



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

PETITION NO. 11 OF 2014

IN THE MATTER OF: REMOVAL OF THE MACHAKOS COUNTY GOVERNMENT
IN THE MATTER OF: REMOVAL/DISCHARGE OF COUNTY ASSEMBLY MEMBERS
FROM COMMITTEES

AND

IN THE MATTER OF: THE COUNTY GOVERNMENT ACT SECTIONS 14, 16 AND 17

AND

IN THE MATTER OF: THE CONSTITUTION OF KENYA ARTICLES 27, 33, 26, 38, 43 AND 47

AND

IN THE MATTER OF: THE CONSTRUCTION OF KENYA PRACTICE AND PROCEDURE
RULES, 2013

BETWEEN

DOMINIC NDONYE MAITHYA.....1ST PETITIONER

STEPHEN MUTHUKA.....2ND PETITIONER

CORNELIUS MUSYOKA KITHEKA.....3RD PETITIONER

PETER NZOKA.....4TH PETITIONER

VERSUS

THE MACHAKOS COUNTY ASSEMBLY.....1ST RESPONDENT

THE SPEAKER, MACHAKOS COUNTY ASSEMBLY.....2ND RESPONDENT

THE CLERK, MACHAKOS COUNTY ASSEMBLY.....3RD RESPONDENT

RULING OF THE COURT

1. The Petitioners herein filed a Petition dated 1st July, 2014 alleging violation of their fundamental rights

and freedoms under the constitution of Kenya 2010 and sought for the following reliefs:-

(1) A declaration that the removal and or discharge of the Petitioners and other members of the Assembly from the various committees was null and void and that the resultant elections and/or nominations to replace the Petitioners, and other members was illegal null and void.

(2) A permanent order of injunction restraining all persons elected and/or nominated to replace the Petitioners and other members from conducting any business in the Assembly and from discussing, debating or preparing any reports unless there is compliance with the law and in particular standing order Number 157.

(3) Costs of the Petition be awarded to the Petitioners.

2. The Petitioner's case is that the 1st and 2nd Respondents participated in the removal or discharge of the Petitioners and other members of the County Assembly from membership to various committees established by the County Assembly and had the 1st Petitioner illegally removed as the chairperson of the Public Accounts committee. The Petitioners also averred that the removal or discharge was in complete violation of the Constitution and the County Government Act and Standing Order Number 158 of the 1st Respondent and thus the report thereof was null and void. The petitioners further complained that the actions of the Respondent's was actuated by malice and calculated to deny the Petitioners the opportunity to take part in upcoming vetting of chief officers and from raising issues of corruption involving the 2nd Respondent and others who had been adversely mentioned in a report of the Public Accounts Committee headed by the 1st Petitioner and there was clear abuse of powers by the Speaker and the Committee on selection.

The Petitioners aver that their rights under the constitution particularly Article 23 (2), 3, 175 have been violated in that they were not accorded fair administrative action and now call upon this court to allow the Petition.

3. The Respondents upon being served with the Petition only entered appearance through the firm of Kilukumi & Company Advocates and who subsequently, filed a Notice of Preliminary Objection dated 10th July 2014 seeking for an order of dismissal of the Petitioner's Petition dated 1st July, 2014 in *limine* on the following grounds namely:-

(1) The court has no jurisdiction to entertain these proceedings by virtue of the provisions of Article 196(3) of the Constitution of Kenya, 2010 ("the Constitution") read together with the provisions of Section 17 of the County Government Act, 2012 and the provisions of Section 12 & 29 of the National Assembly (Powers & Privileges) Act.

(2) The issue of removal of the Petitioners and other members of the County Assembly from membership to various committees is an internal matter for the County Assembly regulated and governed by the applicable Standing Orders and not amenable to the Court's jurisdiction.

(3) The power to discharge a member from a committee is vested in the political party that nominated such a member to a Select Committee by virtue of Standing Order No. 157 of the Machakos County Assembly, Interim Standing Orders, subject to written notice being received by the Speaker.

(4) The decisions of the political parties represented in the County Assembly are communicated to the Assembly, the Speaker and the Clerk by the leader of the Majority Party and the leader of the Minority Party together with their respective Whips, given that "strangers" are not allowed into the debating chamber of the County Assembly.

(5) The proceeding offends the doctrine of separation of powers encapsulated in Article 175 (a) of the Constitution.

(6) Articles 23 (2) of the Constitution cited by the Petitioners does not confer upon them any constitutional right of fundamental freedom in the bill of Rights capable of being violated. Accordingly, no cause of action is disclosed by the Petition.

(7) The Petition does not raise any constitutional issues whatsoever capable of being determined by the court.

4. Submissions:

Parties agreed to dispose of the Preliminary objection by way of written submissions. However it is only counsel for the Respondents who filed submissions while counsel for the Petitioner did not. Counsel for the Respondent submitted that the basis of the preliminary objection was the fact that this court lacks jurisdiction to entertain this petition because the activities of the 1st Respondent are protected by the separation of powers between the arms of Government and more particularly Article 196(3) of the Constitution and Section 17 of the County Government Act 2012. Counsel further submitted the removal of the Petitioners and other members of the County Assembly from membership to various committees is an internal matter for the Assembly regulated and governed by the applicable Standing Orders as well as powers and privileges enjoyed by the National Assembly and by all County Assemblies by dint of the provisions of Section 12 and 29 of the Privileges Act and as such the same are not amenable to this court's jurisdiction as it would be tantamount to interfering with the internal matters of county Assemblies. Counsel further submitted that the Petitioner's claim that their individual rights and fundamental freedoms in the Bill of Rights have been infringed is not acceptable since they have not raised a single Constitutional issue fit for determination by this court and further that they have not indicated on the body of the Petition the specific provisions violated. Counsel submitted that the provisions of Article 23(2) of the Constitution cited by the Petitioners does not confer upon them any constitutional right or fundamental freedom in the Bill of Rights capable of being violated and therefore they have not proved how their removal and/or discharge from membership to various committees of the Assembly constitutes a breach of their fundamental rights and freedoms. Finally, counsel submitted that the Petitioners were obliged to have demonstrated in the body of the Petition and the supporting affidavit in what manner or mode the denial, violation or infringement of rights has been occasioned by the respondent. Counsel relied on the following cases:-

(1) Owners of Motor Vessel "Lillians" =Vs= Caltex Oil (K) Ltd [1989] KLR 14.

(2) Ngogo Vs Kaparo & Others [2007] eKLR

(3) Mumo Matemu =Vs= Trusted Society of Human Rights & 5 Others [2013] eKLR.

(4) John Harun Mwau & 3 Others =Vs= Attorney General (2012) eKLR.

Counsel urged this Court to uphold the preliminary Objection and strike out the Petition dated 1st July, 2014 with costs to the Respondents.

5. Determination:

I have considered the submissions of the Respondents, I have also considered, the various authorities cited in support of the preliminary objection. From the outset I need to point out the fact that the Petitioners or their learned counsel did not file a reply to the Respondents preliminary objection either by way of grounds of opposition or even submissions. It would therefore appear that the Respondents preliminary Objections aforesaid remains unchallenged. Even though this might be the position, this court is under a duty to analyze the preliminary objection raised herein and find out if the same is merited in view of the fact that the Petitioner's have raised issues to do with violation of fundamental freedoms in the Bill of Rights. The Respondents preliminary objection is intended to determine this suit at this stage. Indeed the purpose of a Preliminary objection once raised is to help finally dispose of a matter if all the pleadings are deemed correct. This is the position as stated in the famous case of MUKISA BISCUIT MANUFACTURING COMPANY LIMITED =VS= WEST END DISTRIBUTORS [1969] EA 696.

The issues for determination herein are as follows:

(1) Whether this court has jurisdiction to entertain this petition.

(2) Whether the removal and/or discharge of the Petitioners from committees by the Respondents was proper and legitimate.

As regards the first issue it is imperative for a court to address itself thereon once the same has been raised by the parties or even by the court of its own motion. The issue of jurisdiction has been stated by the Court of Appeal in the case of OWNERS OF MOTOR VESSEL "LILLIANS" =VS= CALTEX OIL (K) LTD [1989] KLR 14 where Justice Nyarangi stated:-

"Jurisdiction is everything, without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

In order to establish whether this court has no jurisdiction to entertain this Petition, it is necessary to have a look at some of the provisions which guide the activities of the Respondents as submitted by their learned counsel. They are as follows:

i. Article 196(3) constitution

"Parliament shall enact legislation providing for the powers, privileges and immunities of County Assemblies, their committees and members."

ii. Section 17 County Government Act 2012

"The National law regulating the powers and privileges to parliament shall, with the necessary modifications, apply to a County Assembly".

iii. Section 12 of the Privileges' Act provides:-

"No proceedings or decisions of the Assembly or the committee of Privileges acting in accordance with this Act shall be questioned in any court."

iv Section 29 of the Privileges Act provides:-

"Neither the Speaker nor an officer of the Assembly shall be subject to the jurisdiction of any court in respect of the exercise of any power conferred on or vested in the Speaker or in speaker or such officers by or under this Act or the Standing Orders."

v. Section 14 County Government Act provides:-

"County Assemblies to establish committees through the Assembly Standing Orders and constitute business transacted in the Assembly....."

From the above provisions, it is clear that all County Assemblies enjoy some powers and privileges as well as immunities. The businesses of County Assemblies are usually transacted through their respective Standing Orders and are for all intents and purposes internal matters. The doctrine of separation of powers is quite essential in a democracy so that each arm of government is independent from the other. The courts will only intervene where there are clear constitutional violations of certain rights and liberties. The Petitioners herein have moved to this court alleging that their constitutional rights have been infringed or violated when the Respondents removed or discharged them from certain committees of the 1st Respondents. The Petitioners have averred that the actions of the Respondents was actuated by malice and calculated to deny them the opportunity to take part in an upcoming vetting of chief officers

and also from raising issues of corruption involving the 2nd Respondent. It must be pointed out that the Petitioners had initially been selected by their majority and minority leaders and the whip on the basis of party strengths and once they occupied the position of committee members they were deemed to remain there at the beck and call of their parties and were to take care of issues and policies, germane to their sponsoring parties. It seems the Petitioners fell afoul with their parties and were thus removed and or discharged from those committees. My view of the Petitioners complaint is that the Respondents actions were an internal matter which does not warrant this court to interfere. I find the Petitioner's claim that they have been prevented from participating on the vetting of Chief Officers and also raising corruption issues against the 2nd Respondent not convincing since even without being members of such committees, there are a number of avenues for raising such concerns such as by presenting Petitions or inviting institutions which deal with such matters to take them up. I find nothing prevented the Petitioners from presenting their views regarding the vetting of chief officers or raising corruption issues against the 2nd Respondent. Hence I am unable to find that Petitioners individual rights and freedoms have been violated to warrant this court to interfere with the actions by the Respondents. The authorities cited by Respondents' Counsel support the view that courts should be reluctant to interfere with actions of National Assemblies or now County Assemblies unless there are clear violation of fundamental freedoms guaranteed by the constitution. In the case of NGOGE VS KAPARO & OTHERS [2007] eKLR 13 & 14 a three judge bench upheld a preliminary objection founded on jurisdiction as follows:

“The declarations and orders sought in this regard would be plainly in contravention of the constitution. Moreover it would result in the court interfering with the immunity granted to parliament on such internal matters which have nothing to do with any violation of the constitution preserve of parliament is protected by parliamentary privileges as set out in Section 12 of the National Assembly (Powers and privileges Act and also demands deference by this court of the powers, immunities and privileges The doctrine of separation of powers as regards the internal arrangements of parliament demands that we do not interfere with any such internal arrangements. The internal arrangements are normally regulated by the Standing Orders of the House An application which in substance invites the court to violate a constitutional provision or doctrine of separation of powers is itself an abuse of the court process and is also incompetent and ought to be dealt with summarily”.

The above “Ngoge” case involved an application where the Applicant sought court intervention after he failed to be elected a speaker. The court held that his failure to be elected as a speaker did not amount to violation of his rights under the Constitution. Similarly, in the present scenario, the Petitioners are claiming that their removal from committees by the Respondent was a violation of their rights under the constitution. I find their grievances unsustainable since their removal was as a result of party resolution and in any case they were liable to be removed from such committees as and when their party dictated so.

In the case of MUMO MATEMU VS TRUSTED SOCIETY OF HUMAN RIGHTS ALLIANCE & 5 OTHERS [2013] eKLR 49 the Court of Appeal held thus:-

“It is not in doubt that the doctrine of separation of powers is a feature of our constitutional design and a pre-commitment in our constitutional edifice. However, separation of powers does not only proscribe organs of government from interfering with the others functions. It also entails empowering each organ of government with countervailing powers which provide checks and balances on actions taken by other organs of government. Such powers are however not a license to take over functions vested elsewhere. There must be judicial, legislative and executive deference to the depository of the function.”

The above case reinforces the provisions of Article 175 (a) of the Constitution which stipulates that:

“County government shall be based on democratic principles and the separation of powers”. Hence the Respondents herein were constitutionally mandated to conduct their affairs pursuant to Article 175 (a) of the Constitution and this court can only scrutinize their actions if there are clear constitutional violations. However, in the present scenario none have been shown by the Petitioners to warrant this court to intervene. It is therefore quite clear from the above

observations that this court does not have jurisdiction to entertain this petition.

As regards the second issue and as observed hereinabove, the removal and or discharge of the petitioners from committees by the Respondents was not only an internal matter for the Respondent but that the Petitioners were amenable to removal as deemed by their sponsoring political parties through the leaders of Majority and Minority and whips in the Machakos County Assembly. If the Petitioners parties felt that they were not handling committee issues to the party's satisfaction, they had the prerogative to remove them and replace them with others. Hence I find their removal proper and legitimate and if they had any issues, they could raise them through their Party's machinery. Again on perusal of the Petitioners petition I find that the Petitioners have not specified the Article of the Constitution that has been denied, violated, infringed or otherwise threatened. The same must be demonstrated in the body of the Petition and the supporting affidavit in what manner or mode that denial, violation or infringement of rights has been occasioned by the Respondents. This is of paramount significance so as to invite a court to address itself on those violations while determining the Petition placed before it. The Petitioners have cited Article 23(2) of the Constitution which does not confer upon them any constitutional right of fundamental freedom in the bill of Rights, capable of being violated. The said Article provides:-

23(2) Parliament shall enact legislation or give original jurisdiction in appropriate cases to subordinate courts to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights."

The Petitioners have not demonstrated to this court how their removal or discharge from membership to various committees of the assembly constitutes a breach of their fundamental rights and freedoms. Even if the Petitioners are removed from Committees, they are still members of County Assembly and are at liberty to contribute to the debate in the house and effectively represent their wards, I find the Petitioners have merely made some generalities of what they deem to be a violation of their fundamental rights and freedoms. In the case of JOHN HARUN MWAU AND 3 OTHERS VS ATTORNEY GENERAL & 2 OTHERS [2012] eKLR a three judge bench held at paragraph 114 that:-

"In cases concerning the enforcement of fundamental rights and freedoms under the Bill of Rights and enforcement of the constitution a party seeking the courts relief must plead his case with precision. We agree with the dicta in Republic =Vs= Truth Justice & Reconciliation Commission & Another Exparte Augustine Njeru Kathangu and others that an applicant has to clearly set out the acts and or omissions that in his or her view contravene the constitution. He or she must specify the provision of the constitution that those acts or omissions contravenes and prayers or the reliefs he or she seeks....".

The above two cases support the Respondents submissions that the Petitioners have failed to specify the exact provisions of the constitution in which their rights have been infringed.

6. Conclusion:

From the foregoing analysis and observations, it is the finding of this court that it has no jurisdiction to entertain the Petition as the Petitioner's removal and or discharge from the committees were exclusively internal matters within the Machakos County Assembly. It is also the finding of this court that the removal of the Petitioners from the 1st Respondent's committees did not amount to violation of their individual rights under the constitution because their membership to those committees was at the pleasure of their political parties through the leaders of majority and minority as well as the whip at the Machakos County Assembly. The Petitioners' could still raise their contributions to any issues through the county Assembly debates by virtue of the fact that they are still members of the County Assembly. It is to be noted that the Petitioners herein did not oppose the Respondent's preliminary objection. The upshot is that the Respondent's preliminary objection dated 10th July, 2014 has merit. The same is hereby upheld. The Petitioners Petition dated 1st July 2014 is ordered struck out with costs to the Respondents.

It is so ordered.

Dated and delivered at Machakos this **9th** Day of **MARCH** 2017.

D. K. KEMEI

JUDGE

In the presence of:

Nthiwa for Kilukumi for Respondent.....

C/A - Muoti.....