



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

MISCELLANEOUS J.R APPLICATION NO.81 OF 2016

IN THE MATTER OF THE DECISION OF THE SPEAKER OF THE COUNTY ASSEMBLY OF MACHAKOS

AND

IN THE MATTER OF THE MAJORITY LEADER AND LEADERSHIP OF THE COUNTY ASSEMBLY OF MACHAKOS

AND

IN THE MATTER OF DECISION OF THE CHIEF MAGISTRATE'S COURT ISSUED ON 3RD MARCH 2016

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA AND ENFORCEMENT AND INTERPRETATION OF THE CONSTITUTION

AND

THE MATTER OF ARTICLES 1, 2, 3, 4, 10(1) (a), (b), & (c), (2) (a) & (b), 258, 259 and 260 OF THE CONSTITUTION OF KENYA

AND

THE MATTER OF ARTICLES 175(a) and 185(3) OF THE CONSTITUTION OF KENYA

AND

THE MATTER OF SECTION 10 (1) & (2) OF THE COUNTY GOVERNMENT ACT, 2012

AND

IN THE MATTER OF : PART XIX, STANDING ORDER NO 15(1),(20,(3),(4) & (5) AND 85(1), (2),(3)(a),(b),(c),&(d),(4) &(5) OF THE NATIONAL ASSEMBLY STANDING ORDERS

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

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

THE CHIEF MAGISTRATE'S COURT MACHAKOS.....2ND RESPONDENT

JOSHUA MWONGA.....3RD RESPONDENT

THE COALITION FOR REFORMS

AND DEMOCRACY.....INTERESTED PARTY

EX PARTE:

HON. ISAAC MUINDE

PHOEBE KOKI

RULING

Introduction

The 1st *ex parte* Applicant in this matter is Hon Isaac Muinde, who is an elected member of the County Assembly of Machakos. The capacity in which Phoebe Koki, the 2nd *ex parte* Applicant, has brought the application and her interest is however not clear from the pleadings. The 1st Respondent is the Speaker of the County Assembly of Machakos, while the 2nd Respondent is the Chief Magistrate's Court of Machakos, and the 3rd Respondent is a member of the County Assembly of Machakos . The Interested Party is a Coalition Party registered as such under the Registrar of Political Parties.

I have found it necessary to provide a brief account of the proceedings leading to this ruling, so as to explain the circumstances in which it is being made. The *ex parte* Applicants (hereinafter “the Applicants”), filed an application under certificate of urgency by way of a Chamber Summons dated 17th March 2016, seeking leave to apply for the following judicial review orders:

- a. An order for certiorari to bring into the Court for purposes of being quashed and to quash the decision of the 1st Respondent dated 10th March 2016 to allow for debate and discussion on the issue of majority leadership of the Machakos County Assembly leading to the purported recognition of Hon. Joshua Mwonga as Majority Leader .
- b. An order for certiorari to bring into the Court for purposes of being quashed and to quash the decision of the 2nd Respondent dated 3rd March 2016 issued by Hon. I.M Khahoya, Senior Resident Magistrate, restraining the 1st Respondent and 2 Others in **Machakos CMCC No 120 of 2016: Joshua Kiilu Mwonga & Another** from giving effect to and/or acting on the decision and/or resolutions of the alleged CORD coalition meeting held on 2/3/2016 at the old chambers, and which elected Hon. Isaac Muinde, the 1st Applicant herein, as Majority Leader of the Machakos County Assembly .
- c. An order of prohibition prohibiting the Respondents one and all, whether by themselves, their servants, agents, representatives and/or assigns from effecting the decision purported to have been communicated by the 1st Respondent on the 10th March 2016 in any way allowing or continuing to allow the 1st Respondent to carry himself as the Majority Leader of the Machakos County Assembly.

The Applicants further sought an order that the leave so granted do operate as a stay of the decision of

the 1st Respondent dated 10th March 2016 to allow for debate and discussion on the issue of majority leadership of the Machakos County Assembly leading to the purported recognition of Hon. Joshua Mwonga as Majority Leader, and the decision of the 2nd Respondent dated 3rd March 2016 issued by Hon. I.M Khahoya, Senior Resident Magistrate, restraining the 1st Respondent and 2 Other in **Machakos CMCC No 120 of 2016: Joshua Kiilu Mwonga & Another** from giving effect to and/or acting on the decision and/or resolutions of the alleged CORD coalition meeting held on 2/3/2016 at the old chambers and which elected Hon. Isaac Muinde, the 1st Applicant herein, as majority leader of the Machakos County Assembly.

The Applicants' application was heard *ex parte* by this Court on 18th March 2016, and the said orders sought by the Applicants were granted. The Applicants were further directed to file their substantive Notice of Motion within 14 days.

The 1st Respondent subsequently filed an application under certificate of urgency by way of Notice of Motion dated 23rd March 2016 seeking the discharge and setting aside of the orders made on 18th March 2016, pending the hearing of the judicial review proceedings. The 3rd Respondent followed suit and filed an application also under certificate of urgency by way of a Notice of Motion dated 29th March 2016, seeking the following substantive orders:

- a. That the application be certified as urgent and the same be heard *ex parte*, and interim orders be granted with the first instance.
- b. That the Court do suspend orders made on 18th March 2016 operating as a stay of the decision of the 1st Respondent dated 10th March 2016 to allow for debate and discussion on the issue of majority leadership of the Machakos County Assembly, leading to the purported recognition of Hon. Joshua Mwonga as Majority Leader for the County Assembly of Machakos pending the hearing of the application *inter partes*.
- c. That the Court do discharge and/or set aside the orders made on 18th March 2016 operating as a stay of the decision of the 1st Respondent dated 10th March 2016 to allow for debate and discussion on the issue of majority leadership of the Machakos County Assembly, leading to the purported recognition of Hon. Joshua Mwonga as Majority Leader for the County Assembly of Machakos
- d. That the Court be pleased to strike out the judicial review proceedings herein *in limine*.

The two applications by the 1st and 3rd Respondents were heard *inter partes* on 30th March 2016. Learned counsel appearing were Mr. Ndubi for the Applicants, Ms. Kamende for the 1st Respondent, and Mr. Nyamu for the 3rd Respondent. The learned counsel for the 3rd Respondent asked that he be heard only on the second prayer seeking suspension of the stay orders, and parties addressed the court on the said prayer. Mr. Ndubi, further asked that the Applicants be given the opportunity to file a response to the said applications before a ruling on the said prayer is reserved, which leave was granted for the replying affidavit to be filed by the Applicants by the close of business on 1st April 2016, and a further hearing and ruling date on the said prayer was given by the Court of 4th April 2016.

On 4th April 2016, the learned counsel for the Applicants was not in attendance for the further hearing, neither had the Applicants filed their replying affidavit as directed by the Court. On that date the Court proceeded to hear the learned counsel for the 1st and 3rd Respondents, and adjourned proceedings for two hours to write a ruling on the 3rd Respondent's prayer for suspension of the stay orders, which ruling the Court reserved for delivery at 12.30 pm on the same date.

This Court while so adjourned, was availed a Notice of Preliminary Objection on the 1st and 3rd Respondent's applications by the Interested Party. The counsel for the said Interested Party was not in Court on 4th April 2016 to argue his Preliminary Objection, and directions on the same will have to be given at a later date.

A summary of the pleadings and submissions made by the parties with respect to the prayer for suspension of the stay order in the 3rd Respondent's Notice of Motion dated 29th March 2016 now follows.

The Applicants' Case

The Applicants in the verifying affidavit sworn by the 1st Applicant, and statutory statement annexed to their chamber summons gave a background to their application, and on the impugned decisions. The Applicants' learned counsel also made oral submissions in Court on 30th March 2016. The Applicants' application emanates from elections conducted by the members of the CORD coalition in the Machakos County Assembly on 2nd March 2016, in which the 1st Applicant alleges he was elected Majority Leader in the Assembly and replaced the 3rd Respondent. The 1st Applicant stated that the said decision was communicated by the 1st Respondent on the same day to the Machakos County Assembly, in accordance with Standing Order 15 of the Assembly.

However, that the 3rd Respondent being aggrieved by his replacement filed a suit in Machakos Chief Magistrate's Court being **CMCC No 120 of 2016**, and obtained interim orders therein restraining the 1st Respondent and 1st Applicant from giving effect to, or acting on the decision of the CORD coalition held on 2nd March 2016. The Applicant stated that he filed a preliminary objection in the Chief Magistrate's Court's on the issue of the Court's jurisdiction, which the said Court set for hearing on 18th March 2016, despite the 3rd Respondent having filed a notice of withdrawal on 10th March 2016.

It is the Applicant's case that the 3rd Respondent then wrote a letter to the 1st Respondent on 10th March 2016 communicating that he had appointed one Wambua Kilonzo as the CORD coalition's chief whip, which Wambua Kilonzo then forwarded minutes of an alleged meeting of the CORD coalition meeting held on 10th March 2016 to the 1st Respondent. It is also the Applicant's contention that the said meeting was held in violation of the rule of *sub judice*, as the case in the Chief Magistrate's Court had not been concluded.

Further, that the on 10th March 2016 the 1st Respondent then made a communication addressing the matter of leadership of political coalitions in the Assembly, which was contrary to standing Order 85 of the County Assembly that prohibits debate on a matter pending in Court. The 1st Applicant alleges that the 1st Respondent acted either fraudulently or in collusion with a section of political interests, and that his election as Majority Leader and the consequent communication by the 1st Respondent thereon is the true legal status of the CORD leadership in the Assembly. The interim orders given by the Chief Magistrate's Court and the communication by the 1st Respondent on 10th March 2016 are the two decisions being challenged by the Applicants.

Mr. Ndubi, the learned counsel for the Applicants in his oral submissions in Court argued that no urgency had been demonstrated by the Respondents and that there is no vacancy in the leadership of the CORD coalition in the County Assembly that will affect the operations of the County Assembly. He was of the view that the Respondents needed to respond substantively to the substantive Notice of Motion which the Applicants filed on 29th March 2016.

Further, that the issue as to whether there was a decision by the Speaker that needed to be quashed was one of substance on which parties need to be heard, and that the orders of the lower court were still in existence, all that the Chief Magistrate's Court refused to do was to extend the said orders. It was also urged by Mr Ndubi that suspending the stay orders will amount to reinstating the 3rd Respondent as the Leader of Majority.

The learned counsel also reiterated that the 3rd Respondent was *sub judice* and acted contrary to Standing Order 85 of the Machakos County Assembly, as he proceeded to hold elections when the matter was still

pending in the Chief Magistrate's Court. Further, that this issue was brought to the attention of the 1st Respondent.

The Responses

The 1st Respondent's response is in his supporting affidavit to his Notice of Motion sworn on 23rd March 2016, and oral submissions made by his learned counsel in Court. The 1st Respondent states that he has no powers under any provisions of the law to make a decision on political parties matters, and that the County Assembly cannot and does not debate such matters. Further, that the matter raised by the Applicants is a political dispute and the jurisdiction to hear the dispute is within the Political Parties Tribunal.

The 1st Respondent's case is that the Applicants have misled the Court that he allowed the County Assembly to debate and discuss the issue of majority leadership, when all he did was carry out his duties under Standing Order No. 15(5) of the Machakos County Assembly once he received communication on the change of leadership, which he communicated to the members both on the 2nd March 2016 and 10th March 2016. Further, that communication of a decision already made by the members of the County Assembly in a political scenario cannot amount to a decision of the Speaker of the Assembly.

It was also alleged by the 1st Respondent that the stay orders were issued in concealment of material facts as there is no order in **CMCC No. 120 of 2016** capable of being quashed by this Court, as the interim orders granted by the Chief Magistrate's Court in the said case were not extended, and were not in force at the time the Applicants made their application for stay. Further, that the Plaintiff in that case filed a Notice of Withdrawal of the suit and of his application therein, and the only issue pending before the said Court is a ruling as to whether to withdraw or strike out the suit. The 1st Respondent attached copies of the communication he made on 2nd and 10th March 2016 to the County Assembly members.

Ms Kamende reiterated the above arguments in her oral submissions and pointed the Court to court proceedings in pages 19 to 20 of the Applicant's Chamber Summons dated 17th March 2016, for evidence that the Applicants were aware that the orders of the Chief Magistrate's Court in **Machakos CMCC No 120 of 2016: Joshua Kiilu Mwonga & Another** had lapsed at the time the Applicants filed the said application.

The 3rd Respondent's case is abridged from the supporting affidavit he swore on 29th March 2016 in support of his Notice of Motion of the same date, and in oral submissions made in Court by his learned counsel. The 3rd Respondent contended that the orders made by the 2nd Respondent and sought to be quashed are not annexed to the verifying affidavit as required, and that that the Applicants failed to make full disclosure of material facts, as the said orders in any event lapsed on 10th March 2016 and were not extended. The 3rd Respondent also stated that the 1st Respondent has discretion under Standing Order 85(5) to allow reference to any matter before the House including matters *sub judice*.

The 3rd Respondent also raised the issue of jurisdiction stating that the matters that are before the Court ought not to be entertained and are under the jurisdiction of the Political Parties Tribunal, and that the orders granted are an affront to the principle and spirit of separation of powers, and an interference with the legislative arm of government by the Judiciary.

Mr. Nyamu for the 3rd Respondent reiterated the above arguments in his oral submissions and added that the procedure for the election of Majority Leader of the Machakos County Assembly is provided under Standing Order 15 and it is the members who elect the Majority Leader and all the 1st Respondent does is to communicate this decision. Further, that the role of the majority leader is key in light of section 10 of the County Government Act, and that there is now a stalemate as to who the Majority Leader of the Machakos County Assembly is. Lastly, that the *sub judice* rule does not apply to the 1st Respondent under proviso 5 to Standing Order 85. He placed reliance on the decision in **R vs Capital Markets Authority**

ex. Parte Joseph Mumu Kivai & Another, (2012) e KLR for the position that *ex parte* stay orders granted in judicial review proceedings can be discharged by a Court.

The Issues and Determination

I have considered the pleadings and submissions made by the Applicant and 1st and 3rd Respondents. The issue that requires to be determined is whether sufficient and reasonable grounds have been shown for the stay orders granted herein to be suspended. In determining what these grounds are, this Court **will be guided by the principles that apply to the discharge of orders of stay issued *ex parte*, that include the non-disclosure of material facts; that an application was made in abuse of the Court process; and that it is in the public interest to discharge the said orders, as summarised by Majanja J. in R vs Capital Markets Authority ex. Parte Joseph Mumu Kivai & Another, (2012) e KLR**

This Court will also be guided by the laid down principles as to the purpose of stay in judicial review proceedings, as was clearly brought out by Maraga, J. (as he then was) in **Taib A Taib v Minister for Local Government and 3 Others, [2006] eKLR** when he stated that:

“I also want to state that in judicial review applications like this one the court should always ensure that the Ex-parte applicant’s application is not rendered nugatory by the acts of the respondent during the pendency of the application. Therefore where the order of stay is efficacious the court should not hesitate to grant it. Even with that in mind, however, it should never be forgotten that stay orders are discretionary and their scope and purpose is limited. What then is the scope and purpose of stay orders in the judicial review jurisdiction?”

The purpose of a stay order in judicial review proceedings is to prevent the decision maker from continuing with the decision making process if the decision has not been made or to suspend the validity and implementation of the decision that has been made. It is not limited to judicial or quasi-judicial proceedings as some think. It also encompasses the administrative decision making process (if it has not yet been completed) being undertaken by a public body such as a local authority or minister and the implementation of the decision of such body if it has been taken. A stay is only appropriate to restrain a public body from acting. It is, however, not appropriate to compel a public body to act.”

In the present application, the 1st and 3rd Respondents have alleged that there was misrepresentation and material non-disclosure by the Applicants, particularly on the fact that the orders of the Chief Magistrates Court in **Machakos CMCC No 120 of 2016: Joshua Kiilu Mwonga & Another** had lapsed by the time the application was made. I have perused the orders issued on 3rd March 2016 by Hon. I.M. Kahoya SRM annexed as Exhibit ‘BMM-D’ to the supporting affidavit by the 1st Respondent sworn on 23rd March 2016. The said orders granted therein were pending the hearing and determination of the application dated 3rd March 2016 by the 3rd Respondent, and the said application was set *for inter partes* hearing on 10th March 2016.

I have also perused the court proceedings of 10th March 2016 in **Machakos CMCC No 120 of 2016: Joshua Kiilu Mwonga & Another** that were annexed by the Applicants to the verifying affidavit sworn by Hon. Isaac Muinde on 17th March 2016. Hon. Ocharo, Principal Magistrate is reported as ruling that she will not entertain any application on interim orders. I however note that the said proceedings are not certified as a true record for this Court to definitively rely on the same. This observation notwithstanding, I note that the Applicants did not provide any evidence of orders issued and subsisting as at the time of their application on 17th March 2016. It is thus an arguable issue if there was any order subsisting at the time of the Applicant’s application that was capable of being quashed.

This Court is also called upon to consider the public interest in suspending the stay orders, particularly as regards the continued operations of the County Assembly in relation to the certainty as to who is the Leader of Majority in the Assembly. I have in this regard perused the provisions of Standing Order 15 of the Machakos County Assembly which provides as follows:

15. Leader of the Majority Party

- (1) The largest party or coalition of political parties in the Assembly shall elect a member of the Assembly belonging to the party or coalition of parties to be the Leader of the 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 for 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 of the meeting at which the decision was made.**

I have also perused the two communications by the 1st Respondent dated 2nd March 2016 and 10th March 2016 annexed as Annexure “BMM-C” and ‘BMM –G” to the 1st Respondent’s supporting affidavit sworn on 23rd March 2016.

The two communications are on information received by the 1st Respondent on the elections of the 1st Applicant as Majority Leader of the Cord Coalition on 2nd March 2016, and on the election of the 3rd Respondent as Majority Leader of the same coalition on 10th March 2016. The issue as to whether the said communications can amount to decisions which are subject to judicial review orders in light of the provisions of Standing Order 15, will have to await and be canvassed at the full hearing of the 1st and 3rd Respondent’s applications.

Likewise, the import and effect of Standing Order 85 of the Machakos County Assembly as to the effect of the *sub judice* rule on the said elections of the 3rd Respondent and communication by the 1st Respondent is one to be decided after a full hearing and not at this stage. The said Standing Order 85 for purposes of information provides as follows:

85. Matters *sub Judice* or secret

- (1) Subject to paragraph (5), no Member shall refer to any particular matter which is *sub judice* or which, by the operation of any written law, is secret.**
- (2) A matter shall be considered to be *sub judice* when it refers to active criminal or civil proceedings and the discussion of such matter is likely to prejudice its fair determination.**
- (3) In determining whether a criminal or civil proceeding is active, the following shall apply –**
 - (a) criminal proceedings shall be deemed to be active when a charge has been made or a summons to appear has been issued;**
 - (b) criminal proceedings shall be deemed to have ceased to be active when they are concluded by verdict and sentence or discontinuance;**
 - (c) civil proceedings shall be deemed to be active when arrangements for hearing, such as setting down a case for trial, have been made, until the proceedings are ended by judgment or discontinuance;**

(d) appellate proceedings whether criminal or civil shall be deemed to be active from the time when they are commenced by application for leave to appeal or by notice of appeal until the proceedings are ended by judgment or discontinuance.

(4) A Member alleging that a matter is *sub judice* shall provide evidence to show that paragraphs (2) and (3) are applicable.

(5) Notwithstanding this Standing Order, the Speaker may allow reference to any matter before the House or a Committee.

What is however evident from the communications by the 1st Respondent and the responses by the Respondents, is that there are disputed elections of the Leader of Majority of the Machakos County Assembly, one conducted on 2nd March 2016 and the other on 10th March 2016, according to the minutes annexed by both the Applicants and 1st Respondent. The Applicants however failed to disclose the fact of the second election in their application. This Court has also been told that suspending the stay orders will have the effect of reinstating the 3rd Respondent as Majority Leader of the Machakos County Assembly.

The issue as to who is the duly elected and lawful Majority Leader of the Machakos County Assembly is not before this Court, and neither is this Court the appropriate forum at this stage that should decide this issue. It must in this regard be pointed out that it is not for the Court to wade into the merits of the parties' respective cases in judicial review proceedings. In addition, it has been held time and again that judicial review should be an intervention of last resort, after all other interventions provided by law have failed.

Therefore, to the extent that the stay orders granted by this Court may be used for an improper purpose of preventing or facilitating the determination of who the *bona fide* Majority Leader of Machakos County Assembly is, either in the County Assembly of Machakos or the Political Parties Tribunal as the case may be, or of imposing a Majority Leader for the Machakos County Assembly, the said stay orders are amenable to suspension both in the interests of justice and in the public interest.

In the premises, the second prayer in the 3rd Respondent's Notice of Motion dated 29th March 2016 is allowed for the foregoing reasons, and it is hereby ordered that the stay orders granted herein on 18th March 2016 be and are hereby suspended pending the hearing of the outstanding prayers in the 1st and 3rd Respondents' Notices of Motion dated 23rd and 29th March 2016 respectively, and of the Interested Party's Preliminary Objection dated 4th April 2016.

Each party shall meet their costs of the application.

Orders accordingly

DATED AND SIGNED AT MACHAKOS THIS 4TH DAY OF APRIL 2016

P. NYAMWEYA

JUDGE