



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION**

**ACEC MISC. APPLICATION NO. 42 OF 2016**

***FORMERLY JR MISC. APPL. NO. 527 OF 2016***

**HON. ELIZABETH MANYALA.....1<sup>ST</sup> APPLICANT**

**HON. FLORENCE ATTEMBO.....2<sup>ND</sup> APPLICANT**

**HON. TABITHA NDIGIRIGI.....3<sup>RD</sup> APPLICANT**

**HON. ROSE KULA.....4<sup>TH</sup> APPLICANT**

**HON. DANIEL ORIA.....5<sup>TH</sup> APPLICANT**

**HON. ALEXINA MOODY.....6<sup>TH</sup> APPLICANT**

**HON. PETER OWERA.....7<sup>TH</sup> APPLICANT**

**HON. GARI MAURICE.....8<sup>TH</sup> APPLICANT**

**HON. JOYCE BOCHA.....9<sup>TH</sup> APPLICANT**

**HON. CATHERINE OPIYO.....10<sup>TH</sup> APPLICANT**

**HON. WILFRED ODALLO.....11<sup>TH</sup> APPLICANT**

**HON. KEN NGONDI.....12<sup>TH</sup> APPLICANT**

**HON. PETER IMWATOK.....13<sup>TH</sup> APPLICANT**

**VERSUS**

**ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT**

**ETHICS & ANTI-CORRUPTION COMMISSION.....2<sup>ND</sup> RESPONDENT**

## JUDGEMENT

1. By way of Notice of Motion dated 28<sup>th</sup> November, 2016, the Applicants moved the Court seeking the following Orders;

*a. An Order of Certiorari removing into this Honourable court for the purposes of the same being quashed the Notices dated 1<sup>st</sup> November, 2016 issued by the Ethics and Anti-Corruption Commission to the ex parte Applicants to record statements at the Ethics and Anti-Corruption Commission arising from proceedings before the Nairobi City County Assembly Chambers on the 29<sup>th</sup> September, 2016.*

*b. An Order of Prohibition to prohibit the 2<sup>nd</sup> Respondent and the State from initiating any investigations or prosecutions against the ex parte Applicants arising from proceedings before the Nairobi City County Assembly on the 29<sup>th</sup> September, 2016.*

*c. Costs of this suit; and*

*d. Any other remedy that the court deems fit and just.*

### THE APPLICANTS' CASE

2. The Application is premised on the grounds in the Statutory Statement and supported by the Affidavit of the 1<sup>st</sup> Applicant, **Hon. Elizabeth Manyala**.

3. The Ex-parte Applicant together with thirteen (13) others are Members of Nairobi City County Assembly.

4. She deponed that as Members of the Nairobi City County Assembly, they exercise part of their mandate in plenary sittings of the Assembly where they debate Motions or any other matters brought before the Assembly for considerations. That they are subject to the Assembly's Standing Orders.

5. She deponed that the 2<sup>nd</sup> Respondent has through various Notices summoned the Ex-parte Applicants to appear before it on various dates, for purposes of investigations and to record statements on their conduct before the Nairobi City County Assembly on 29<sup>th</sup> September, 2016.

6. She further stated that the conduct the subject of the investigation arose in the course of and during proceedings before the Nairobi City County Assembly. To them, the said proceedings are privileged as envisaged in Article 196 of the Constitution, County Government Act and the National Assembly (Powers and Privileges) Act.

7. She deposed that the issuance of the Notices was contrary to the principles and objects of devolution and the doctrine of separation of powers.

That the Nairobi City County Assembly Power and Privileges Committee has the mandate to deal with any misconduct by members of the County Assembly.

8. **Mr. Ochieng** for the Ex-parte Applicants submitted that Section 16 and 17 of the County Government Act 2012 and Article 196 of the Constitution confirmed that proceedings before the County Assembly are privileged. He referred the Court to the case of **Francis Matheka & 10 others –vs- DPP & Another 2015 eKLR** where the court addressed the question of immunities and privileges and the rationale behind them. He also referred to the case of **Rosemary Mule –vs- County Assembly of Machakos & Another [2016] eKLR** on the same subject.

9. It was Mr. Ochieng's submission that the 2<sup>nd</sup> Respondent does not have the Jurisdiction to open an inquiry in regard to the proceedings in County Assemblies. That any inquiry as to the constitutionality of

its proceedings is the mandate of the High Court by dint of Article 165 (3) (d) (ii).

10. He submitted that issues of discipline are handled by the County Assembly Powers and Privileges Committees. He referred to the case of ***Council of Governors & Others –vs- the Senate [2015] eKLR*** to support his argument.

### **1<sup>ST</sup> RESPONDENT'S CASE**

11. The 1<sup>st</sup> Respondent elected not to make any submissions.

### **2<sup>ND</sup> RESPONDENT'S CASE**

12. The 2<sup>nd</sup> Respondent opposed the Application vide the Replying Affidavit by ***Derrick Kaisha Jumba*** sworn on 14<sup>th</sup> December, 2016. The deponent is an investigator with the 2<sup>nd</sup> Respondent. He deponed that the 2<sup>nd</sup> Respondent has a legal mandate by dint of Section 4 (2) of the Leadership & Integrity Act 2012 to oversee and enforce the implementation of the said Act. That the Ex-parte Applicants being Members of the Nairobi City County Assembly are State officers and are subject to the provisions of Chapter Six of the Constitution and the laws enacted pursuant thereto.

13. That on 29<sup>th</sup> September, 2016, the Ex-parte Applicants were engaged in physical fights at the Nairobi City County Assembly while the said County Assembly was in session. This incident was captured by the print and electronic media. The conduct by the Ex-parte Applicants is contrary to the provisions of Articles 73 (1) (a) (ii), (iii) and (iv) and 75 (1) (c) of the Constitution.

14. He deponed that Notices were lawfully issued to the Ex-parte Applicants under Section 42 (10) of the Leadership & Integrity Act 2012. Further that the parliamentary privilege is limited to words spoken before or written in a report to the Assembly or Committee thereof. That the conduct by the Ex-parte Applicants was criminal in nature and so was not privileged.

15. He averred that what the 2<sup>nd</sup> Respondent was doing was just an investigation and the outcome is unknown. He also states that not all the Ex-parte Applicants signed the authority allowing the 1<sup>st</sup> Ex-parte Applicant to sue on their behalf. For that reason, he asked the Court to strike out the names of those who did not sign the authority.

16. ***Mrs. Litoro*** for the 2<sup>nd</sup> Respondent submitted acknowledging the powers/privileges donated by Parliament to the County Assembly. She however, stated that the extent of these powers had to be determined. That the notices (EM1) were neither civil/criminal and they do not impute any guilt on the parties. The conduct the 2<sup>nd</sup> Respondent wanted to investigate involved physical fights and was covered in the media and print.

17. She submitted that the Ex-parte Applicants are bound by the Constitution, the Leadership & Integrity Act and their own code (DKJ1). She referred to the case of ***Francis Matheka*** (supra) where the Applicants were engaged in unethical acts, and it was held that the law protected the Applicants against speech and not criminal acts. She also referred to Section 23 (f) of the National Assembly Powers and Privileges Act.

18. It was her submission that it had not been shown why the 2<sup>nd</sup> Respondent should not investigate the Applicants. That the 2<sup>nd</sup> Respondent could not be stopped from carrying out its constitutional mandate.

She raised issue with the Ex-parte Applicants' who had not signed the authority allowing the 1<sup>st</sup> Ex-parte Applicant to swear the affidavit on their behalf and asked the court to remove their names from the Application.

19. Finally, she submitted that the Privileges Committee of the Nairobi City County Assembly had not

taken over this matter for any action. That even if it did, it could not handle it impartially as one of its Members one **Hon. Beatrice Kwamboka** had accompanied one of the Ex-parte Applicants **Hon. Alexina Moody** to the Ethics & Anti-Corruption Commission.

20. In a rejoinder, Mr. Ochieng submitted that the aim of the Notices was to open an inquiry, yet any issues arising from the proceedings had to be dealt with by the Privileges Committee. That failure by the Privileges Committee to act can be challenged.

He still emphasized that the **Francis Matheka case** (supra) emphasized on the importance of Parliamentary Privileges.

21. On removal of the names of some of the Ex-parte Applicants, he submitted that this would go against Article 27 (1), Articles 159 (2) (d) of the Constitution. He confirmed that the Privileges Committee had yet to take up the matter herein.

## **DETERMINATION**

22. I have considered the Application, the Affidavits filed in support of and in opposition to the application together with the submissions. Two issues emerge for determination, namely;

- i. Whether the names of the Ex-parte Applicants who did not sign the authority letter should be removed from the Application;
- ii. Whether the 2<sup>nd</sup> Respondent's investigation of the Ex-parte Applicants conduct in the County Assembly on 29<sup>th</sup> September, 2016 violates the latter's immunity against civil and/or criminal proceedings.

***Issue No. (i): Whether the names of the Ex-parte Applicants who did not sign the authority letter should be removed from the Application;***

23. The Ex-parte Applicants are thirteen (13) in number. It's alleged that only three (3) of them signed the authority for Hon. Elizabeth Manyala to swear the affidavit in support of the proceedings.

The authority filed in Court shows the following to have signed it;

- Hon. Joyce Nambire
- Hon. Alexina Moody
- Hon. Tabitha Ndigirigi
- Hon. Peter Owera
- Hon. Catherine Okoth
- Hon. Florence Alembo

The total of those who signed are six (6) and not three (3) as earlier stated. It has not been explained why the rest of them did not sign. This issue was raised in the Replying Affidavit by Derrick Kaisha Jumba but there is no response to it.

24. It was the Respondent's submission that on account of failure by some of the Ex-parte Applicants, to sign the authority to swear the affidavit, the names of the affected Applicants should be removed from the pleadings. The Applicants submitted that striking out the names of some Ex-parte Applicants would go against the tenets of Articles 27 (1) and 159 (2) (d) of the Constitution.

Article 27 (1) provides;

***“Every person is equal before the law and has the right to equal protection and equal benefit of the law”.***

Article 159 (2) (d) provides;

***“justice shall be administered without undue regard to procedural technicalities”***

Mr. Ochieng asked the Court to disregard the technicalities and retain the non-compliant Applicants in the Pleadings.

25. Even without dealing with the technicalities, I wish to point out that the matter before me is the substantive Judicial Review Application by way of Notice of Motion. The Application for leave to file for Judicial Review was made on 8<sup>th</sup> November, 2016. It is in that Application that the authority to swear an affidavit was filed. My sister **Justice Aburili** who dealt with it then, being satisfied with what was presented to her, granted leave to the Applicants to file the Judicial Review. The leave having been granted, I think it is only fair that the Court overlooks that anomaly and moves on to deal with the substantive issue which is whether the Applicants are deserving of the Orders sought or not.

***Issue No. (ii): Whether the 2<sup>nd</sup> Respondent’s investigation of the Ex-parte Applicants conduct in the County Assembly on 29<sup>th</sup> September, 2016 violates the latter’s immunity against civil and/or criminal proceedings.***

26. The 2<sup>nd</sup> Respondent is the Ethics and Anti-Corruption Commission established under the Ethics & Anti-Corruption Commission Act 2011 pursuant to Article 79 of the Constitution for purposes of ensuring compliance with and enforcement of the Provisions of Chapter Six of the Constitution.

The Leadership & Integrity Act 2012 and the Leadership & Integrity Regulations 2015 were enacted and made pursuant to the provisions of Article 80 of the Constitution to establish procedures and mechanisms for the effective administration of Chapter Six of the Constitution and for connected purposes.

Under Section 4 (2) of the Leadership and Integrity Act, 2012 the 2<sup>nd</sup> Respondent has the legal mandate of overseeing and enforcing the implementation of the said Act.

27. The Ex-parte Applicants are Members of Nairobi City County Assembly. Being Members of the County Assembly they are holders of a State Office hence State Officers by virtue of Article 260 of the Constitution. As State officers, they are subject to the provisions of Chapter Six of the Constitution, the Leadership & Integrity Act and its Regulations.

They are further subject to the Leadership and Integrity Code for Nairobi City County Assembly which they committed themselves to by signing (DKJ‘2’)

28. The position of an Honourable Member of a County Assembly is clearly set out in the above provisions of the Law. To ensure that such an Honourable Member is accorded a conducive environment within which to carry out his/her mandate and the power that goes with that office, the Law has set out privileges/immunities for him/her.

Article 196 (3) provides;

***“Parliament shall enact legislation providing for the powers, privileges and immunities of county assemblies, their committees and members”.***

Section 16 of the County Government Act provides;

***“No civil or criminal proceedings may be instituted in any court or tribunal against a member of a county assembly by reason of any matter said in any debate, petition, motion or other proceedings of the county assembly”.***

Section 17 of the same Act provides;

***“The national law regulating the powers and privileges of Parliament shall, with the necessary modifications, apply to a county assembly”.***

29. The National Assembly Powers and Privileges Act regulates the powers and privileges and immunities of Members of Parliament. At Section 4, it provides;

***“No Civil or Criminal Proceedings shall be instituted against any Member for words spoken before, or written in a report to the Assembly or a Committee or by reason of any matter or thing brought by him therein by petition, Bill, resolution, motion or otherwise.”***

30. What flows from the above provisions of the law is that while carrying out their lawful duty in the County Assembly, the Applicants are insulated against civil and criminal proceedings. Section 4 of the National Assembly Powers and Privileges Act and Section 16 of the County Government Act are very specific on what the Honourable Members are insulated from in the course of proceedings.

31. **Odunga J.** in the case of **Francis Matheka & 10 Others –vs- DPP and Another [2015] eKLR** had this to say at paragraph 52 about these provisions;

***“A reading of Section 4 of the Privileges Act clearly reveals that the immunity be it in civil or criminal proceedings is limited to words spoken before or written in a report to, the Assembly or a Committee, or by reason of any matter or thing brought by him therein by petition, Bill, resolution or otherwise. It is therefore clear that by far, the most important right accorded to Members of the House is the exercise of freedom of speech in parliamentary proceedings. This right is a fundamental right without which, they would be hampered in the performance of their duties. It permits them to speak in the House without inhibition, to refer to any matter or express any opinion as they see fit, to say what they feel needs to be said in the furtherance of the national interest and the aspirations of their constituents.”***

32. The privileges of Parliament and by extension of the County Assembly are not meant to give any special protection to the Hon. Members but are meant to create a conducive environment to enable them carry out their mandate. The cases of (1) **Raja Ram Pal –vs- Speaker, Lok Sabha & Others Writ Petition (Civil) 1 of 2006**; (2) **Canada (House of Commons) –vs- Vaid [2005] 1 SCR 667** also speak to this.

33. Bearing all the above in mind, I now wish to consider what made the Ex-parte Applicants move the Court in this matter. They were served with Notices to appear before the Ethics & Anti-Corruption Commission to shed light and record statements in relation to their conduct at the Nairobi City County Assembly Chambers on 29<sup>th</sup> September, 2016. In the Replying Affidavit sworn by Derrick Kaisha Jumba, the 2<sup>nd</sup> Respondent states that the Ex-parte Applicants are alleged to have engaged in physical fights at Nairobi City County Assembly on 29<sup>th</sup> September, 2016 while the said County Assembly was in session. This aforesaid conduct was captured by the print and electronic media. These averments have not been challenged by the Ex-parte Applicants.

34. The 2<sup>nd</sup> Respondent in carrying out its constitutional mandate was investigating the matter. The Applicants contend that they cannot be investigated by the 2<sup>nd</sup> Respondent because their conduct is privileged. They claim that any mis-conduct by them can only be investigated and dealt with by the Powers and Privileges Committee of the Nairobi City County Assembly. There is no evidence that the said Committee has attempted to take any steps in handling this matter.

35. For the Ex-parte Applicants to plead “**privilege and immunity**”, they must show that whatever is alleged against them, squarely falls within Section 4 of the National Assembly Powers & Privileges Act and, Section 16 of the County Government Act, which provisions I have produced above. Anything outside those provisions cannot be said to be privileged. In the case of **The Council of Governors & Others –vs- The Senate [2015] eKLR**, it was held;

***“To our mind, this court has the power to inquire into the constitutionality of the actions of the Senate notwithstanding the privilege of inter alia, debate accorded to members of Senate. That finding is fortified under the principle that the Constitution is the Supreme Law of this country and the Senate must function within the limits prescribed by the Constitution permit it to do, it cannot seek refuge in illegality and hide under the doctrine of Parliament Privilege”***

It therefore follows that anything found not to be privileged must be dealt with under the relevant provisions of the law.

36. To avoid any illegalities being committed in the disguise of proceedings in parliament or the County Assembly, Section 23 (d) to (f) of the National Assembly Powers and Privileges Act provides:

***“Any person who:***

***(d) assaults, obstructs, molests or insults any member coming to being within or going from the precincts of the Assembly, or endeavours to compel any member by force, insult or menace to declare himself in favour of or against any proposition or matter pending or expected to be brought before the Assembly or any Committee; or***

***(e) assaults, interferes with, molests, resists or obstructs any officer of the Assembly while in the execution of his duty; or***

***(f) creates or joins in any disturbance which interrupts or is likely to interrupt the proceedings of the Assembly or any Committee while the Assembly or Committee is sitting; shall be guilty of an offence and liable, on conviction before a subordinate court of the first class, to a fine not exceeding five hundred shillings or to both such fine and imprisonment.”***

The enumeration of these offences confirms that there is a limitation to the application of these privileges.

37. The Ex-parte Applicants seem to be telling this Court that anything done in the County Assembly or during proceedings whether unlawful or illegal should never be investigated because of the privileges and immunities to the Hon. Members. If in the course of proceedings at the Assembly, a fight breaks out and some members are seriously injured or even die, or property is destroyed, what would happen? Is fighting to be taken as part of proceedings in the County Assembly? Would the investigating agencies fold their hands and say they cannot take any action or investigate because the Hon. Members are insulated against any civil or criminal proceedings? Could that not amount to elevating the Honourable Members above the law? That is not what Parliamentary powers and privileges is about. Criminal acts are not covered under Parliamentary Privileges.

38. Odunga J. sums this up very well in the Francis Matheka case (supra) when he states at paragraph 53 – 55 as follows;

***“53. It is to be recognised that privilege essentially belongs to the House as a whole; individual Members can only claim privilege insofar as any denial of their rights, or threat made to them, would impede the functioning of the House. In addition, individual Members cannot claim privilege or immunity on matters that are unrelated to their functions in the House. It follows that the special privileges of Members are not intended to set them above the law; rather, the intention is to give them certain exemptions from the law in order that they might properly execute the responsibilities of their position. In this context, it would be difficult to envisage a***

*criminal act which would fit into or be a part of a parliamentary proceeding save for those contemplated under section 4 of the Privileges Act as read with section 16 of the CGA. A criminal offence which immediately comes to one's mind in this respect is criminal libel. Similarly, the right to freedom from interference in the discharge of parliamentary duties does not apply to actions taken by Members outside parliamentary proceedings which could lead to criminal charges. No Member may claim immunity from arrest or imprisonment on such charges. Whereas the Speaker must always ensure that the privileges of the House and its Members are respected, he must at the same time ensure that the privileges accorded to Members are not misused to obstruct justice.*

*54. Therefore, it goes without saying that if Members are charged with infractions of the criminal law other than those contemplated under the two provisions cited above, they must abide by the due process of law. To do otherwise would show contempt for the Kenyan Constitution and the system of justice. Under Article 27 of the Constitution, every person is equal before the law and has the right to equal protection and equal benefit of the law. Therefore the powers, privileges and immunities granted to the legislative assemblies ought to be enjoyed only to the extent permitted by the law and ought not to be abused for reasons outside the ambit of the law in order to commit offences which are not covered by the privilege.*

*55. Members of Parliament and by extension County Assembly are presumably elected by virtue of their development records coupled with oratory skills and attributes rather than their combative capabilities and endowments. Article 73(1)(a)(iii) and (iv) of the Constitution provides that authority assigned to a State officer is a public trust to be exercised in a manner that brings honour to the nation and dignity to the office and promotes public confidence in the integrity of the office while Article 75(1)(c) provides that a State officer shall behave whether in public and official life, in private life, or in association with other persons, in a manner that avoids demeaning the office the officer holds. The Legislative Assembly, be it at national or county level, in my view is an honourable institution as opposed to a sparring arena hence the reason its members are referred to as "Honourable Members" and the House "August House". They are expected, in the conduct of their honourable duties, to behave in a distinguished, respectable and virtuous manner. To do otherwise would be to strip themselves of otherwise lawful immunities that go with their honoured status in the society."*

39. I find that the Ex-parte Applicants have failed to demonstrate that the acts complained of are privileged, and that the 2<sup>nd</sup> Respondent is acting beyond its mandate by issuing the said Notices to them. It has also not been shown that the issuance of the said Notices has caused any violation of their constitutional rights. In the failure of any of the above being proved, the Court declines to interfere with the Mandate of the 2<sup>nd</sup> Respondent in carrying out investigations in this matter. To do so would go against the public interest and the Constitution which we have all sworn to uphold.

40. In the premise, I find no merit in the Notice of Motion dated 28<sup>th</sup> November, 2016 which I hereby dismiss with costs.

Signed, Dated and delivered this 16<sup>th</sup> day of *February, 2017* at *Nairobi*

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**HEDWIG I ONG'UDI**

**HIGH COURT JUDGE**