



REPUBLIC OF KENYA
THE HIGH COURT OF KENYA AT KERICHO
PETITION NO.11 OF 2016

GILBERT TUWEI.....PETITIONER

VERSUS

THE COUNTY ASSEMBLY OF KERICHO.....1ST RESPONDENT

THE SPEAKER COUNTY ASSEMBLY OF KERICHO.....2ND RESPONDENT

HON. JAPHETH K. MUTAI.....3RD RESPONDENT

JUDGMENT

Introduction

1. This petition relates to the powers of County Assemblies to remove members of County Executive Committees under powers conferred by section 40 of the County Government Act 2012 (hereafter “CGA”). The petitioner, Gilbert Tuwei, lodged the present petition dated 12th May 2016 against the County Assembly of Kericho as the 1st respondent, and against the Speaker of the County Assembly as the 2nd respondent. The Speaker has also been joined to the proceedings in his personal capacity as the 3rd respondent.

2. In his petition, the petitioner seeks the following orders:

A. A declaration that within the intendment of Article 10 of the Constitution, the respondents are bound by the key national values and principles, to wit, the rule of law.

B. A declaration that the statutory period under Section 40(3) (b) of the County Governments Act cannot be extended by a County Assembly.

C. A declaration that within the intendment of Article 47(1) of the Constitution, holding quasi-judicial proceedings outside a well-defined statutory period amounts to administrative action that is unlawful.

D. A declaration that within the intendment of Article 50(2) (k) of the Constitution, the right to cross-examine witnesses applies to all quasi-judicial proceedings.

E. A declaration that within the intendment of Article 50(2) (b) & (j) of the Constitution, the respondents when engaging in quasi-judicial proceedings are bound to provide the affected party with all the particulars and documentation at the commencement of the proceedings.

F. A declaration that within the intendment of Article 50(2) (c) of the Constitution, the Respondents when engaging in quasi-judicial proceedings are bound to provide affected parties adequate time to prepare a defence.

G. A declaration that within the intendment of Article 47(1) and resonating Article 50(1) of the Constitution, the Respondents when engaging in quasi-judicial proceedings is bound to provide a procedurally fair hearing.

H. A declaration that impeachment proceedings before a select committee under Section 40 of the County Governments Act are quasi-judicial in nature and are amenable to judicial review.

I. An order of Certiorari to remove into this Court and quash the report of the County Assembly of Kericho approved on 10th May 2016 recommending the removal of the Petition from office.

J. A declaration that by presiding over a sitting of the County Assembly of Kericho on 10th May 2016 to discuss and deliberate on matters that had been settled by a Court order of 28th April 2016, the 3rd Respondent has violated the provisions of Article 10 (rule of law and good governance) and Article 232(1) (high standards of professional ethics) of the Constitution and is unfit to hold public office.

K. The Speaker of the County Assembly of Kericho, Japheth. K Mutai, the 3rd respondent herein, personally bears the costs of these proceedings for his role in presiding over proceedings of the County Assembly to discuss a matter that the self-same Speaker had given express instructions for a consent order to be recorded in Court to settle.

L. Such other orders as the Honorable Court deems fit.

3. The petitioner filed with the petition an application for conservatory orders in which he sought orders to restrain the County Government of Kericho from removing him from his position as the County Executive Committee Member for ICT. Orders were issued in his favour by the High Court sitting in Nakuru on 13th May 2016.

Background

4. The petitioner describes himself as the County Executive Committee Member in charge of ICT and e-Governance in the County Government of Kericho. He was formerly in charge of the Department of Water, Energy, Environment & Natural Resources. On 7th April 2016, the County Assembly of Kericho approved a motion seeking his impeachment.

5. According to the petitioner, under section 40 (3) of the County Government Act, upon approval of such a motion, a select committee of the Assembly is required by statute to complete the investigations within 10 days. The petitioner contends that the County Assembly Committee did not summon him in time for the proceedings, declined to give him the list of witnesses against him or allow him to cross-examine the said witnesses, and that it failed to avail to him the documents in support of the charges against him.

6. The petitioner further contends that on 20th April 2015, the Committee changed its mind and determined that he was entitled to cross-examine witnesses and to be provided with documents. It invited him to appear before it on 22nd April 2016. When he appeared before it however, it again changed its mind and decided that he was not entitled to cross-examine witnesses.

7. On 25th April 2016, the Committee tabled its report in the Assembly and sought an additional 10 days to complete its work. It then invited the petitioner to appear before it on 28th April 2016.

8. The petitioner then filed before this court **Constitutional Petition No. 10 of 2016 Gilbert Tuwei vs**

The County Assembly of Kericho to challenge what he terms as the unlawful act of the County Assembly in extending the period of 10 days within which it should have dealt with the process of his impeachment. His contention is that the County Assembly had no powers to extend the 10 days' mandatory statutory period and could only commence fresh impeachment proceedings against him.

9. When the matter came up before the Court (Muya, J) for the hearing of the petitioner's application for conservatory orders on 28th April 2016, the parties entered a consent order on the basis of which the petitioner withdrew his petition.

10. The imperative for the withdrawal of the petition is somewhat contested. The petitioner alleges that it is because the County Assembly recognized that it had a weak case, and it agreed to the withdrawal of the petition on the condition that it would begin the impeachment process afresh, the words used being that it would be at liberty to start the impeachment process afresh if it so wishes. According to the petitioner, the implication of the consent was that the impeachment proceedings based on the motion approved on 7th April 2016 had failed. The position taken by the respondents, however, is that the petitioner voluntarily withdrew his petition as the Court indicated that it could not stop an ongoing process before an independent constitutional organ.

11. On 10th May 2016, however, the Select Committee of the County Assembly tabled a report before the Assembly based on its findings pursuant to the impeachment process, which the petitioner impugns as faulty and illegal, that had been initiated on 7th April 2016. The report recommended the impeachment of the petitioner, and was approved and adopted by the County Assembly of Kericho.

12. Following the adoption of the report, the Speaker of the County Assembly wrote to the Governor of Kericho to dismiss the petitioner as a County Executive Committee Member. While the petitioner contends that he is still in office, the respondents contend that he was dismissed from office by the Governor vide his letter dated 12th May 2016.

13. At any rate, the petitioner filed the present petition on 12th May 2016. The record indicates that the matter was placed before Mulwa J, sitting at the High Court in Nakuru, who granted prayers 1 and 2 of the application for conservatory orders and directed that the matter be placed before the Court in Bomet or Kericho for *inter partes* hearing on 25th May 2016. On that day, Muya J, sitting in Bomet, extended the interim orders and directed that the matter be placed before the High Court in Kericho.

14. The parties appeared before this Court on 8th June 2016 when they agreed to proceed with the main petition instead of canvassing the application for conservatory orders. On 23rd June 2016, they further agreed that the interim orders granted on 13th May 2016 would remain in force pending the hearing and determination of the petition. The parties also agreed to proceed on the basis of the affidavits and filed written submissions.

The Petitioner's Case

15. From the petitioner's pleadings and submissions, his case revolves around two limbs: the first is that the County Assembly had no power to extend the 10 day statutory period granted in section 40(3) of the CGA. The second is that the impeachment process was illegal as it was carried out in violation of a consent order that was adopted as an order of the High Court.

16. The petitioner's case was presented by his Learned Counsel, Mr. Ateka. He relied on the petition dated 12th May 2016 and the affidavit in support sworn on the same date, the supplementary affidavit sworn by the petitioner on the 7th of June 2016, and written submissions dated 21st June 2016.

17. According to the petitioner, his case is anchored on Article 47 (1) of the Constitution on fair administrative action and Article 50 on a fair hearing. It was submitted on his behalf that there had been a previous petition between the same parties challenging the same process, being **Petition No.10 of 2016**.

The petitioner reiterated the proceedings before Muya, J on 28th April 2016 when the petition was withdrawn and a consent recorded. According to the petitioner, the consent provided that the respondent may commence fresh impeachment proceedings against the petitioner if it so wishes. However, instead of commencing fresh proceedings, the County Assembly proceeded to rely on the findings of the flawed process in which the removal of the petitioner had been recommended.

18. The petitioner's position was that he was not challenging the merits of the accusations against him, his complaint being only against the procedure that had been employed. His contention was that the County Assembly should not have relied on the impugned process but should have commenced a fresh process.

19. The second limb of the petitioner's case revolves around the alleged extension of the statutory period by the County Assembly. According to the petitioner, section 40 (3) of the County Government Act requires that when a select committee of the Assembly is formed to investigate a member of the County Executive Committee, it must submit its report within 10 days.

20. The petitioner argued that the County Assembly had purported to extend the period in two instances, the first of which led to the filing of Petition No.10 of 2016. With regard to the second instance, the petitioner contended that instead of commencing a fresh impeachment process, the Assembly relied on the earlier proceedings, thus purporting to extend the period outside the 10 day statutory period.

21. In response to averments and submissions by the respondents that the Governor of Kericho County should have been a party to the present proceedings, the petitioner's response was that the Governor should not be a party as the petitioner is still in office and is challenging the report of the Assembly that recommended his removal through a flawed process. He therefore prayed that his petition be allowed and the orders that he sought be granted.

The Respondents' Case

22. The respondents opposed the petition and relied on an affidavit sworn by the 3rd respondent, Mr. Japheth Mutai, on 25th May 2016. They also filed submissions dated 15th July 2016 as well as a list of authorities of the same date. The case was presented for the respondents by their Learned Counsel, Mr. Njenga.

23. The respondents challenge the petition on three limbs. The first relates to the competence of the petition in the absence of the Governor as a party. They submit that the petition is challenging the removal of the petitioner under section 40 of the CGA, which provides at section 40 (6) that it is the Governor who makes a decision to dismiss a member of the CEC. Their submission is that the County Assembly only makes a recommendation for removal. The respondents rely on the letter dated 12th May 2016 annexed to the affidavit of Mr. Mutai to submit that the petitioner had already been removed from office in accordance with section 40 (6).

24. Their submission was that the Governor, who was the person who had made the decision to remove the petitioner from office, was not before the Court, and for the petition to be competent, it must target the person who made the decision, otherwise the Court might engage in a purely academic exercise. It was their prayer therefore that the Court finds the present petition incompetent.

25. The second limb of the respondents' case revolved around the reasons for the removal of the petitioner. According to the respondents, the reasons for his removal are well documented at paragraph 15 of the affidavit of the Speaker, Mr. Mutai, and were not disputed by the petitioner. The respondents urged the Court to consider the facts before it in light of the principles of good governance and accountability set out in Article 252 of the Constitution.

26. With respect to the petitioner's challenge of the process of his removal, the respondents submit that the consent order entered into on 28th April 2016 was to allow the petitioner to withdraw the petition on terms that the County Assembly may commence fresh proceedings against him. The respondents take the

position that the impeachment process was on going, while the interpretation given by the petitioner is that the County Assembly ought to have abandoned the process and instituted a fresh process.

27. The respondents argue that this was not the import of the order. They submit that the use of the word 'may' was deliberate, to enable the Assembly make an election to proceed from where they were or start afresh. In their view, the petitioner would have preferred a re-institution of the process as it would have bought him more time. They submit that the fact that the Assembly elected to proceed from where it was cannot be interpreted as a violation of the court order.

28. It is also the respondents' case that there was no finding that the process followed by the County Assembly was flawed. In their view, it is the petitioner who interprets the process as being flawed, and had there been a flawed process, the option for the petitioner was to institute proceedings for contempt of the orders of the court, not to file a fresh petition.

29. With respect to the allegation by the petitioner that the Assembly had extended the time for the impeachment process, the respondents concede that the process of removal is undertaken wholly by the County Assembly and its procedure. Under section 74 (1) of the CGA, County Governments are allowed to amend standing orders to regulate their procedures. The respondents' submission in this regard was that the County Assembly is governed by its standing orders, which provide procedures where time is not provided for or is not sufficient to execute statutory duties. Under Standing Order No.1 of the Kericho County Standing Orders, the Speaker is given the discretion to extend time for purposes provided for under the standing orders, and the extension of time to allow for completion of investigations does not disclose any violation.

30. In any event, according to the respondents, no prejudice had been pleaded or established by the petitioner as having resulted as a consequence of the extension of time, as a party who relies on a question of time is under a duty to demonstrate prejudice. In their view, the petition was without merit and should be dismissed.

The Petitioner's Rejoinder

31. In his submissions in response, Mr. Ateka argued that Standing Orders cannot supersede national legislation.

32. Further, that the petitioner was challenging the report of the County Assembly and is still in office pursuant to stay orders. It was also his submission that none of the orders that he was seeking was directed at the Governor.

33. With respect to the prejudice suffered as a result of the extension of time, the petitioner's argument was that by relying on the original proceedings which were quite flawed and not instituting a fresh hearing where it could have accorded him a hearing, the prejudice is apparent.

34. Mr. Ateka further maintained that the petitioner was not accorded an opportunity to cross-examine any of the invitees of the committee as guideline number 8 of the Guidelines of the Select Committee provides that no person may cross-examine any invitees of the committee. He however conceded that the option of cross-examining the invitees of the committee was not taken up by the petitioner as he filed Petition No. 10 of 2016 instead.

Analysis and Determination

35. I have read and considered the pleadings and submissions of the parties, as well as the authorities filed in court in support of the parties' respective cases. I have also considered the statutory provisions cited and relied on by the parties. The petitioner has set out in his submissions four issues for determination, while the respondent sets out a total of six issues. Having considered the two sets of issues which overlap in several respects, I believe that they can be condensed into the following:

- i. Whether the County Assembly could extend time within which the report of the County Assembly could be made;*
- ii. Whether the proceedings against the petitioner violated the provisions of Article 47 and 50 of the Constitution;*
- iii. Whether the proceedings before the County Assembly were a nullity for breach of a court order;*
- iv. Whether the petition is incompetent for non-joinder of the Governor;*
- v. Whether there is justifiable cause for the removal of the petitioner from office;*
- vi. Who should pay the costs of this petition.*

Extension of time for County Assembly Report

36. The present petition arises out of proceedings undertaken by the County Assembly of Kericho in accordance with powers conferred upon it by section 40(3) of the County Government Act, 2012. Section 40(1) provides for the grounds on which a member of the county executive committee can be removed. It provides as follows:

“Subject to subsection (2), the Governor may remove a member of the County Executive Committee from office on any of the following grounds—

- a. incompetence;*
- b. abuse of office;*
- c. gross misconduct;*
- d. failure, without reasonable excuse, or written authority of the governor, to attend three consecutive meetings of the County Executive Committee;*
- e. physical or mental incapacity rendering the executive committee member incapable of performing the duties of that office; or*
- f. gross violation of the Constitution or any other law.*

37. Section 40(2) and (3) provide the process for removal in the following terms:

2. A member of the county assembly, supported by at least one-third of all the members of the county assembly, may propose a motion requiring the governor to dismiss a county executive committee member on any of the grounds set out in subsection (1).

3. If a motion under subsection (2) is supported by at least one-third of the members of the county assembly—

a. The county assembly shall appoint a select committee comprising five of its members to investigate the matter; and

b. The select committee shall report, within ten days, to the county assembly whether it finds the allegations against the county executive committee member to be substantiated.

38. Section 40(4) gives the executive committee member concerned the right to appear and be heard on the allegations against him, while subsection (5) sets out the different outcomes expected out of the

County Assembly investigations:

4. The county executive committee member has the right to appear and be represented before the select committee during its investigations.

5. If the select committee reports that it finds the allegations—

a. Unsubstantiated, no further proceedings shall be taken; or

b. Substantiated, the county assembly shall vote whether to approve the resolution requiring the county executive committee member to be dismissed.

39. Section 40(6) then provides the steps to be taken once the County Assembly passes a resolution to remove the county executive committee member:

6. If a resolution under subsection (5) (b) is supported by a majority of the members of the county assembly—

a. the speaker of the county assembly shall promptly deliver the resolution to the governor; and

b. the governor shall dismiss the county executive committee member.

40. It is apparent from the material before the Court that there is no dispute that a motion was tabled before the County Assembly for the removal of the petitioner, and there is no dispute that the provisions of section 40(2) were complied with. A motion for the impeachment of the petitioner was passed on 7th April 2016. The reasons for his removal as set out in the annexure to the letter dated 15th April 2016 were, inter alia, that he facilitated the construction of substandard masonry tanks with cracks and leakages and poorly done dams, and that he failed to supervise the administration and delivery of services under the department contrary to section 36 of the CGA leading to unsatisfactory work done and generally poor implementation of water projects in the County. There is also an allegation that as a result, millions in public funds were lost.

41. Thereafter, for various reasons which I will consider in dealing with the next issue raised in this petition, the County Assembly did not proceed with the process contemplated under section 40(3) within the 10 day period set out in section 40(3)(b). As a result, the Select Committee applied and was granted an extension of time on the 25th of April 2016. This extension of time is at the core of this dispute.

42. According to the petitioner, the County Assembly had no power to extend the time granted under section 40(3) (b). If it did not complete the process contemplated under section 40(3) within the stipulated period, then the process, as I understand the petitioner's position to be, would need to start afresh, from the tabling of the motion to the sittings of the Select Committee and the investigation of the allegations against the petitioner. To do otherwise, in the view of the petitioner, would be to violate Article 10 of the Constitution on the national values and principles of governance, and the constitutional provisions on fair administrative action contained in Article 47.

43. The question that must be asked is what the intention was in enacting the provision for the Committee to report within 10 days. What was the purpose in requiring that a report be tendered within a certain timeline?

44. The Constitution gives county assemblies the mandate to oversee the conduct of county executive committee members and other organs, and in this regard, provides as follows:

3. A county assembly, while respecting the principle of the separation of powers, may exercise oversight over the county executive committee and any other county executive organs.

45. Section 40 was intended, I believe, to give effect to the provisions of Article 185(3) which gives

county assemblies oversight powers over county executives. The purpose was to facilitate the exercise of oversight powers by the county legislatures over the county executives, such oversight to be exercised in accordance with the Constitution. No timelines are given in the Constitution with respect to the period within which such oversight may be exercised. It seems to me the purpose of the constitutional and statutory provisions was to provide a means of ensuring accountability by county executives while safeguarding their right to due process. Should this view be correct and I believe it is, to interpret the provisions of section 40(3)(b) so rigidly as to render the process null and void, one that must be started afresh every time the 10 day period is exceeded, would be to render meaningless the oversight role. All that a CEC member intent on avoiding accountability would need to do is frustrate the process till the statutory period was over.

46. While there is a duty on county assemblies to comply with the statutory timelines, the circumstances under which the period provided was not complied with must be taken into account. If the circumstances were such as to require a reasonable extension of the period, as was done in this case, then in my view, there was no violation of the provisions of Article 10 or 47 of the Constitution. This is particularly so when one takes into account the events leading to the extension of time, as I will discuss in considering the next issue raised in this petition.

Whether due process was followed in the proceedings against the petitioner

47. The petitioner has alleged a violation of Article 47 and 50 of the Constitution in the proceedings that led to the decision to impeach him. Article 47 contains the constitutional guarantee to administrative action that is ***“expeditious, efficient, lawful, reasonable and procedurally fair”***, while Article 50 safeguards the right to fair hearing.

48. The facts before me indicate that on 7th April 2016, a motion for the impeachment of the petitioner in accordance with the provisions of section 40 (1) was tabled before the County Assembly, and was approved. On 15th April 2016, the County Assembly wrote a letter to the petitioner informing him of the resolution. The letter, signed by the Clerk of the County Assembly, was in the following terms:

The CEC Member

Information Communication and Technology

County Government of Kericho

Dear Sir,

RE: INVITATION TO ATTEND SELECT COMMITTEE HEARING ON THE MOTION PASSED BY THE COUNTY ASSEMBLY ON 7TH APRIL 2016

I refer to the above matter.

On the 7th April 2016, a motion was passed regarding your removal from the office as a County executive Committee Member. (See attached copy of the said motion and terms of reference of the Select Committee basing on the charges made against you).

Pursuant to section 40 of the County Governments Act you are hereby invited to attend select committee hearing on 19th April 2016 at 9.00 a.m. You have the option of being accompanied with your representative or lawyer.

Kindly come with all supporting documents pertaining the water projects for FY 2013/2014 and 2014/2015 that will be necessary for your defence.... (Emphasis added)

49. The petitioner confirms that he did receive the letter on 18th of April, and that he sought extension of

time to enable him prepare his case. He also stated in his letter to the County dated 18th April 2016 that the venue for the committee sittings was not indicated, nor were the allegations against him. In its letter of the same date, 18th April 2016, the County stated that the allegations had been attached to the letter of 15th April 2016, but that it was attaching them again.

50. What can be garnered from the petitioner's pleadings and documents is that the petitioner's Counsel appeared before the Committee on 19th April 2016, and that the petitioner appeared with his Counsel on 20th April 2016 when they asked for copies of documents, rules for the conduct of the committee proceedings, list of witnesses and their statements, and specifics of the allegations against the petitioner. In a letter dated 20th April 2016 from the County, the petitioner was informed that various documents were attached, but in his response, the petitioner's Counsel stated that no documents had been received. He also insisted on witness statements, committee rules, and on the right to cross-examine witnesses, noting that the Guidelines of the Committee indicated at rule 8 that there would be no cross-examination of witnesses.

51. I agree with the petitioner that he was entitled to be heard on the allegations made against him, in accordance with the provisions of Article 50 of the Constitution. He was entitled to receive information relating to the allegations against him, for time to prepare his defence, and to cross-examine witnesses. I also agree, to a large extent, with the decision of the Court in **Bungoma Petition No. 4 of 2014- Stephen Nendela vs County Assembly of Bungoma** which the petitioner has relied on.

52. In that decision, the High Court (Mabeya J) considered a petition similar in some respects to the petition currently before me. In his judgment, the Learned Judge considered at length the provisions of section 40 of the County Government Act with regard to the removal of County Executive Committee members. He concluded, *inter alia*, that the County Assembly of Bungoma had violated the petitioner's rights under Article 50(2). The court also made far-reaching findings with respect to section 40(3) CGA, specifically the constitutionality thereof, but since the point has not been argued before me, I need not address it.

53. However, I believe that this case is distinguishable on the facts from the **Nendela Case** above. In that case, the County Assembly gave the petitioner a matter of hours to prepare his case, and refused to give him any time whatsoever to consider and prepare to answer the charges levelled against him.

54. In this case, however, what is apparent from the material before me is that the County Assembly acceded to virtually every demand made by the petitioner and his Counsel. The petitioner was informed of the venue of the meeting which he had alleged had not been indicated. He was given an extension of time to prepare his defence. He was sent documents, though he alleges that he was not. He was given the right to cross examine witness, the Committee having indicated in the letter dated 25th April 2016 that the witnesses who had already been heard would be recalled for the petitioner to cross-examine.

55. It seems to me that between the 18th of April 2016 and the 26th of April 2016 when the petitioner filed his first petition, the petitioner did everything possible to avoid going through the committee sittings. I say this for several reasons. First, though from the documents before me he had the reasons for the motion to impeach him, which I note are set out in the attachment to the letter from the County dated 15th April 2016 which he placed before the Court in his affidavit in support of his petition, he alleged that he did not. He asked for extension of time on 19th April, and it was given to him. He asked for the right to cross examine witnesses. It was acceded to. It would appear that it was at this point that he elected to file **Kericho High Court Constitutional Petition No. 10 of 2016:-Gilbert Tuwei vs The County Assembly of Kericho** challenging the extension of time by the County Assembly.

56. The question might be asked whether a party who does everything to frustrate proceedings against him can then turn around and argue that the statutory timeline had expired, and that the process should therefore start afresh. I think not. At any rate, in my view, the petitioner in this case was accorded due process: he just elected not to go through the process mandated by statute and underpinned by the Constitution. I am therefore unable to find a violation of the provisions of Articles 47 and 50 of the

Constitution with respect to him.

Whether the proceedings before the County Assembly were a nullity for breach of a court order.

57. The next issue for determination is whether there was violation of a court order which rendered the proceedings before the County Assembly a nullity. The petitioner relies on the consent order entered before Muya J on 28th April 2016 in **Kericho Constitutional Petition No. 10 of 2016:-Gilbert Tuwei vs The County Assembly of Kericho**. The consent order was as follows:

1. That the petition dated 26th April 2016 be and is hereby marked as withdrawn with no order as to costs.

2. That the respondent may commence fresh impeachment proceedings against the petitioner if it so wishes.

58. Each of the parties, not unexpectedly, has given their own, very different interpretations, to this consent order. The petitioner argues that the implication of the consent order was that the impeachment proceedings based on the motion approved on 7th April 2016 had failed. What was required, in the petitioner's view, was that the entire process should commence from the start as provided in section 40 of the CGA.

59. The petitioner has relied on the decisions in **P.N.N vs L.W.N [2014] eKLR** and **Kenya Commercial Bank Limited vs Benjoh Amalgamated Limited & Another, Nairobi Civil Appeal No. 276 of 1997 [1998] eKLR** with respect to the binding nature of a consent order.

60. In response, the respondents argue that the interpretation given to the consent order by the petitioner was erroneous. There was nothing in the order that obliged them to set aside the ongoing process and start afresh. In their view, a literal reading of the order suggests otherwise, and there was no positive order made against the County Assembly to act or not act in a specified manner. The respondents take the position that they were at liberty to initiate the process afresh, while retaining the option of proceeding with the process then ongoing to its logical conclusion.

61. There is no dispute, I believe, as the authorities cited by the petitioner attest, that a consent order is enforceable between the parties to it as an order of the court, unless it is set aside on very clear and well established grounds. The consent order in contention in this matter was entered in **Petition No. 10 of 2016**. The question must therefore arise whether filing another petition was the way to go to enforce compliance with the court order.

62. It appears to me that the proper suit and forum for enforcing the order or punishing the party in breach of the order as alleged was in the same petition and the same court before which the consent order had been entered. It is not, in my view, open to a party to file another suit, as was done in this case, that is premised on an order that was issued in another suit.

63. A second concern, which is related to and could have been addressed had the petitioner followed the path of enforcing the consent order by way of contempt in his previous petition, is precisely what the consent order was intended to achieve. In the face of what is clearly a rather weakly worded consent order and the widely differing interpretations given by the parties, the best that the court can do is attempt to arrive at its meaning by considering the meaning of the words used and the circumstances surrounding its recording as can be gleaned from the averments of the parties.

64. The word "**may**" is defined in the Concise Oxford English Dictionary to mean "**expressing possibility**" or "**expressing permission.**" The question is did the use of the word '**may**' connote a binding obligation on the 1st respondent, as argued by the petitioner, to start the removal process afresh? Was its use intended to '**express the possibility**' of the respondent starting the removal process afresh?

65. From the averments by the respondents as set out at paragraph 25 of the affidavit of Mr. J.K Mutai, it appears that the consent order was entered into following an observation by the court (Muya, J) who was then seized of the matter, that he could not stop an ongoing process before another independent constitutional organ. This has not been disputed by the petitioner, though he filed a supplementary affidavit sworn on 7th June 2016 in which he addressed himself only to paragraph 29 of the respondents' replying affidavit with respect to his removal by the Governor.

66. Given this uncontroverted position, then the reasonable inference to be drawn from the words used is that the consent order was not intended to terminate the ongoing process, but to give the petitioner an exit from a legal process that could not be sustained. In the circumstances, I must resolve this issue in favour of the respondents. The process before the County Assembly was not a nullity for breach of a court order.

Whether the petition is incompetent for non-joinder of the Governor

67. The respondents argue that the present petition is incompetent for non-joinder of the Governor. They submit that as the removal of a county executive committee member is the prerogative of the County Governor, then he is a necessary party to the proceedings. It is also their submission that when the court sits to interrogate a matter concerning the removal of a county executive committee member under section 40 of the CGA, such action must be directed against the Governor, and in his absence, the proceedings run the risk of being an academic exercise. The respondents rely on the decision in **Mary Wangai Gachihi & Another vs Principal Magistrate, Mukurweni Courts and Another [2016] eKLR** with respect to who is a necessary party to proceedings.

68. In response, the petitioner argues, first, that he has not been removed from office. He contends that the letter for his removal relied on by the respondents was never served on him, and that it was subsequently immediately withdrawn when the Governor was served with the stay orders issued by the Court.

69. The petitioner argues further that he is challenging the constitutionality of the impeachment process carried out by the County Assembly, seeks remedies against the County Assembly for breaching his due process rights, as well as an order of certiorari to quash the report of the Assembly approved on 10th May, 2016, and there was therefore no need to join the Governor as the proper parties were already joined to the proceedings.

70. In considering this issue, I am mindful of the provisions of Rule 5 of **The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013** which provides as follows:

5. The following procedure shall apply with respect to addition, joinder, substitution and striking out of parties—

a. Where the petitioner is in doubt as to the persons from whom redress should be sought, the petitioner may join two or more respondents in order that the question as to which of the respondent is liable, and to what extent, may be determined as between all parties.

b. A petition shall not be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every proceeding deal with the matter in dispute.

c. ...

d. The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear just—

i. ...and

ii. that the name of any person who ought to have been joined, or whose presence before the court may be necessary in order to enable the court adjudicate upon and settle the matter, be

added.

71. In the circumstances, and in light of the clear provisions of the Rules set out above, I am not satisfied that this petition is incompetent on the basis that the Governor was not joined as a party. In any event, nothing turns on this issue in view of my findings on the other issues before the Court.

Whether there is justifiable cause for the removal of the petitioner from office

72. The respondents raise the question whether there is justifiable cause for the removal of the petitioner from office. They submit that from the facts set out in the report of the County Assembly, it was evident that during the tenure of the petitioner as the County Executive Committee member for water in Kericho County, he presided over massive misappropriation of funds to the tune of over Kshs.100 million in fraudulent dealings around contracts intended to improve the water security for the people of the County. The petitioner did not address himself to this issue. Indeed, during the hearing of this petition, the petitioner's counsel expressly stated that the petitioner was not challenging the merits of the allegations against him.

73. However, much as the petitioner does not challenge the merits of the allegations against him, this is an issue that, in the view of this court, it is not competent to determine. Certain allegations set out in the terms of reference of the Select Committee set up to investigate the petitioner allude to massive irregularities in the award of tenders, and in the approval of substandard works by the petitioner leading to the loss of public funds.

74. It is not, however, within the mandate of this Court to say whether or not there is justifiable cause for the removal of the petitioner. What it can say, on the material before it, is that the County Assembly may have had just cause to initiate the process against the petitioner as provided under section 40 of the CGA. Further, that if the allegations against the petitioner are justified, then he should be made subject to the criminal justice system within which the investigation and his prosecution if justified can proceed.

Who should pay the costs of this Petition

75. The petitioner has prayed that the 3rd respondent, the Speaker of the County Assembly of Kericho, should be condemned to personally pay the costs of this petition for presiding over an unlawful process. However, having found on the issues for determination in this matter in favour of the respondents, I believe an award of costs against the 3rd respondent cannot issue. In any event, even had I found against the respondents, it appears to me that in this case, costs cannot properly be awarded against the 3rd respondent in his personal capacity as he was acting in his capacity as the Speaker of the County Assembly and presided over the proceedings of the County Assembly. As costs are in any event within the discretion of the court, given the nature of this matter, it is my view that each party should bear its own costs.

Summary of Findings

76. The upshot of my findings on the six issues identified in this petition are as follows:

i. Whether the County Assembly could extend time within which the report of the County Assembly could be made.

It is my finding that in the circumstances of this case, the County Assembly was entitled to extend the 10 day period.

ii. Whether the proceedings against the petitioner violated the provisions of Article 47 and 50 of the Constitution;

It is my finding that the petitioner was accorded due process, and there was no violation of the provisions of Article 47 and 50 of the Constitution.

iii. Whether the proceedings before the County Assembly were a nullity for breach of a court order;

It is my finding that there was no breach of the court order. Further, that the proper proceedings and forum for enforcement of the order was in the petition in which it had been issued;

iv. Whether the petition is incompetent for non-joinder of the Governor:

It is my finding that in light of the provisions of Rule 5(b) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, this petition is not incompetent for non-joinder of the County Governor.

v. Whether there is justifiable cause for the removal of the petitioner from office;

It is my finding that this court does not have the mandate or the competence in these proceedings to determine whether there was justifiable cause for the removal of the petitioner from office.

vi. Who should pay the costs of this petition

There is no basis for condemning the 3rd respondent to bear the costs of this petition. Each party shall bear their own costs.

Conclusion

77. In light of my findings as summarized above, this petition is found to be without merit, and is hereby dismissed.

78. The conservatory orders issued by the High Court sitting in Nakuru on 12th May 2016 staying the implementation of the report of the County Assembly of Kericho approved on 10th May 2016 recommending the removal from office of the petitioner are hereby discharged.

Dated, Delivered and Signed at Kericho this 2nd day of December 2016.

MUMBI NGUGI

JUDGE