



**REPUBLIC OF KENYA**

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

**CONSTITUTIONAL PETITION NO. 1 OF 2015**

**IN THE MATTER OF THE CONSTITUTION OF KENYA 2010**

**IN THE MATTER OF THE COUNTY GOVERNMENT ACT NO. 17**

**AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL**

**RIGHTS AND FREEDOMS UNDER ARTICLES 27, 197,**

**28,21(3), 22(1)23(1)(3),27(1),27 (3) 38,80,91,92,196 OF THE**

**CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA(SUPERVISORY**

**JUSRIDICITION AND PROTECTION OF FUNDAMENTAL RIGHTS AND**

**FREEDOMS OF THE INDIVIDUAL) HIGH COURT PRACTICE RULES, 2010**

**AND**

**IN THE MATTER OF COUNTY ASSEMBLY GENDER BALANCE AND**

**DIVERSITY AND GENDER DISCRIMINATION**

**BETWEEN**

**HON. JENNIFFER EKHUYA .....PETITIONER**

**VERSUS**

**COUNTY ASSEMBLY OF VIHIGA .....1ST RESPONDENT**

**SPEAKER COUNTY ASSEMBLY OF VIHIGA ..... 2ND RESPONDENT**

**JUDGMENT**

1. By a petition filed herein on 20th January, 2015 under Articles 27, 28, 197, 22, 23, 27, 38, 47, 80, 91,

92 and 196 of the constitution, the Petitioner seeks to stop her replacement as Leader of Minority of the Vihiga County Assembly. In summary it is her contention that her removal on 15th January, 2015 and subsequent replacement on 16th January, 2015 does not meet the threshold of the afore-cited articles of the constitution. She contends that the procedure used to remove her was planned and unconstitutional since she was not adversely mentioned in the report upon which her removal is based and also because the removal was because she is a woman. She further contends that she was the only woman in leadership in the County Assembly and her removal means that there shall be no gender balance.

2. In the Petition she seeks first a declaration that the decision made by the 1st Respondent on the 15th and 16th January 2015 replacing her without observing the county gender balance and diversity was in breach of Articles 27 and 197 of the constitution and secondly an order of certiorari quashing the said decision for being unconstitutional. She also seeks damages and the costs of the suit.

3. In the Notice of Motion filed simultaneously with the Petition she sought an order restraining the newly elected and sworn in Leader of Minority from taking over office pending the hearing and determination of the petition. She also urged the court to reverse the decision made on the 15th and 16th January, 2015 to replace her. The court issued an interim order in her favour.

4. Both the Petition and the notice of motion were opposed vide a replying affidavit sworn by Daniel C. Chitwah, speaker of the 1st Respondent and who is himself the 2nd Respondent. He has deponed that the petition is premised on misrepresentations, untruths, falsehoods and invendos and that by communicating the removal of the Petitioner by her Party Coalition he only did what was required of him as the Speaker. He has also, quoting the standing orders, deposed that members of the Assembly followed the right procedure in communicating to him the ouster and subsequent replacement of the petitioner and that nowhere is it provided that her replacement ought to be a woman. He disputes that it was the members of the Majority Coalition that removed the petitioner. Citing the Assembly, Hansard of 16th January, 2015 he further disputes that the ouster was discussed on the floor of the Assembly. He deposes that any stay orders would be futile as the new leader of minority has already been sworn in and has assumed office. He contends that no iota of infringement of the Petitioner's rights has been disclosed. He also disputes that the petitioner has been discriminated on account of gender and deposes that she is a member of several committees alongside other women members of the County Assembly; that she cannot purport to secure special preference over the others. He emphasizes that all members of the County Assembly are equal under Article 177 of the Constitution. He further deposes that this is a party issue and that the Petitioner ought to have sought redress in the Political Parties Tribunal.

5. At the hearing Mrs. Sandys for the Petitioner conceded that the removal of the Petitioner was instigated by her Party Cord. She however, submitted that the Party did not inform her of that decision but that she only became aware of it through the press and that she was out of the country at the time a fact that the Respondents were aware of. She submitted that neither Standing Order No. 16 nor Section 63 of the County Assembly` Standing order were followed. Instead the decision was made by only a few members. She submitted that this contravenes Article 27 of the constitution and as the meeting comprised men only it also contravened Article 197. She submitted that it was the duty of the 2nd Respondent to advice the members of the Assembly which he did not do and hence acted in contravention of Article 10 which binds all state organs and officers. She contended that the Petitioner was removed merely because she was a woman and this is a gross violation of her rights. She urged this count to consider the Articles cited in the constitution which are all intended to defend women and make a finding that the county Assembly infringed the Petitioner`s rights.

6. On his part Mr. Kopanga Kusina submitted that the process of removing a person from the office of Leader of Minority is provided for in standing order No. 16 (5) of the County Assembly Standing Orders and that procedure was duly observed. He contended that order No. 63 cited by Mrs Sandy`s relates to removal of the speaker and is therefore not relevant in this case. He submitted that the removal of the Petitioner was not debated on the floor of the house as that decision had been made by her party. On the issue of discrimination he contended that anybody elected or nominated could occupy the office irrespective of gender. He stated that she was not removed on account of misappropriation of funds but rather for her incompetency to secure the interests of her party in the Assembly. He noted that the new

leader of Minority has taken over office and as required by the constitution took the oath of office immediately. He further submitted that the Articles of the Constitution cited do not disclose violation of the petitioner's rights; That indeed they have no relevance to her case. He submitted that to the contrary, they as an Assembly have ensured that women are given an opportunity to serve in four committees. He stated that the Petitioner was not the only one affected as even the Deputy Minority Leader and Minority Whip and Deputy Majority leader were affected. He urged this court to dismiss the Petition.

7. In reply Mrs. Sandys reiterated her submission that the decision was made in the absence of those affected and hence flawed. She reiterated that the matter was one for all the members not just a few and that Standing Order 63 protects the right of an individual to a fair hearing and that to-date the petitioner has not been furnished with the particulars of her incompetence. she pointed out that of all those who were replaced she was the only woman and so affirmative action was not observed. She observed that the petitioner was the only woman in the leadership of the Assembly and now that she has been removed it has only men a situation that is chauvinistic. On the submission that the petitioner ought to have sought redress in the political parties Tribunal. Her response was that this court has jurisdiction under Article 165 to hear the matter.

8. It is not in dispute that until 14th January, 2015 the Petitioner was the Leader of Minority in the County Assembly of Vihiga. It is also not in dispute that on 15th January, 2015 she was removed from that position following a decision of members of her Coalition. It is also not in dispute that following her ouster a new leader of Minority was elected and subsequently sworn to office. The Petitioner's complaint is that the process that culminated in her removal was flawed as only a few members of her Coalition attended the meeting that passed the resolution to remove her and that she was not given a hearing. It is also her contention that she was discriminated against as a woman and that the two thirds rule was not observed in her case. These are the issues that call for determination by this court but before that this court must determine whether it is seized with jurisdiction to hear the matter.

9. On the issue of jurisdiction my finding is that this court has jurisdiction both under Article 23 (I) and article 165 (3) (b) of the Constitution and the only issue is whether the Petitioner is deserving of the order sought.

10. Removal of the Leader of Minority is as conceded by both sides governed by Standing Order 16 (3) (4) and (5) of the Standing Orders for Members of The County Assembly of Vihiga which provides;\_

**“ ( 3) A member elected under paragraph (2) may be removed by a Majority of votes of all members of the Minority party or Coalition of parties in the County 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 under paragraph (1)**

**( 5) The whip of the Minority party or Coalition of parties in the County 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.**

11. The Petitioner has annexed the Minutes of the Vihiga County Cord meeting held at Standkisa Guest House on 14/1/2015 annexure JE3, a communication from the office of Minority whip to the speaker – annexure JE4 and the order paper for the special sitting of the Assembly on 16th January, 2015 which included the communication from the chair. A cursory glance at these annexures indicates that the procedure set out under Standing Order 16(3) (4) (5) was followed. The minutes show that nine of the members of the County Assembly were present, one was absent with apology and three were absent without apology. Those who attended and agreed with the resolution appended their signatures in support of the same. Thereafter, the Minority Whip communicated the decision to the speaker in writing as provided for under Order 16(5). The minutes show that some of the members who attended were women.

12. The Petitioner at ground 2 of the Notice of motion, paragraph 9 of the affidavit in support of Notice of

Motion, paragraph 3 of the Petition and Paragraph 9 of the affidavit in support of the Petition takes issue with the removal because it was not supported by her party. At ground 3 of the Notice of Motion for instance she states:-

**“ That the Petitioner`s political party is the one that has the mandate to appoint and replace her through the bonafide members of her party and not the 1st Respondent`s members who sat down and replaced her without her knowledge and without notifying her party as required by law”**

13. In the petition she contends that she could not be removed without communication to the Cord Coalition Secretariat whereupon all members of the party would have the final word. With due respect she seems to have misapprehended the procedure. The same as I have stated is clearly spelt out under Order 16(3) and it is that a member elected as leader of Minority may be removed by a majority of votes of all members of the minority party or coalition of parties. As I understand it the word members here means a member elected or nominated in accordance with article 177 (I) of the constitution as defined by section 2 of the county Governments Act, 2012. Indeed this is the same meaning attributed to member under standing order No. 2 of the Standing Orders of Vihiga County Assembly. In effect it is the majority votes of the members of the Assembly of the Minority party or coalition whether elected or nominated that call the shots, not the members of the party at large. The minutes show that nine out of thirteen members of her party were in support of the decision. She does not say that these were not the bonafide members of her party, neither does she say that the number fell short of the members of her party in the County Assembly. As to why she was removed that is purely a party issue with which this court would be reluctant to interfere. Suffice to state however, that she has not satisfied this court that she was removed purely because she is a woman which would of course be unconstitutional. Nowhere do those minutes indicate that she was removed on account of her gender. They allude to other reasons and as was held by my brother Majanja-J, with whom I agree in, **Republic Versus County Assembly of Migori & 4 others Exparte Johnson Omolo Owino {2014} Eklr:-**

**“ ..... As the Majority of members of the Coalition contemplated under Standing Order No. 16(3) have exercised the option to elect the 2nd interested party as the Majority Leader, the Court ought to defer to that position as it represents the will of the Majority of the members of that Majority Party and Coalition.**

**In my view, the election of the Majority Leader is a prerogative of the members of the party in the Assembly.”**

14. In the end, I find no merit in the petition and the Notice of Motion and dismiss them accordingly. Any interim orders that were granted are hereby vacated.

15. The costs of the Petition and of the Notice of Motion shall be borne by the Petitioner.

**Dated signed and delivered at Kisumu this 5th day of February, 2015**

**E.N. MAINA**

**JUDGE**

**In the presence of:**

Mr. Sandys for the Petitioner

Mr. Kosina for the Respondents

Petitioner present

Moses Okumu – Court Interpreter

