



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**PETITION NO. 13 OF 2016**

**ARTICLES 10(1) & (2), 19(1), 20(1), 21(1), 22(1), 35(1)(b), 47(1), 48, 50(1), 75(1) & 165 OF CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF VIOLATION AND/OR INFRINGEMENT ON THE FUNDAMENTAL RIGHTS OF THE PETITIONERS**

**AND**

**IN THE MATTER OF SECTIONS 15, 43 & 44 OF THE STANDING ORDERS OF THE ASSEMBLY**

**AND**

**IN THE MATTER OF KISII COUNTY ASSEMBLY, KISII COUNTY**

**AND**

**IN THE MATTER OF LEADER OF THE MAJORITY AND MINORITY OF THE COUNTY ASSEMBLY, KISII COUNTY**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS & FUNDAMENTAL FREEDOM) PRACTICE AND PROCEDURE RULES, 2013**

**BETWEEN**

**HON. PROTUS ARAMBA MOINDI**

**HON. DANIEL APEPO ..... PETITIONERS**

**-VERSUS-**

**THE SPEAKER OF THE COUNTY ASSEMBLY – KISII COUNTY**

**THE COUNTY ASSEMBLY – KISII COUNTY .....RESPONDENTS**

**AND**

**RULING**

1. This Petition dated 18<sup>th</sup> April 2016, was filed by **Protus Aramba Moindi** and **Daniel Apepo**, elected ward representatives and leaders of the majority and minority representing the political coalition parties known as Cord and Jubilee in the County Assembly of Kisii. They have brought this action against the Speaker of the Kisii County Assembly (first respondent) and the County Assembly of Kisii (second respondent).

2. The prayers sought in the petition are mainly declaratory and injunction orders. There is an additional prayer for the judicial review order of certiorari. A Notice of Motion dated 18<sup>th</sup> April 2016, was contemporaneously filed with the Petition seeking interim orders of injunction pending the hearing and determination of firstly, the application and secondly, the Petition. The orders are intended to restrain the respondents from preventing, barring, restricting and/or interfering with the petitioners' performance, discharge and/or executions of their duties as the leaders of majority and minority in the County Assembly of Kisii also from directing the removal and/or replacement of the petitioners as leaders of the majority and minority without due regard to the provisions of the County Assembly Standing Orders.

3. The petitioners seek also a Conservatory Order to protect, preserve and/or conserve their status as the leaders of majority and minority.

The grounds in support of the application are in the body of the Notice of Motion and fortified by the supporting affidavit dated 18<sup>th</sup> April 2016, deponed by the first petitioner on his own behalf and that of the second petitioner.

The brief facts of the dispute as may be deciphered from the supporting affidavit are that; following the conclusion of the last general elections held on 4<sup>th</sup> March 2013, in which the petitioners were elected as Members of the Kisii County Assembly (MCAs) representing their respective wards, they were also elected as Leaders of the Majority and Minority in the County Assembly of Kisii for purposes of representing the interests of their political parties coalitions.

4. Their election as such leaders was undertaken by their respective political parties coalition pursuant to the County Assembly Act, 2012 and the relevant Standing Orders of the County Assembly. Thus, the Orange Democratic Movement (ODM) on behalf of the Cord Coalition elected the first petitioner as Leader of the Majority and the Jubilee Coalition elected the second petitioner as the Leader of the Minority. A communication to that effect was made by the first petitioner upon receipt of the minutes of the coalition parties through the Office of the Chief Whip of the parties.

5. Thereafter, the petitioners took up the offices of the Leader of Majority and Minority and performed their duties in accordance with the Constitution of Kenya, 2010, and the County Governments Act as well as the County Assembly Standing Orders. They worked closely together in execution of their duties on the floor of the assembly and in the Assembly Service Board which is instrumental in the affairs of the Assembly.

However, on the 13<sup>th</sup> April 2016, motions were received from two nominated members of the County Assembly seeking to canvass a vote of no confidence against the two petitioners.

6. The first respondent upon receiving the motions and without scrutiny and/or verification of the same for necessary compliance presented them to the floor of the assembly for debate and/or deliberations. Indeed, the first respondent allowed debate on issues of integrity without first directing the mover of the motion to supply and/or tender to the petitioners any adverse information intended to be used in prosecuting the motion of no confidence.

With necessary knowledge that the petitioners were appointees of their respective political parties

coalitions, the first respondent proceeded to usurp the mandate of the chief whips of the coalition parties and directed the removal and replacement of the petitioners thereby violating the provisions of the County Assembly Standing Orders.

It was for all the foregoing reasons that this Petition and Application were filed by the petitioners against the respondents.

7. However, an interested party by name **Caleb Gichana**, applied to be enjoined in the Petition and hence, the application for his own benefit and that of the members of the public within the County of Kisii. His application to that effect dated 10<sup>th</sup> May 2016, was allowed by the court on the 11<sup>th</sup> May 2016, when directions were given that the Preliminary Objection to the entire Petition dated 5<sup>th</sup> May 2016, by the second respondent be heard and disposed of prior to the hearing of the notice of motion dated 18<sup>th</sup> April 2016. The point raised in the Objection was that this court lacked the jurisdiction to hear and determine the Petition by dint of S.12 of the Powers and Privileges Act.

8. A second notice of preliminary objection dated 26<sup>th</sup> May 2016, was again filed by the second respondent based more or less on the same grounds as those raised in the earlier notice dated 5<sup>th</sup> May 2016.

Suffice to say that this was an abuse of the court process by the second respondent.

Nonetheless, the latest objection dated 26<sup>th</sup> May 2016, seems to have been given first priority by the parties. In that regard, directions were given that the objection be heard by way of written submissions.

Accordingly, submissions were filed by the petitioners through Messrs **Oguttu Mboya & Co. Advocates** and by the second respondent Messrs **Aboki Begi & Co. Associates**.

The interested party also filed his submissions through Messrs **S.M Sagwe & Co. Advocates**.

The first respondent did not file any submissions but had earlier filed grounds of opposition dated 3<sup>rd</sup> June 2016 through the firm of **G.M Nyambati & Co. Advocates**, who were later replaced by the firm of **Muchemi & Co. Advocates**.

9. This ruling is with regard to the Preliminary Objection dated 26<sup>th</sup> May 2016, and in that regard the rival submissions by the petitioners, the second respondent and the interested party have been given due consideration by this court.

On the outset, a preliminary objection normally raises pure points of law which are argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion (see, **Mukisa Biscuit Co. Vs. Westend Distributors (1969)EA 697**).

10. With regard to ground one of the objection, the second respondent contends that the application is an affront of the well known Constitutional Principles of Separation of Powers between the Legislature and the Judiciary. This is merely an arguable point which has improperly been raised herein as a preliminary objection. However, it is instructive to note that every public agency is required and expected to discharge its mandate in accordance with the Constitution and relevant Statutory Law but where any aspect of such discharge of mandate entails uncertainties that occasion dispute, then it falls upon the courts to exercise their authority to interpret and clarify the Law and declare the valid position.

11. Courts are required by the Constitution to ensure that all Branches of Government act within the law and fulfill their Constitutional Obligations (see, **Doctors of Life International Vs. Speaker of the National Assembly – a South African Constitutional Court decision**).

In **Samson Vali Musembi & Others Vs. Makueni County assembly and Others (2014)e KLR**,

the High Court observed that the doctrine of separation of powers in relation to the Legislature and the Judiciary provides that the Legislature and Judiciary should respect each other's sphere of competence with the courts respecting the legislative mandate of Parliament and Parliament the adjudication role of the courts. In the circumstances, the court may only interfere with legislative matters where it is shown that the Assembly has acted, is acting or has threatened to act in contravention of the Constitution which the Judiciary must defend in accordance with its delegated sovereign judicial mandate of the people of Kenya, (see Article 1(3) of the Constitution).

12. Article 165 (6) of the Constitution, grants the High Court supervisory jurisdiction over any person, body or authority exercising a judicial or quasi-judicial function, but not over a Superior Court.

For all the foregoing reasons, ground one of the Objection is unsustainable and must hereby be overruled. With regard to ground two, the second respondent contends that this Court's jurisdiction to hear and determine the Application and the Petition is expressly ousted by S.12 of the National Assembly (Power & Privileges) Act (Cap 6 LOK).

The said Act is an Act of Parliament to declare and define certain powers, privileges and immunities of the National Assembly and of the members of the National Assembly and for purposes incidental to or connected with the matters aforesaid.

13. S.12 of the Act provides that:- ***"No proceedings or decision of the Assembly or the Committee of Privileges acting in accordance with this Act shall be questioned in any court"***.

The Act applies *"Mutatis Mutandis"* to all the County Assemblies now that we are in the era of devolution and County Governments.

On the face of it, S.12 of the Act purports to exclude interference of the courts in matters of the National assembly or for that matter County Assemblies. However, Article 2 of the Constitution proclaims the supremacy of the Constitution to the effect that it is Supreme Law of the Republic and binds all persons and all state organs at both levels of Government. So that, no person may claim or exercise State authority except as authorized under the Constitution and any law that is inconsistent with the Constitution is void to the extent of the inconsistency and any act or omission in contravention of the Constitution is invalid.

14. Article 165(3) of the Constitution, confers jurisdiction to the High Court to hear any question respecting the interpretation of the Constitution including the determination of the question whether anything said to be under the authority of the Constitution or any law is inconsistent with, or in contravention of the Constitution.

County Assemblies are thus behoved to operate under the Constitution which is the Supreme Law of the Land and if they violate the procedural requirements of the Supreme Law, it is for the Courts of Law to assert the authority and supremacy of the Constitution (see, **Speaker of the Senate & Another Vs. Attorney General & Others, Supreme Court of Kenya Advisory Opinion No. 2 of 2013**).

Besides, this court as the custodian of the Bill of Rights which is invoked in this Petition is entitled to intervene where the facts disclose a need to prevent a violation of the rights and fundamental freedoms guaranteed under the Constitution (see, **Bill Kipsang Rotich Vs. Inspector General National Police Service (2013)e KLR**).

15. Jurisdiction being the authority which a court has to decide matters that are litigated before it or to make cognizance of matters presented in a formal way, for its decision and taking into account that Article 165(3) of the Constitution grants the High Court the power to determine any question as to the interpretation of the Constitution and that the High Court is recognized as the custodian of the Bill of Rights which is the framework of social, economic and cultural policies in a democratic state such as Kenya it would follow that S.12 of the National Assembly (Power & Privileges) Act cannot restrict or oust the Constitutional mandate of this court.

Consequently, ground two of the Objection must fail as the petitioners herein have invoked the judicial process clearly for the purposes of achieving Constitutional values and objectives.

**16.** With regard to ground three of the Objection, the second respondent contends that the issues raised by the petitioners are issues to do with political parties' management which should first be canvassed before the political parties tribunal as the forum of arbitration in accordance with the provisions of the Political Parties Act and in line with S.11 of the Civil Procedure Act.

In the Australian Case of Plaintiffs 157 of 2002 Vs. Commonwealth of Australia [2003]UCA 2, it was stated that:- ***"The Parliament cannot abrogate or curtail the court's Constitutional function of protecting the subject against any violation of the Constitution, or any law made under the Constitution"***.

Therefore, the existence of the Political Parties Tribunal created under the Political Parties Act does not curtail this court's power under the Constitution of Kenya especially in determining issues relating to Violation of Constitutional rights as those raised in this Petition.

**17.** In any event, The Political Parties Act, 2011, is an Act of Parliament to provide for the registration, regulation and funding of Political Parties, and for connected purposes.

S.40(1) of the Act, provides for jurisdiction of the Political Parties Disputes Tribunal to wit:-

- (a) disputes between the members of a political party.
- (b) disputes between a member of a political party and a political party.
- (c) disputes between political parties.
- (d) disputes between an independent candidate and a political party.
- (e) disputes between coalition parties and
- (f) appeals from decisions of the Registrar under this Act.

The dispute in this matter has nothing to do with political parties and/or political parties coalition but alleged Violation of the Constitution and Statutory Law by the first and second respondents.

Consequently, the third ground of the Objection is unsustainable and overruled accordingly.

**18.** In the end result, it is the finding of this court that the Preliminary Objection by the second respondent dated 26<sup>th</sup> May 2016 is devoid of merit and is hereby dismissed in its entirety with costs to the petitioners and the interested party to be borne by the second respondent.

Ordered accordingly.

**[Read and signed this 8<sup>th</sup> day of December 2016.]**

**J.R. KARANJAH**

**JUDGE**

**In the presence of**

Mr. Sagwe for the Interested Party

Mr. Ondari for Mr. Begi for the 2<sup>nd</sup> Respondent

Njoroge CC