

that violated Articles 10, 41 and 236 of the Constitution;

(vii) A declaration that the petitioner can only be removed from office pursuant to Sec. 11 of the County Governments Act 2012 and must be in accord with the Constitutional Principles of Good Governance, integrity, Rule of Law, transparency and accountability in terms of Articles 10 of the Constitution of Kenya;

(viii) And order of prohibition do issue prohibiting the respondents either by acting by themselves, agents, Employees or any other body or person acting under their instructions from giving effect or implementing the resolutions contained in the report by the Assembly's Adhoc committee adopted on the 9th day of June, 2016;

(ix) The petitioner claims general and exemplary damages for loss of reputation and dignity;

(x) Costs of this petition.

2. It was ordered that the same be served upon the respondents and direction be taken. Upon receiving the pleadings, the respondent raised a preliminary objection dated 21st June, 2016 which the parties canvassed by way of written submissions. It is this preliminary objection that this court has been tasked to determine.

3. The petition is supported by a verifying affidavit sworn by the petitioner on 15th June, 2016. The motion is also supported by the replying affidavit sworn by the petitioner on 15th June, 2016 and numerous annexures. The respondents filed memo of appearance together with a notice of preliminary objection dated 21st June, 2016.

The Preliminary Objection

4. The preliminary objection to both the petition and the application dated 16th June, 2016 seeks orders to strike out the entire pleadings with costs on the grounds that:-

(i) *The matter raised by the petitioner in the petition and the application concerns employment disputes which falls outside the jurisdiction of this Honourable court;*

(ii) *The jurisdiction of this honourable court to entertain matters of employment and labour is expressly ousted by dint of Article 165 (5) (b) of the constitution;*

(iii) *The matters raised in the petition falls within the exclusive jurisdiction of the employment and Labour Relations Court in the exercise of the status of the High Court;*

(vi) *The honourable courts jurisdiction does not extend to a challenge to an investigative process, an investigation report or a recommendation for an investigation;*

(v) *The entire petition inclusive of the application therefore amounts to gross abuse of the process of the honourable court and must be struck out.*

Submissions and Determination

5. Parties canvassed the preliminary objection by filing and exchanging written submissions which they ably highlighted. The court has had the opportunity of reading the submissions filed together with the petition and finds that the only issue for determination is whether this court has jurisdiction to hear and determine the petition herein.

6. The issue of jurisdiction is paramount and ought to be determined in the first place before taking any further steps. This was the decision in the case of the **MOTOR VESSEL LILLIAN "S" VS.**

CALTEX OIL KENYA LTD. (1989) KLR where the court of appeal stated:-

“Without jurisdiction 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 before it. 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.”

7. Counsel for the respondent, Mr. Musiega has challenged the jurisdiction of this court to hear and determine the petition and issue the orders sought in the Notice of Motion. Apparently, the petitioner who is the speaker of Vihiga County assembly was asked to step aside through a resolution of the full house reached on 14th April, 2016 to pave way for investigations on allegations touching on his performance as a speaker. The committee appointed to investigate his conduct made a report which was adopted by the assembly and which recommended that he remains suspended a further investigations are carried out by the Ethics and Anti-corruption Commission and the Commission on Administration of Justice. This resolution by the County assembly is what the petitioner is challenging.

8. Mr. Musiega submits that the dispute as pleaded concerns matters of employment and/or Labour Relations which falls under the exclusive jurisdiction of the Employment and Labour Relations Court.

9. Mr. Amusani for the petitioner submits that the *ad hoc* committee made a recommendation that the petitioner be removed from office of the speaker which promoted the filing of this petition. He submits that the office of the speaker is a Constitutional office created under Article 178 of the Constitution and that sub Article 3 empowers parliament to enact legislation providing for election and removal of speaker of County Assemblies. He submits further that these provisions contained in section II of the County Government Act for the removal of the speaker from office have not been adhered to and the removal of the speaker will therefore be a violation of the Constitution.

10. Both counsels for the petitioner and respondent have raised the issue of the status of the office of the speaker. It is submitted by the petitioner that the said office is a state organ and the holder thereof is a state officer within the provisions of Article 260 of the Constitution and thus their terms and conditions of service are regulated by the Constitution or the relevant statute and they are not subject to the Provisions of the Employment Act.

11. Mr. Musiega’s take is that the relationship between the speaker and the county assembly is that of employee/employer and the dispute herein is to do with how the speaker as the employee has performed. He has cited various authorities in support of his submission.

12. The issue as to whether a speaker of the County assembly is an employee of the county assembly or not has been in our courts for quite some time now. It is long settled that the speaker of a county assembly is an employee of the county assembly since the law is not concerned with the manner of engagement or assumption of office, what is of importance is the existence of a contract of service whether oral or in writing and whether expressed or implied to employ or serve as an employee for a period of time (see the Court of Appeal finding in **Civil Appeal No. 17 & 18 of 2015 County Assembly of Kisumu and 2 others vs. Kisumu County Assembly Board and 6 others (2015) eKLR**. The Court of Appeal found that the speaker elections are akin to appointments which create employer/employee relationship.

13. Having therefore settled the issue of employer/employee relationship of the speaker the issue of jurisdiction of this court then comes into play. The constitution of Kenya 2010 has provided for the formation of specialized courts with the status of the High Court. Article 162 (2) of the constitution provides clearly that:-

“(2) Parliament shall establish courts with the status of the High Court to hear and determine dispute relating to –

a. ***Employment and labour relations; and***

b. *The environment and the use and occupation of and title to land.*

14. Parliament established the Industrial Court Act No. 20 of 2011 (Employment and Labour relations Court which has jurisdiction to hear and determine employment and labour related issues.

15. The issues as raised in the petition here are employment and labour related. They concern the performance of the petitioner as a speaker of the Vihiga County Assembly and not the removal of the speaker as the petitioner would want us to believe.

16. The jurisdiction of the Industrial Court has been clearly elaborated by Hon. Majanja J in the matter of **UNITED STATES INTERNATIONAL UNIVERSITY (USIU) VS. ATTORNEY GENERAL 2013 EKLR**. The court found that:-

(a) The Industrial court has jurisdiction to determine applications for enforcement of Rights and Fundamental Freedoms under Article 22 and 23 in relation to all matters within their jurisdiction under the act;

(b) For purposes of all matters falling within the industrial court, reference to the “High Court in the constitution shall be deemed to refer to the Industrial court; and

(c) In order to avoid apparent conflict, the court having the status of the High Court should have all powers of the High Court in determination of disputes.

17. It therefore means that the ELR court is not a lesser court as may be presumed. It has the status of the High Court and therefore it can interpret the constitution and enforce matters relating to breach of fundamental rights and freedoms in matter arising from disputes falling within the provisions of section 12 of the ELR Court Act.

18. This court’s jurisdiction as the High Court has been taken away by the Industrial Court specifically in matters of Employment and Labour relations. Article 165 (5) provides:-

“(5) The High Court shall not have jurisdiction in respect of matters

- a. Reserved for the exclusive jurisdiction of the Supreme court under this constitutional; or***
- b. Falling within the jurisdiction of the courts contemplated in Article 162 (2).”***

19. From the above analysis therefore this court has no jurisdiction to hear the petition and/or issue the orders sought by the petitioner. The court has to therefore down its tools. For those reasons the preliminary objection is successful as ordered below. The court thus makes the following orders:-

(i) The matter herein is transferred to Employment and Labour Relations (ELR) court at Kisumu for hearing and determination.

(ii) Costs in the cause.

SIGNED, DATED, and DELIVERED at **KAKAMEGA** this **15TH** day of **JULY**, 2016.

C. KARIUKI.

JUDGE.

In the Presence of:-

..... **for the Appellant.**

.....**for the Respondent.**

..... **Court Assistant.**