



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**MISCELLANEOUS APPLICATION NO 134 OF 2018 (JR)**

**IN THE MATTER OF AN APPLICATION BY HON. FRANCIS MWANIKI NGUNGA FOR LEAVE TO APPLY FOR JUDICIAL REVIEW**

**AND**

**IN THE MATTER OF POSITION OF MAJORITY LEADER OF MACHAKOS COUNTY ASSEMBLY**

**REPUBLIC ..... APPLICANT**

**VERSUS**

**THE CLERK, COUNTY ASSEMBLY OF MACHAKOS ..... 1<sup>ST</sup> RESPONDENT**

**THE SPEAKER, COUNTY ASSEMBLY OF MACHAKOS ..... 2<sup>ND</sup> RESPONDENT**

**COUNTY ASSEMBLY OF MACHAKOS ..... 3<sup>RD</sup> RESPONDENT**

**AND**

**HON. FRANCIS MWANIKI NGUNGA ..... EX-PARTE APPLICANT**

**RULING**

1. The Exparte Applicant herein Hon. Francis Mwaniki Ngunga who is an elected member of the County Assembly of Machakos filed a Notice of Motion dated 7<sup>th</sup> May, 2018 seeking the following reliefs namely:

***(a) THAT orders of certiorari do issue to remove to this court for purposes of being quashed the following communications purporting to remove the Ex-parte Applicant as the Majority Leader of County Assembly of Machakos:***

***(i) The undated communication by the Speaker of the County Assembly titled "Communication from the Chair" as read and issued to the County Assembly of Machakos on the 17<sup>th</sup> April, 2018.***

***(ii) The communication dated 17<sup>th</sup> April 2018 titled "Majority Party Leadership" as read and issued the County Assembly of Machakos on the 17<sup>th</sup> April, 2018.***

***(b) THAT the costs of this Application and proceedings be borne by the Respondents jointly and severally.***

2. The motion aforesaid is supported by an annexed affidavit of the Exparte Applicant sworn on even date and further on the following grounds namely:-

***(i) That the Exparte Applicant had been elected on a Wiper Democratic Party Ticket and the House Majority Leader.***

***(ii) That there was no notice issued convening a meeting to deliberate his removal as the Leader of the Majority at the County Assembly of Machakos.***

***(iii) That there are no minutes supporting the purported removal and election of Leader of Majority in the Assembly.***

*(iv) That under Standing Order Number 15(3) the Exparte Applicant could only have been removed through a majority vote of members of wiper Democratic Movement Party.*

*(v) That the effect of the Hon. Speaker's pronouncement in the morning in which she faulted the non-compliance with the relevant standing orders ought to invalidate any subsequent attempt to come up with another communication since the Hon. Speaker had by then, become functus officio and therefore if she sanctioned a second process then she acted ultra vires the standing orders of the Assembly.*

*(vi) That not all the members who participated in the purported removal of the Exparte Applicant belonged to the Wiper Democratic Party.*

*(vii) That the Applicant was not given a fair hearing and his right to natural justice was violated.*

3. The Application was strenuously opposed by the Respondents who raised the following grounds of opposition:-

*(i) This court lacks jurisdiction in the matter as it falls within the Political Parties and ought to have been placed before the Political Parties Tribunal under Section 40(1) (a) of the Political Parties Act No. 11 of 2011 that addresses disputes between members of a Political Party and thus matter is wrongly and prematurely before the court.*

*(ii) The orders if issued would amount to an infringement of the concept of separation of powers.*

*(iii) The court should not act as a court of appeal over the decision making body as it would go into the merits of the decision itself which is not the purpose of a Judicial Review.*

*(iv) The Ex-parte Applicant who had been the leader of majority in the Assembly was lawfully removed pursuant to Standing Order No.15.*

*(v) The 2<sup>nd</sup> Respondent's role was only to communicate the information from the Chief Whip to the 3<sup>rd</sup> Respondent under Standing Order 15(5).*

*(vi) The Exparte Applicant misled the court by alleging that the 2<sup>nd</sup> Respondent allowed the 3<sup>rd</sup> Respondent to debate the issue yet it was not true since the 2<sup>nd</sup> Respondent merely made a communication to the Assembly and at no time did the 2<sup>nd</sup> Respondent act ultra vires as she had no personal or any other interest in the matter.*

*(vii) The role of functus officio does not apply as the 2<sup>nd</sup> Respondent satisfied herself as to the veracity of the second letter from the chief whip.*

*(viii) It was the majority party which removed the Applicant and not the Respondents.*

*(ix) The majority party members usually have a whatsapp group which they use to communicate over matters of the Assembly and hence the Exparte Applicant was quite aware of the matter.*

4. Learned counsels agreed to canvass the Application by way of written submissions.

#### **Applicant's Submissions**

5. It was submitted by Mr. Mulyungi for the Ex parte Applicant that the 2<sup>nd</sup> Respondent acted ultra vires as she should not have accepted the second communication from the Majority Chief Whip after rejecting the first one since she became functus officio. He also submitted that the communication was not accompanied by minutes regarding the alleged removal of the Exparte Applicant. On the issue of jurisdiction, learned counsel submitted that this court has jurisdiction to entertain these proceedings since the 2<sup>nd</sup> Respondent's action in relaying the communication is quasi judicial in nature as it relates to removal of a leader for majority in the house and therefore this is amenable to judicial Review for which this court has jurisdiction. The case of **MARTIN NYAGA WAMBORA & 3 OTHERS =VS= SEPAKER OF SENATE & 6 OTHERS [2014] eKLR** was cited where the court of Appeal held that removal of a Governor from office is a constitutional and political process which is quasi Judicial and the court is to examine whether any procedural law was violated. Learned Counsel went on to submit that the Ex parte Applicant is aggrieved by the decision of the Respondent to communicate his alleged removal without verifying whether it complied with the set constitutional and legal threshold and therefore it is this court to determine the matter and not the Political Parties Tribunal.

#### **Respondent's submissions**

6. Miss Kamende for the Respondents submitted that this court has no jurisdiction to entertain the Application as this being a Judicial Review process the court should not review the merits of the decision and proceedings instead of the decision making process itself. Reliance was placed in the case of **MUNICIPAL COUNCIL OF MOMBASA =VS= REPUBLIC AND UMOJA CONSULTANTS LTD C.A NO. 185 OF 2001 AND REPUBLIC VS KRA EXPARTE YAYA TOWERS LTD [2008] EKLR** where it was held that Judicial Review is concerned with the decision making process and not with the merits of the decision.

It was also submitted that the Exparte Applicant should have taken his complaint before the Political Parties Tribunal pursuant to Section

40(1) of the Political parties Act No.11 of 2011 after exhausting the party's internal dispute resolution mechanism. The Exparte Applicant in rushing to court is a premature. Learned counsel sought reliance in the cases of **THE OWNERS OF MOTOR VEHICLE "LILLIAN S" =VS= CALTEX OIL (K) LTD (1989) KLR 14, THUO MATHENGE =VS= NDERITU GACHAGUA & 2 OTHERS [2013] eKLR, PAUL PARTOIRE OLE KAIKA =VS= ODM PETITION NO. 87 OF 2014, SPEAKER OF THE NATIONAL ASSEMBLY =VS= KARUME [2008] IKLR** where it was held that jurisdiction is everything without which a court can do nothing more particularly where there are other written laws providing the requisite forum for dispute resolution.

It was also submitted that the Exparte Applicant concealed material facts from the court when he alleged that the 2<sup>nd</sup> Respondent allowed the 3<sup>rd</sup> Respondent to debate and discuss the issue of the removal when the truth of the matter was that the 2<sup>nd</sup> Respondent merely made a communication to the 3<sup>rd</sup> Respondent pursuant standing orders 15(5) of the 3<sup>rd</sup> Respondent and was not a decision of the speaker of the Assembly who had no personal or any other interest in the matter of the House Majority leadership which the Applicant ought to address through the mechanisms of the political parties coalition in the Assembly to which he belongs. It was also contended by the Respondents that the Exparte Applicant was aware of the matter as the majority party members had a whatsapp group which they use for all communication and thus he cannot be heard to say that he was not made aware. Due to the said concealment of facts by the Exparte Applicant, it was submitted that this court should proceed to discharge the order of stay as it amounts to imposing a majority leader for the Machakos County Assembly.

It was finally submitted that as the 2<sup>nd</sup> Respondent did not participate in the decision making process, there is nothing for this court to be quashed. The Application should be dismissed with costs.

### **The issues and Determination**

7. I have considered the Exparte Applicants application dated 7<sup>th</sup> May, 2018 together with the rival affidavits and annexures. I have also considered the submissions by learned counsels for the parties. I find the following issues necessary for determination namely:-

***(i) Whether the action of the 2<sup>nd</sup> Respondent in communicating to the County Assembly the issue of the Exparte Applicant's removal amounted to a quasi judicial decision making warranting the same to be removed to this court for purposes of quashing.***

***(ii) Whether the Exparte Applicant concealed material facts from the court.***

***(iii) Whether this court has jurisdiction to entertain the matter.***

8. As regards the first issue, it is noted that the 2<sup>nd</sup> Respondent received communication from the members of the coalition parties in the Assembly to the effect that there were changes in the Majority Leadership. This was on the morning of the 17/4/2018. The 2<sup>nd</sup> Respondent duly perused the same and noted that it did not comply with the Assembly's Standing Order 15(5) as it had not been presented by the Chief Whip of the Majority in the Assembly. The chief whip of the majority later in the afternoon presented another communication in pursuance to the Standing Order 15(5) intimating that there were changes in the Majority Leadership. This was taken up by the 2<sup>nd</sup> Respondent who duly communicated the same to the Assembly. The copies of the communications and the handsard report availed to court confirms that the 2<sup>nd</sup> Respondent did satisfy did herself that the chief whip had done the right thing as per the Standing orders of the 3<sup>rd</sup> Respondent and she thus performed her duty by communicating to the Assembly. The handsard report shows that the 2<sup>nd</sup> Respondent played no role other than to pass the communication to the Assembly. As the matter involved issues of political parties, she did not take part in the voting and the decision on the matter of the removal of the Exparte Applicant. In fact the decision to remove him had been made by the members of the majority party outside the house and it was only relayed to the 2<sup>nd</sup> Respondent to communicate to the Assembly. Matters relating to political parties obviously was not part of her responsibility to *dab into*. As the decision had been made by the members of the majority outside the Assembly, I am thus unable to find that the 2<sup>nd</sup> Respondent was part of that decision making process. It is obvious that the members of the majority must have met elsewhere in their usual "*Kamukunji*" and made the resolution to kick out the Exparte Applicant as leader of majority since they claimed they had lost confidence in his leadership. That decision was not made by the 2<sup>nd</sup> Respondent whose only duty was to communicate to the house over the same after she had satisfied herself that the relevant standing orders had been complied with. The relevant standing orders 15(5) provides as follows:

***"The whip of the largest party or coalition of partes in the Assembly shall forthwith upon a decision being made under the Standing Order, communicate to the Speaker in writing the decision together with the minutes of the meeting and the list of the members who were present."***

The Exparte Applicant has claimed that the 2<sup>nd</sup> Respondent ought not to have entertained the second communication from the majority chief whip since she had become *functus officio*. Indeed the 2<sup>nd</sup> Respondent had verified the earlier communication and directed that it be made by the Majority Chief Whip. That was in the morning. If the majority chief whip presented the communication in the afternoon while the Assembly was in session, I do not see anything wrong on the part of the 2<sup>nd</sup> Respondent communicating the same to the Assembly as it was part of her duties to do so. The second communication was part of the business of the house. I find the 2<sup>nd</sup> Respondent not being allied to any political party in the conduct of the Assembly affairs had absolutely no personal or any other interest in the matter of the House Majority leadership. The 2<sup>nd</sup> Respondent had not become *functus officio* as claimed by the Exparte Applicant since the second communication had been presented by the relevant person as per the standing orders and that the Assembly was in session to conduct business for the day and further the 2<sup>nd</sup> Respondent had satisfied herself that the communication had been properly made in pursuance to the standing orders of the 3<sup>rd</sup> Respondent. The Exparte Applicant has made a raft of allegations against the 2<sup>nd</sup> Respondent for participating in his ouster as leader of majority in the house and further accused her of not rejecting the communication from the majority chief whip which was flawed in that the minutes and members who participated were suspect and further failing to ensure that the Exparte Applicant had been fully notified of the impending changes in the majority leadership. I find the Exparte Applicant in essence is questioning the merits or otherwise of the decision made by the members of the majority party and coalition in the Assembly in removing him as their leader. As the Exparte Applicant has moved this court by way of judicial Review, he is expected to be in the know that such forum is only concerned with the decision making

process but not with the merits of the decision for which he is now aggrieved. The court of Appeal in **MUNICIPAL COUNCIL OF MOMBASA =VS= REPUBLIC & UMOJA CONSULTANTS LIMITED C.A. NO. 185 OF 2001** held as follows:

***“Judicial Review is concerned with the decision making process, not with the merits of the decision: the court would concern itself with such issues as to whether persons affected by the decision were heard before it was made..... the court should not act as a court of Appeal over the decider which would involve going into the merits of the decision itself such as whether there was or there was not sufficient evidence to support the decision.”***

It has transpired from the averments of the Respondents in the replying affidavit that the members of the majority party or coalition in the Assembly had a common whatsapp group where communication was shared amongst themselves and therefore the Exparte Applicant was obviously aware of the intended removal. Again it is noted that the 2<sup>nd</sup> Respondent verified the two communications before satisfying herself that the correct procedure had been followed as per the standing order of the Assembly before communicating the matter before the Assembly. This then in my view formed part of the decision making process which I find was properly conducted. The majority members acted within their political parties dictates to remove the Exparte Applicant as leader of majority as they had lost confidence in him. The position of leader of majority was created by the relevant political parties whose members had the prerogative to interfere as and when the interest of the parties called for.

As the 2<sup>nd</sup> Respondent was merely performing her duties in communicating to the Assembly about the issue of the removal of the Exparte Applicant as leader of majority, I find the same did not amount to a quasi Judicial making exercise so as to warrant the same to be removed to this court for purposes of quashing. Hence the remedy sought by the Exparte applicant is not merited in the circumstances. In any event the Exparte Applicant’s grievances ought to be presented before his political party for redress pursuant to the provisions of the political parties Act No. 11 of 2011.

9. As regards the second issue, the Respondents in their replying affidavit vehemently denied the assertion by Exparte Applicant that the 2<sup>nd</sup> Respondent allowed the Assembly to debate and discuss the issue of majority leadership by asserting that the 2<sup>nd</sup> Respondent merely made a communication to the Assembly as it was part of her duties. I have perused the handsard proceedings availed and which does not contain anything to the effect that the matter of the removal of the Exparte Applicant was ever debated or discussed. It is clear that the decision to remove the Exparte Applicant as leader of majority had been made by the members elsewhere and that the party chief whip only passed the communication to 2<sup>nd</sup> Respondent whose duty was to merely verify and communicate to the House. The Exparte Applicant has also claimed that he was ambushed by the members while he was away in Dubai and therefore did not get adequate notice of the intention for his removal. The Respondents in their replying affidavit have countered the allegation by claiming that the majority members have a whatsapp group which they used to communicate. Indeed the use of whatsapp by various groups of persons is quite common in Kenya currently and is a quick mode of communication amongst members in the said whatsapp group. Both the National Assembly and Senate have been known to use whatsapp group for its members and therefore the County Assembly of Machakos is no different as regards use of whatsapp. I am therefore convinced that the Exparte Applicant had been made aware of the matter of his removal. It is also believed that the Exparte Applicant must have had some close confidants who would obviously brief him on the happenings in the political arena as far as the politics of the County Assembly of Machakos are concerned. The Exparte Applicant has also claimed that some of the members who participated in his removal do not belong to Wiper Democratic Party Movement and therefore the process was tainted with illegalities and malafides. The Respondents have countered this assertion in the Replying affidavit and averred that the members who participated not only belong to Wiper Democratic Party Kenya but comprise of the NASA coalition. Indeed the provisions of standing order 15 of the Machakos County Assembly clearly shows that members of coalition of parties can work together to achieve certain goals for their parties. The same provides as follows:-

#### **15. Leader of the Majority Party.**

***(1) The largest party or coalition of parties in the Assembly shall elect a member of the Assembly belonging to the party of coalition of parties to be the leader of majority party;***

***(2) In electing the member under paragraph (1) the largest party or coalition of parties in the Assembly shall take into account any existing coalition agreement entered into pursuant to the political parties Act;***

***(3) A member elected under paragraph (2) may be removed by a majority of votes of all members of the largest party or coalition of parties in the Assembly;***

***(4) The removal of a member from office under paragraph (3) shall not take effect until a member is elected in the manner provided under paragraph (1) in his or her place.***

***(5) The whip of the largest party or coalition of parties in the Assembly shall forthwith, upon a decision being made under this standing order, communicate to the Speaker in writing the decision together with the minutes was made.***

I have perused the minutes and list of the members as well as their respective political parties and note that all the members fall under the NASA coalition and they are in the coalition to promote the coalitions agenda in the Assembly. It is therefore apparent that the members who participated in the Exparte Applicant’s removal belonged to one coalition of parties namely NASA and this then puts into doubt the Exparte Applicant’s claim that some strangers had been allowed to participate in the meeting that deliberated on his removal.

The above observations lead me to come to the conclusion that the Exparte Applicant had concealed material facts from this court at the time he lodged the Ex Parte Chamber Summons in the first instance and as such I find he is undeserving of the orders of stay that were initially granted by this court.

10. As regards the third issue, the issue of jurisdiction is a key plank in the determination of the question whether this court has the requisite powers to hear and determine the matter herein. In the case of **THE OWNERS OF MOTOR VESSEL “LILIAN S” VS. CALTEX OIL (K) LTD [1989] KLR 14** the Court of Appeal held as follows:

***“...Jurisdiction is everything. Without it, a court has no power to make one step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending and a court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”***

The Respondents have urged this court to hold that the Ex Parte’s grievances lay elsewhere namely under the Political Parties Act No. 11 of 2011 on the ground that the removal of the Applicant as leader of majority by majority members in the Assembly was an internal matter involving a dispute if any between members of a political party. Indeed the Ex parte Applicant at the time he was elected the leader of majority in the Assembly the issue of the political party strength or coalition was the key determinant. During the removal of the Ex Parte Applicant by a majority of the members of the Political Party or Coalition, any disputes or disagreements ought to be addressed under the mechanisms provided for by the Political Parties Act 2011. The majority members in the Assembly removed the Ex Parte Applicant pursuant to Standing Orders 15 (3) of the Assembly and therefore the Applicants grievances would best be adjudicated under the Political Parties Act.

Learned Counsel for the Ex Parte Applicant has submitted that this court has jurisdiction to supervise the Respondents to ensure that the procedure for removal of the Ex Parte Applicant and the subsequent two communications was followed and that as long as the exercise is quasi judicial in nature the same is amenable to judicial review. However, I am not convinced by the said submissions for the simple reason that the speaker of the Assembly merely communicated to the Assembly the decision that had been made by the majority members. As long as the Speaker did not participate in the decision making process on the removal of the Ex Parte Applicant, there is nothing capable of being removed to this court for quashing. The Political Parties Act has clearly provided for the manner in which the dispute is to be resolved and it is improper for the Ex Parte Applicant to clothe the grievance as a Constitutional Violation yet the Political Parties Act provided for the dispute resolution mechanism. The Ex Parte Applicant’s political rights have been infringed as he has actually been removed as leader of majority party in the Assembly and therefore this recourse is in the Political Parties Act. I am guided by the Court of Appeal decision in the case of **SPEAKER OF THE NATIONAL ASSEMBLY VS. KARUME [2008] 1KLR E.P. 425** where it was held as follows:

***“There was considerable merit in the submission that where there was a clear procedure of the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should have been strictly followed.”***

The effect of the Ex Parte Applicant abandoning the forum provided by the Political Parties Act and moving this court will have the effect of imposing a leader of majority for the Machakos County Assembly. The majority of the members in the assembly have already ditched the Ex Parte Applicant for another member. It would be a chaotic situation to allow the Ex Parte Applicant hang onto the position which has been filled. He should proceed and present his grievance before the right forum as provided for under the Political Parties Act since this court lacks jurisdiction to entertain his claim.

11. In view of the foregoing, it is the finding of this court that the Ex Parte Applicant’s application dated 7<sup>th</sup> May, 2018 lacks merit. The same is ordered dismissed. The earlier orders of stay are hereby discharged and or vacated. Each party to bear their own costs.

It is so ordered.

**Dated and delivered at Machakos this 17<sup>th</sup> day of July, 2018.**

**D. K. KEMEI**

**JUDGE**

**In the presence of:**

Muema for Mulyungi - for the Applicant

Muema for Kamende for the 1<sup>st</sup> – 3<sup>rd</sup> Respondents

Josephine – Court Assistant