save the people from the rigors of bad leadership. In this they rely in the following cases ***Kenya Guards Allied Workers Union vs Security Guards Services & 38 Others Misc. 1159 of 2003, Hermanus Philip Steyn vs Giovanni Gnechi-Ruscone (2013) eKLR*** and ***Moses Kassaine Lenolkulal vs Director of Public Prosecution (2019) eKLR***.

Issues and Determination:

28. I have considered both parties pleadings and submissions, and the main issue for determination at this stage of the proceedings is as to whether this court ought to issue the conservatory orders sought by the applicant. He seeks a Conservatory order restraining the implementation of the 1st Respondent decision impeaching him pending the hearing and determination of the petition.

29. The grounds upon which the application is based is that the petitioner was denied a hearing before the assembly when the hereinabove select committee report was adopted and that he was not served with said report and given an opportunity to defend himself before the assembly contrary to the assembly standing orders noted above, additionally he alleges that the process leading to his impeachment fails for want of public participation.

30. The 1st Respondent on the other hand opposes the application alleging that the impeachment of the petitioner was within the law, in that he was given a hearing before the select committee of the assembly, where he appeared with his Advocate presented his case and the assembly select committee reached a finding that the allegations against the petitioner were substantiated. Additionally, they allege that the applicant was served with the select committee report, invited to attend to assembly and chose not to. In regard to the claim that the applicant was denied a chance to be heard before the assembly when the select committee report was adopted, the 1st Respondent admits that although the County Government Act at Section 40 and the assembly standing orders contemplates such a chance for hearing it does not provide for the manner to be executed. On public participation, they allege that the members of the public were given an opportunity, before the select committee, however during the adoption of the report by the assembly time constrains inhibited public participation.

31. Rule 23 of the Constitution of Kenya(Protection of Rights and Fundamental Freedoms)Practice and Procedure Rules, 2013, provides that despite any provision to the contrary a judge before whom a petition under rule 4 is presented shall hear and determine an application for conservatory or interim orders. Consequently, granting a conservatory order is at the discretion of the Court.

32. In the case of *Kevin K. Mwiti & others vs Kenya School of Law & Others [2015] eKLR* the court considered an application for conservatory orders and stated that the court must consider whether an applicant has established a prima facie case and in the view of the court;

“A prima facie case... is not a case which must succeed at the hearing of the main case, but must be a case that is not frivolous. The petitioners have to show that he has a case which discloses arguable issues and, in this case,, arguable constitutional issues, but the court should not at this stage make definitive findings either of fact or law as that is the province of the court that will intimately hear the petition.”

33. Therefore a party who moves the Court seeking conservatory orders must show to the satisfaction of the Court that his or her rights are under threat of violation, are being violated or will be violated and that such violation, or threatened violation is likely to continue unless a conservatory order is granted as the purpose of granting a conservatory order is to prevent violation of rights and fundamental freedom and preserve the subject matter pending the hearing and determination of a pending cause or petition.

34. In *Rights Education and Awareness (CREW) and 7 others vs Attorney General [2011] eKLR*, the court in this regard stated that at this stage a party seeking a conservatory order is only required to demonstrate that he has a Prima facie case with a likelihood of success and that unless the conservatory order is granted, there is a real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution.

35. Further, in *Judicial Service Commission vs Speaker of the National Assembly Another [2013] eKLR* the Court stated that;

“Conservatory orders... are not ordinary civil law remedies but are remedies provided for under the constitution, the supreme Law of the land. They are not remedies between one individual as against another but are meant to keep the subject matter of the dispute in situ. Therefore such remedies are remedies in rem as opposed to remedies in personam. In other words, they are remedies in respect of a particular state of affairs as opposed to injunctive orders which may only attach to a particular person”

36. Furthermore, the Supreme Court in *Gatiru Peter Munya vs Dickson Mwaura Kithinji & 2 Others [2014] eKLR* in this regard stated:-

“Conservatory orders’ bear a more decided public law connotation: for these are orders to facilitate ordered functioning within Public agencies, as well as to uphold adjudicatory authority of the court in the Public interest. Conservatory orders therefore are not unlike interlocutory injunctions linked to such private party issues on the prospects of irreparable harm occurring during the pendency of a case or high probability of success” in the applicant’s case for orders of stay. Conservatory orders consequently should be granted on the inherent merit of the case bearing in mind the public interest, the constitutional values and the proportionate magnitudes, and priority levels attributable to the relevant causes.”

37. It is therefore apparent from the above established legal principles that a conservatory order is issued where there is real impending danger to violation of the Constitution or fundamental rights and freedoms with a consequence that a petitioner or the public at large would suffer prejudice unless the court intervenes and grants Conservatory orders. In such a situation, the Court would issue a conservatory order for purposes of preserving the subject matter of the dispute.

38. In this instant petition the Petitioners alleges that there was a breach of the law to wit the Constitution, the County Government Act and the Wajir County Assembly Standing Orders. He has challenged the 1st Respondent procedure leading to his impeachment citing a flawed process where he was denied a hearing before the adoption of the select committee report leading to his impeachment. It is noteworthy that the 1st Respondent admits that indeed there is provision for a hearing before the assembly; however there is no provision on the manner in which the same ought to be conducted.

39. The court at this stage only ought to consider whether the applicant has demonstrated a prima facie case to warrant the issuance of a conservatory orders. I have considered the grounds in support of the application and the 1st Respondent response and in my view the applicant is basically urging this court to issue conservatory orders stopping his replacement process pending the hearing and determination of this petition.

40. Taking the view that a Conservatory order is meant to preserve the subject matter or prevent further breach pending the determination of a pending cause or petition, it is my view that the Applicant has demonstrated a prima facie case and therefore court in the circumstances is inclined to issue the sought conservatory orders pending the hearing and determination of the petition.

41. Thus the court makes the following orders:

- i. Prayers 2 and 3 are granted as prayed.*
- ii. The petition to be heard on priority basis.*
- iii. Costs in the main course.*

DATED, SIGNED AND DELIVERED AT GARISSA THIS 13TH DAY OF NOVEMBER, 2019.

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C. KARIUKI

JUDGE