



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

PETITION CASE NO. 1 OF 2018

IN THE MATTER OF ARTICLES 1,2,3(1), 6, 10, 19, 20, 21, 22 ,23,2 7, 28, 38, 47, 160(1), 165(3)(b), 174, 178, 183,191,258(1), 260

AND

IN THE MATTER OF RULES 4,10,11,13, AND 20 OF THE CONSTITUTION OF KENYA (SUPERVISORY JURISDICTION AND PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOM) OF THE INDIVIDUAL, HIGH COURT PRACTICE AND PROCEDURAL RULES, 2013

AND

IN THE MATTER OF SECTION 8,10, AND 12 OF THE COUNTY GOVERNMENT ACT, ACT NO. 17 OF 2012 LAWS OF KENYA

AND

IN THE MATTER OF THE POLITICAL PARTIES ACT, NO. 11 OF 2011

AND

IN THE MATTER OF THE ELECTIONS ACT, NO. 24 OF 2011

AND

IN THE MATTER OF SECTION 46 OF THE COUNTY ASSEMBLY SERVICE ACT NO 24 OF 2017

AND

IN THE MATTER OF SECTION 8 OF THE PUBLIC APPOINTMNETS (COUNTY ASSEMBLIES APPROVAL) ACT, NO. 24 OF 2017 LAWS OF KENYA

AND

IN THE MATTER OF STANDING ORRDER NO. 2, 16, 152, 153 AND 185 OF THE COUNTY GOVERNMENT STANDING ORDERS OF THE COUNTY ASSEMBLY OF UASIN GISHU

BETWEEN

WERAMBO RAMADHAN ALI.....PETITIONER

VERSUS

THE COUNTY ASSEMBLY OF UASIN GISHU.....1ST RESPONDENT

SPEAKER OF THE COUNTY ASSEMBLY OF UASIN GISHU.....2ND RESPONDENT

CLERK OF THE COUNTY ASSEMBLY OF UASIN GISHU.....3RD RESPONDENT

VERSUS

RULING

The petitioner herein by way of Notice of Motion dated 13th February, 2018 seeks against the Respondents for orders that:-

- (1) The County Assembly of Uasin Gishu be barred from resuming business after a recess unless the Orange Democratic Movement is recognized as the Minority party and the applicant recognized as the leader of the Minority and Minority whip.
- (2) Interim injunctions do issue barring various committees and the Uasin Gishu County Assembly from conducting any business unless and until the petitioner is substituted for either *Hon. Isaac Kemboi* or *Hon. Sarah Malel* on the Uasin Gishu County Assembly Service Board pending inter-parties hearing.
- (3) The Respondents be ordered to conduct future house business with him in his capacity as the leader of minority and as the chairperson of the County Assembly Public Investment and Accounts Committee.

The application is premised on the grounds that:-

- (i) The applicant had been duly appointed as the leader of minority after the 2013 elections and also held other offices within the county government as a chair and a member in other instances. This changed after fresh elections were held in August 2013. He was elected as the sole opposition candidate under the ticket of the Orange Democratic Movement.
- (ii) Pursuant to *Section 10* and *Section 12* of the *County Government Act No. 17 of 2012*, the applicant expected to be appointed as the minority leader of which the Respondents have failed to.
- (iii) There is an introduced standing order which creates a "County Assembly Party" with a threshold of 5% representation for any political party in the house of the Uasin Gishu County Assembly, thereby openly discriminating against Orange Democratic Movement (ODM) and denying the people of Kiplombe the right to benefit from their preferred choice of leader.
- (iv) The Respondent House is in recess and is set to resume business without accommodating him as the minority leader and without properly constituting the select committees for which the membership of the leader of the minority is mandatory i.e. the house business selections and the appointment committees.
- (v) The Respondents are keen on denying the minority its oversight role over Government Business by refusing to recognize the leader of minority as the chairperson of the Public Investment and Accounts Committee, thereby curtailing the rule of law and the orders and balances provided by the minority leader over Public funds.

He avers that the sought interim reliefs will salvage and retain the sanctity and integrity of the house.

The Applicant, in his submissions stated issues for determination as follows:-

- (a) Whether the Respondents failed in carrying out their constitutional duties.
- (b) Whether the court has jurisdiction over the matter.
- (c) Who should meet the cost of the petition.

He further submitted that the supremacy of the Constitution demands that the County Assembly must operate within its limits. Article 108 of the Constitution provides that the leader of the minority shall be the person who is the leader in the National Assembly of the second largest party or coalition of parties. The said provision is enchoed under Section 10 of the County Government Act, 2012. The applicant was re-elected as the representative of ODM Kiplombe ward and by the standing orders of 18th September 2017, the applicant was nominated by ODM as the minority leader. He was however late in submitting notice anticipated by the standing order No. 16(1) whereby he ought to have written letters to the County Assembly and the other Respondents. He avers that he is the minority leader, and is entitled to the office of minority whip. He challenges the clause in the standing orders that political organizations should include a County Assembly party, which term created an additional threshold of 5% as representation for any political party in the 1st Respondent House. This unfairly denied the ODM which could not muster a 5% entitlement to the lion's share of membership which leads to failure of recognition of the applicant as the leader of the minority or the minority whip or as a member of the select committees where the leader of the minority is required to sit. The said standing orders are ambiguous. They define a minority party and a County Assembly party separately and therefore providing a contradiction in law for which the court should declare them unconstitutional.

On court's jurisdiction, the applicant avers that the court is entitled to intervene where the facts disclose a need to prevent violation of the rights and fundamental freedoms guaranteed under the constitution.

The Respondents submitted that they have not recognized the petitioner as the leader of the minority on the basis of the relevant laws and standing orders as the ODM Party does not qualify as a County Assembly Party so as to qualify to be the 2nd largest party or coalition of parties. Article 108 of the Constitution provides for the majority and minority party and their leaders in the National Assembly, and not the County Assembly. The application, is averred by the Respondents, is without basis as the petitioner urges the court to interfere with the internal arrangements of the County Assembly which is regulated by the standing orders of the 1st Respondent. Recognition of the applicant as minority party leader in his first term does not mean he automatically qualifies in the new term.

On separation of powers the respondents refers to *Article 175 (a)* of the *Constitution* and avers that the County Governments are based on democratic principles and the separation of powers and the matter to do with the appointment of the minority leader is within the jurisdiction of the County Assembly of Uasin Gishu County Assembly and is governed by the standing orders and the courts are obliged to exercise restraint. The courts, is averred, have no basis in interfering with the internal arrangements of the county assembly and should therefore not entertain the application. There is no mandatory constitutional provision for leader of minority party in the county assembly and the violated constitutional provision, by the standing orders, is not disclosed by the applicant. It is the contention of the respondents that the position of committee chairpersons are elective and not appointive, and the applicant should have offered himself as a candidate for his election into the position. He failed to do so and cannot now claim to have been discriminated. He cannot appoint himself to the office of the leader of minority and minority whip. An attempt to do so is outrageous and illegal. The orders sought cannot be granted as the applicant have suffered no illegality, irrationality or procedural impropriety. The court was therefore urged by the Respondent to dismiss the application with costs to the Respondents.

In determining whether this court has jurisdiction to hear the petition and the application, the finding in the case of *County Assembly of Kisumu and 2 others –vs- Kisumu County Assembly service board and 6 others, Civil Appeal No. 17 and 18 of 2015*, by the Court of Appeal, is of great assistance. The court observed that:-

“Understanding of, and respect for, the principle of separation of powers is the sine qua non of a democratic state. The essence of the doctrine of separation of powers is that the Executive, the legislative and the judiciary constitute three separate and independent arms of government with different and exclusive responsibilities. The legislative function, that is the enactment of laws, belongs to the legislature; the implementation of law and government policies is the role of the Executive; and interpretation and enforcement of the rule of law is the mandate of the Judiciary. By virtue of this separation, it is not permissible for any branch to interfere with the other’s spheres. With regard to the issue before us, under the doctrine of separation of powers, the court should not interfere with the freedom of speech and debate of legislative bodies. The court must resist unwarranted intrusion into internal procedures of parliament and the County Assemblies unless they act unconstitutionally. As this court stated in *Martin Nyaga Wambora and other –vs- Speaker of the Senate and others*, where it is shown that in conducting its proceedings, a legislative authority has acted within the confines of the Constitution, courts have no jurisdiction and ought not to interfere simply because anybody is aggrieved by a decision passed by the legislative authority. However, where they have not, the court can interfere. This is because the legislative assemblies, like all other organs of state and indeed every person, must act in accordance with the Constitution”

In this application there is a claim by the applicant/petitioner that the Respondents have not acted within the confines of the Constitution. This court has therefore jurisdiction to determine that of which is the key issue in the filed petition.

However the application must be guided by the finding in the case of *Giella –vs- Cassman Brown (1973) EA 358* where the court considers:

- (i) Whether the applicant has established a prima facie case with a likelihood of success;
- (ii) Whether the applicant stands to suffer irreparable harm; and if in doubt the court to consider
- (iii) On which side does the balance of convenience lies.

The application fails in all the three tests. The Applicant has failed to establish a prima facie case with a likelihood of success. He does not stand to suffer irreparable harm if the sought orders are not granted. The balance of convenience is heartily against him as the application seeks to stop business of the County Government of Uasin Gishu of which if effected can cause gave consequences to the residents of Uasin Gishu County. It would be against public good. The application lacks merit and is dismissed with costs to the Respondents. Parties should take a date for the hearing of the petition.

S. M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 19th day of November, 2018.

In the presence of:-

Mr. Yego for the respondent

Ms Ann - Court assistant