REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

MILIMANI LAW COURTS

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 158 OF 2015

BETWEEN

HON. MICHAEL MANTHI KISOI…….…..PETITIONER

VERSUS

COMMISSION OF INQUIRY INTO THE PETITION

TO SUSPEND MAKUENI COUNTY GOVERNMENT…..…..1ST RESPONDENT

MOHAMMED NYAOGA…….....……..…….....2ND RESPONDENT

JOHNSTON KAVULUDI……..….....…..3RD RESPONDENT

EMILY GATUGUTA…….....…...4TH RESPONDENT

HARRISON MAITHYA (PROF.)…….....5TH RESPONDENT

ALICE WAIRIMU…….....…..6TH RESPONDENT

TAIB ALI TAIB……..….....7TH RESPONDENT

THE COUNTY GOVERNMENT OF MAKUENI…….....8TH RESPONDENT

THE HONOURABLE ATTORNEY GENERAL…….....9TH RESPONDENT

RULING

Introduction

1. The applicant is the Member of Parliament for Mbooni Constituency, Makueni County. He has brought the present petition to challenge the establishment of the 1st respondent and the appointment of the 2nd – 7th respondents to inquire into the question whether the County

Government of Makueni should be suspended. Together with the petition, the petitioner filed an application dated 21st April 2015 brought by way of Notice of Motion in which he seeks the following substantive orders::

i) …

ii) …

iii) That pending the hearing and determination of the petition herein, interim conservatory order to issue against the Commission of Inquiry into the petition to suspend Makueni County Government, Mohammed Nyaoga, Johnston Kavuludi, Emily Gatuguta, Harrison Maithya (Prof.), Alice Wairimu and Taib Ali Taib either by themselves, agents or anyone claiming through them, to restrain them from investigating or further investigating, inquiring or further inquiring into the situation of Makueni County Government, or from making any recommendation concerning or related to suspension of Makueni County Government.

iv) That the respondents herein bear the costs of this application.

2. The application is supported by his affidavit sworn on the same date, and pursuant to orders of the court, the applicant filed submission dated 28th April, 2015. The respondents oppose the petition and have filed affidavits in reply and submissions which I shall refer to later in the ruling.

3. The applicant's case Mr. Kisoi states in his affidavit that he brings the application in his individual capacity as well as in his official capacity as the duly elected representative of Mbooni Constituency in Makueni County. He avers that on or about 22nd November, 2014, it was reported in the media that a petition was presented to the President to suspend the County of Makueni. He claims, however, that the petition has never been published or publicized by the County Government of Makueni or any duly recognised constitutional organ to enable the citizens and residents of Makueni County understand its contents, purport and consequences.

4. The applicant argues, further, that the County Government did not undertake any civic education in the County to educate its residents and citizens with regard to the petition to the President before they signed it; did not facilitate the conduct of a local referendum among the residents of Makueni County before they signed the petition, and neither did the County set up structures for public participation that would enable the residents and citizens in Makueni County present their views on the petition before signing it.

5. It is also Mr. Kisoi's deposition that the County Government did not establish or facilitate avenues for the participation of people's representatives, including members of the National Assembly and Senate in Makueni, before the petition was signed, He further alleges that the petition was never published in the traditional media, public meetings, community stations or television stations to enable the citizens and residents understand its contents, purports and consequences.

6. The applicant avers that by Gazette Notice Number 1557 dated 10th March, 2015, the President constituted the 1st respondent, chaired by the 2nd respondent and with the 3rd to 7th respondents as its Commissioners, to hear the petition. He contends that there was no approval by the National and County Government Co-ordinating Summit, as required by law, of the decision of the President to constitute the 1st respondent to inquire and investigate into the situation of the 8th respondent, and that consequently, the constitution of the commission is void ab initio.

7. The applicant further states that in a newspaper advertisement carried in the Daily Nation newspaper of 16th April, 2015, the 1st respondent advertised that it would commence its proceedings on 23rd April, 2015 in Nairobi, to hear the petition to suspend the Makueni County Government, and invited all persons who so wish, to submit memoranda and statements at their

Nairobi office on the petition. He contends that to date, the 1st respondent has never published or publicized the actual petition that is the subject of its intended proceedings.

8. He argues that it is inconceivable how the 1st respondent expects the residents of Makueni County to submit informed memoranda and statements on the petition whose contents or purport they have never neither seen nor known. It is also his deposition that the residents of Makueni County are neither sufficiently economically endowed, nor socially empowered, and neither do they have access to mainstream media. It was his contention therefore that it was a travesty of justice for the 1st respondent to fail to publish the actual petition that is the subject of their intended proceedings in public meetings held in Makueni County or through media accessible to the people of Makueni, before commencing its hearings.

9. The applicant is also aggrieved by the decision to conduct the hearing of the petition in Nairobi City County, which he avers is several thousand miles away from Makueni County, and expect the majority of the residents of Makueni County who are poor, to participate in the immensely important proceedings that may lead to the suspension of their county. He therefore seeks orders to stop the 1st to 7th respondents from commencing their proceedings on 23rd April 2015.

10. The applicant has made further depositions with regard to the alleged instigation of the petition to suspend Makueni County by the Governor and Deputy Governor as a result of a motion to impeach them by the County Assembly, but these are matters this court need not go into at this stage. He also avers that there was pending before the High Court Constitutional Petition Nos 500 of 2014 and 489 of 2014 challenging the impeachment of the Governor of Makueni County and the County Executive Committee members respectively. It was his contention therefore that the proceedings before the 1st respondent are sub-judice the pending court petitions.

11. The applicant further deposes that the petition presented to the President to suspend the County violates his rights under Article 47 (1) of the Constitution for being unlawful and procedurally unfair as it offends Sections 90 (1) and (2) of the County Governments Act. He contends that the said sections enjoin the Government of Makueni to facilitate and undertake a local referendum pursuant to the Elections Act No 24 of 2011 before the residents and citizens could sign the petition. It is also his deposition that the impeachment of the Governor of Makueni is not an exceptional circumstance under Article 192 (1) (b) of the Constitution and Section 122 (b) of the County Governments Act to warrant suspension or commencement of a process to suspend the County.

12. The applicant similarly argued that the constitution of the 1st respondent to investigate and inquire into the situation of Makueni County is patently unlawful as it offends Sections 123 (3) and (4) of the County Governments Act; that the said proceedings by the 1st to 7th respondents scheduled to commence on 23rd April, 2015 in Nairobi patently breach the provisions of Articles 27 (1), (4) and (5) of the Constitution; and that they disenfranchise the poor residents of and citizens in Makueni County from undertaking their civic duty to participate in the petition seeking to suspend the County.

13. The applicant's Counsel Prof. Ojienda and Mr Okoth made submissions on his behalf. Mr. Okoth submitted that in considering whether to grant conservatory orders in an application such as this, the court is not called upon to make any definite finding either of fact or law, which would be within the province of the court that will ultimately hear the petition. The applicant was only required at this stage to establish a prima facie case with a likelihood of success, and to demonstrate that unless the conservatory order is granted, there is real danger which may be prejudicial to him.

14. He relied, among others, on the decisions in **Centre for Rights, Education and Awareness (CREAW) and 7 Others vs The Hon. Attorney General, Petition No 16 of 2011, Muslims for Human Rights (MUHURI) and 2 Others vs The Attorney General Mombasa High Court**

Petition No 7 of 2011. Counsel submitted further that under Article 23 (3) (c) of the Constitution, a court had jurisdiction, in any proceedings brought under Article 22, to grant appropriate relief, including a conservatory order.

15. Mr. Okoth submitted that one of the objectives of devolved governments under Article 174 of the Constitution is to give powers of governance to the people in making decisions that affect residents of the County. It was his submission that the County Government of Makueni could not be heard to say that it had no role in a petition instituted to suspend the County Government as it was under an obligation to facilitate public participation.

16. Counsel further submitted that the applicant's petition was not frivolous as it was seeking the Court's guidance on the due process of law to be followed in instituting a petition to suspend a County Government; the threshold to be met; participants to be involved and interventions to be explored in the process leading to the signing and lodgement of a petition to the President to suspend a County Government; and the statutory obligations to be performed by a Commission formed to inquire into suspension of a County Government.

17. It was his submission that because of the grave implications of the suspension of the County to the residents of Makueni County on one hand and tax payers generally in the event that the Commission were to recommend suspension, this was the best time and the appropriate forum to inquire into the critical question of what would constitute a valid petition to the President to form a Commission such as the 1st respondent.

18. The applicant submitted that the statutory consequences that would follow a recommendation for suspension include: proroguing of Makueni County Assembly pursuant to Section 124 of the County Governments Act; suspension of the County pursuant to Section 125 of the County Governments Act and transfer of the County Executive Authority of Makueni County to the County Management Board, an entity that has no direct mandate from the residents of the County, but is appointed under Section 126 of the Act; and fresh elections in Makueni County and the eventual dissolution of the current County Executive and County Assembly in accordance with Section 130 of the County Governments Act.

19. It was the applicant's submission, therefore, in reliance on the decision of the Supreme Court in **Gatirau Peter Munya vs Dickson Mwenda Kithinji and 2 Others SC Application No 5 of 2014**, that a recommendation of suspension by the 1st respondent would lead to fresh elections pursuant to Article 192 (6) of the Constitution and Section 130 of the County Government Act, which would utilise enormous, yet scarce public resources. It was his submission that such resources should only be committed to public causes that have received certification by Court to be valid.

20. Mr. Okoth submitted on behalf of the applicant that the Court was not being asked to descend into the arena of the Commission, but to stay the proceedings of the Commission. He contended that once the petition before the Commission is published and it is ascertained that the factual basis of the petition to suspend Makueni County is the very substratum of Nairobi Petition Nos 500 of 2014 and 489 of 2014, then the proceedings before the 1st respondent would be sub judice the said petitions. Counsel submitted that the applicant had established a prima facie case, and asked the Court to dismiss the preliminary objection by the 8th respondent and grant the conservatory orders sought by the applicant.

The Case for the 1st -7th and 9th Respondents

21. In response to the application, and on behalf of the 1st – 7th and 9th respondent, the Attorney General filed an affidavit sworn by Mr. Morris Kaburu, the Secretary to the Commission, on 23rd April, 2015. He also filed submissions dated 27th April, 2015. The case for the Attorney General was presented by Learned Counsels, Mr. Bitta and Mr. Muiruri.

22. In his affidavit, Mr. Kaburu denied the allegation that the petition to suspend Makueni County was never published. He contended that it is inconceivable that a petition supported by signatories in excess of 50,000 from Makueni County as verified by the Independent Electoral and Boundaries Commission (IEBC) can be said not to have been published.

23. He further averred that the petition had been published; that the applicant, as a member of Parliament, had been made aware of the contents of the petition and invited to participate in the proceedings as a person with an identifiable interest; and that the allegation that the County Government of Makueni has failed to undertake some of its constitutional and statutory obligations are allegations which are the very subject matter of inquiry by the Commission.

24. It was also the AG's averment that, contrary to the contention by the applicant, the National and County Government Co-ordinating Summit approved the decision to constitute the Commission, and the President acted in accordance with this approval.

25. To the complaint that the Commission was carrying out its proceedings in Nairobi, Mr. Kaburu averred that the Commission, which commenced sittings on 23rd April 2015, had scheduled hearings from the 4th of May 2015 and throughout the month of May in various locations in Makueni County. Mr. Kaburu contended that, in any event, national organs such as the Senate, the National Assembly and the Supreme Court which legislate on or adjudicate over matters affecting counties, including Makueni County, all sit in Nairobi. It was his deposition therefore that there was no rationale to compel the Commission to set up its offices for the purposes of executing its mandate in Makueni County.

26. The view of the respondents was that this petition is premature and presumptive and seeks to second guess what the Commission will or will not do; is premised on alleged infringement of fundamental rights and freedoms but discloses no such infringement, either in the pleadings or in the supporting affidavit, and has therefore no merit.

27. In their oral and written submissions, the respondents observed that the applicant has waited until the eve of the commencement of the Commission's work before moving to Court to stop the proceedings; that he appeared not to be cognizant of the amount of public resources expended so far to reach the current stage where evidence and public hearings have commenced; and that the granting of the orders that he was seeking would have financial implications arising from on-going contracts for goods and services entered into in relation to the process.

28. Learned Counsel Mr. Bitta submitted that as demonstrated in the averments by Mr. Kaburu, the petition and application is based on false premises in view of the fact that the petition to the President was published in the Kenya Gazette, which is the official publication, and is therefore deemed to have been in the public domain; that it was signed by 50,000 Makueni residents, and it was therefore not possible for it to receive affirmation of 50,000 voters if it was not published.

29. The respondents urged the court to be guided by the decision in **Gatirau Peter Munya (supra), Samuel Sabuni and 2 Others vs. Court Martial and 8 Others [2014] eKLR**, and **Wycliffe Indalu Adieno vs. Attorney General and Others, Petition No 315 of 2014** with regard to what the Court should consider in granting conservatory orders. It was his submission that such considerations are broader than prima facie case and prejudice and in the circumstances; the greater consideration is that of public interest and whether the petitioner has an alternative remedy other than coming to court.

30. In his submissions, Learned Counsel, Mr. Muiruri, urged the Court, in considering the question of proportionate magnitude of the case, should consider whether the petition to the President was adequately publicized; the period within which the Commission is to exercise its mandate, and the process of constituting the Commission. He submitted that the applicant is not an ordinary citizen and that despite sitting through the proceedings in Parliament when the matter was discussed, he has not told the Court whether he attempted to present his views as to why the Commission should

not be formed. On behalf of the 1st respondent and its members, the AG urged the Court to dismiss the application with costs.

The 8th Respondent's Case

31. The 8th respondent opposes both the application for conservatory orders and the petition. It has filed an affidavit in opposition sworn by Ms. Rael Mumo Muthoka, its Secretary on 27th April, 2015. It also filed a notice of preliminary objection dated 24th April, 2015 in which it seeks to have the petition struck out, and written submissions dated 27th April, 2015. Its case was presented by its Learned Counsel, Mr. Nyamu.

32. The 8th respondent argues that this application and the petition are incurably defective for various reasons. It contends, first, that the petition the subject of the inquiry by the 1st respondent is not a petition envisaged under section 88 of the County Government Act, and the provisions of sections 88, 90 and 91 of the County Governments Act are not applicable to such a petition.

33. The 8th respondent argues, further, that the initiation of the petition pursuant to which the Commission was constituted was not subject to the control and participation of the County Government. it contends that the procedure for petitioning the President for suspension of a County Government under Section 123 of the County Governments Act and Article 192 of the Constitution is different from the procedure for other petitions to the County Government under Section 88 of the County Governments Act. It submits therefore that Section 90 of the County Governments Act is not applicable to such petitions, and the present petition is speculative, malicious, scandalous and only meant to delay and defeat the exercise of constitutional mandate by the President and the rights of the people of Makueni County.

34. The 8th respondent further submits that the petitioner is asking the Court to enter into the mandate of the 1st respondent and its commissioners; that the petitioner has an avenue under Section 3 of the Commission of Inquiries Act to raise objections on the basis that the matters the subject of the inquiry are sub-judice in the course of the Commission's proceedings, and a further right to approach the Court with regard to the recommendations of the Commission.

35. In her affidavit, Ms. Mumo avers that the Commission was established in the correct manner; that all the procedures in establishing it were followed to the letter; that the petition to suspend Makueni County was presented six months ago and was gazetted as required. The 8th respondent therefore avers that allegation that the public was not informed is baseless.

36. The 8th respondent further avers that it was not the County Government of Makueni's place to present a petition to the President as envisaged under Section 123 of the County Government Act and Article 192 of the Constitution, and it is therefore not in way concerned with the establishment of the Commission and had no role to play in publication of its responsibilities or mandate. It was its case that the petitioner was confusing the procedure for petitions to the President under Section 123 of the County Government Act and Article 192 of the Constitution with the procedure and requirement of a petition to the County Government under Section 88 of the County Government Act; and in addition, that petitions to the President are not made through County Governments, which, under Section 123 of the County Governments Act, have no obligation to conduct civic education, publish the petition or proceedings thereof or even call a referendum.

37. The 8th respondent agrees with the AG that a petition supported by more than 50,000 signatories from Makueni County as verified by the IEBC cannot be said not to have been published as the persons who appended their signatures in support of the petition are presumed to have read and understood its contents; that the allegation that the Commission will be sitting far from the people of Makueni is false as the advertisement indicated very clearly that the sittings of the Commission will also be in Makueni County on dates to be set and communicated; and further, that the

Makueni County had no obligation to set up structures for public participation as the conduct of proceedings by the Commission is the preserve of the 1st to 7th respondents.

38. The 8th respondent further observes that the applicant, as a Member of Parliament and a State officer, can easily access the Commission Secretariat at the Kenyatta International Conference Centre and be provided with any information, document or material he may require; and it has not been demonstrated that he has made any attempts to raise any matter with the Commission prior to the presentation of this petitions. It prayed that the application be dismissed and the petition struck out.

39. In his submissions on behalf of the 8th respondent, Mr. Nyamu acknowledged that the Court has the discretion to issue conservatory orders. He submitted, however, that for such orders to be granted, a party must prove that he has a prima facie case with a likelihood of success and that unless the Court grants the said orders, there is real danger that he will suffer prejudice as a result of the violation of the Constitution. He relied on, among others, the decisions in **Hon. Martin Nyaga Wambora and Others vs. The Speaker of the County Assembly of Embu and Others, Petition No 7 of 2014** and **Gatirau Peter Munya** (supra).

40. Mr. Nyamu urged the Court to strike out the petition, and in doing so, given the manner in which the petitioner had brought the present petition, to strike it out with costs to the 8th respondent.

41. The 10th respondent was served with the application and petition but did not file a response or participate in the proceedings.

Analysis and Determination

42. I have considered the pleadings and submissions of the parties in this matter, and in my view, two issues arise for consideration:

i. Whether the applicant has met the criteria for the grant of a conservatory order;

ii. Whether the present petition should be struck out in its entirety.

43. Before considering the applicant's case for conservatory orders and the submissions for and against it, I believe it is appropriate to first set out the principles that govern the grant of conservatory orders in constitutional petitions as they emerge from decisions in this and other jurisdictions.

Principles for Grant of Conservatory Orders

44. Article 23(3) of the Constitution vests in the Court the jurisdiction to grant conservatory orders in petitions brought under Article 22 of the Constitution alleging violation or threat of violation of constitutional rights. It states as follows:

> ***(3) In any proceedings brought under Article 22, a court may grant appropriate relief, including—***
>
> ***(a) a declaration of rights;***
>
> ***(b) an injunction;***
>
> ***(c) a conservatory order;***
>
> ***(d)….***

45. In considering whether or not to grant a conservatory order in **Centre For Rights Education and**

Awareness (CREAW) & 7 Others –vs- Attorney General & Others Petition No. 16 of 2011, Musinga J (as he then was) stated as follows:

> ***"...It is important to point out that the arguments that were advanced by Counsel and that I will take into account in this ruling relate to the prayer for a Conservatory Order in terms of prayer 3 of the Petitioner's Application and not the Petition. I will therefore not delve into a detailed analysis of facts and law. At this stage, a party seeking a Conservatory Order only requires to demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the Conservatory Order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution."***

46. While expressing his agreement with the decision of Musinga J in the CREAW case above, Ibrahim J (as he then was), in **Muslims for Human Rights (MUHURI) & 2 Others vs Attorney General & 2 Others, Petition No 7 of 2011** stated as follows:

> ***"I would agree with my Brother, that an applicant seeking Conservatory Orders in a Constitutional case must demonstrate that he has a "prima facie case with a likelihood of success."***

47. The Court went on to cite with approval the Privy Council decision in **Attorney General -v- Sumair Bansraj (1985) 38 WIR 286** in which Braithwaite J. A. stated as follows:-

> ***"Now to the formula. Both remedies of an interim injunction and an Interim declaration order are excluded by the State Liability and Proceedings Act, as applied by Section 14 (2) and (3) of the Constitution and also by high judicial authority. The only judicial remedy is that of what has become to be known as the "Conservatory Order" in the strictest sense of that term. The order would direct both parties to undertake that no action of any kind to enforce their respective right will be taken until the substantive originating motion has been determined; that the status quo of the subject matter will remain intact. The order would not then be in the nature of an injunction, … but on the other hand it would be well within the competence and jurisdiction of the High court to "give such directions as it may consider appropriate for the purpose of securing the enforcement of … the provisions" of the Constitution.***

48. In arriving at his decision in the **Muhuri** case, Ibrahim J concluded as follows:

> ***"What is clear to me from the authorities is that strictly a "Conservatory Order is not an injunction as known in Civil matters or generally in other legal proceedings but is an order that tends to and is intended to preserve the subject-matter or set of circumstance that exist on the ground in such a way that the constitutional proceedings and cause of action is not rendered nugatory. Through a Conservatory Order the court is able to "give such directions as it may consider appropriate for the purpose of securing of … the provisions of the Constitution (see – BANSRAJ above)". A Conservatory Order would enable the court to maintain the status quo or existing situation or set of facts and circumstances so that it would be still possible that the rights and freedoms of the claimant would still be capable of protection and enforcement upon determination of the Petition and the trial was not a futile academic discourse or exercise.***

49. It is to be observed that emphasis is placed on balancing the respective rights and interests of parties in a matter, and considering both the public interest and the balance of convenience before issuing conservatory orders. In the Bansraj case (supra) which was cited with approval in the Muhuri decision, the court observed as follows:

> ***"On the other hand, however, the state has its rights too… The critical factor in cases of this kind is the exercise of the discretion of the judge who must "hold the scales of justice evenly not only between man and man but also between man and state."***

50. With respect to the balance of convenience, the court in the **Muhuri** case stated as follows:

> ***"Upon consideration of all matters herein including the submissions and principles enunciated in some of the authorities cited, it would be reasonable to state that in certain constitutional interlocutory applications which seek Conservatory Orders then the court may also consider the Balance of Convenience as between the Applicant/Claimant and the Respondent and in particular where it may involve the national and/or public interest.***

51. The public interest principle has been re-emphasised in the recent past in the decision of the High Court in **Martin Nyaga Wambora vs Speaker of The County Assembly of Embu & 3 Others Petition No. 7 of 2014. In that case, the Court set out the principles applicable in the grant of conservatory orders as follows:**

> **[59]*"In determining whether or not to grant conservancy orders, several principles have been established by the courts. The first is that: "… [an applicant] must demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the conservatory order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution"* [60] *To those erudite words I would only highlight the importance of demonstration of "real danger". The danger must be imminent and evident, true and actual and not fictitious; so much so that it deserves immediate remedial attention or redress by the court. Thus, an allegedly threatened violation that is remote and unlikely will not attract the court's attention".***
>
> **[61]** ***The second principle, which naturally follows the first, is whether if a conservancy order is not granted, the matter will be rendered nugatory".***

52. The Court then went on to cite the decision of the Supreme Court in **Gatirau Peter Munya v Dickson Mwenda Githinji & 2 Others SCK Petition No 2 of 2013.** In that decision, the Supreme Court (Ojwang and Wanjala, JJSC) stated as follows with regard to the public interest consideration with respect to conservatory orders:

> ***"*[86] *'conservancy orders' bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within the public agencies, as well as to uphold the adjudicatory authority of the court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private party issues as 'the prospects of irreparable harm' occurring during the pendency of a case; or 'high probability of success' in the supplicant's case for orders of stay. <u>Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values and the proportionate magnitudes, and priority levels attributable to the relevant causes"</u>* [63] *Thus, where a conservancy order is sought against a public agency like a legislative assembly that is mandated to carry out certain functions in the normal course of its business, it is only to be granted with due caution. The interruption of the lawful functions of the legislative body should take into account the need to allow for their ordered functioning in the public interest."***

53. I now turn to weigh the applicant's case against the principles enunciated in the cases set out

above.

Whether the Applicant has met the Criteria for the Grant of a Conservatory Order

54. The applicant raises several grounds for the grant of a conservatory order in his favour, and also as forming the basis of his petition. He argues, first, that the petition for the suspension of Makueni County has never been published or publicised; that the 8th Respondent never undertook any civic education in the County; that it did not facilitate the conduct of a local referendum among the residents of Makueni County before the petition was signed, nor did it set up the structures for public participation that would enable the residents and citizens in Makueni County present their views on the petition before it was signed; and further, that the County Government of Makueni did not carry out a local referendum in accordance with the provisions of sections 88, 90 and 91 of the County Government Act.

55. The applicant also argues that the petition was instigated and influenced by the Governor and Deputy Governor of the 8th Respondent through public pronouncements and manipulation of the public psyche following an impeachment motion against them.

56. The applicant also has various grievances against the 1st respondent. He has argued, first, that its constitution was unlawful as it offends the provisions of sections 123(3) and 123(4) of the County Government Act as there was never a resolution of the National and County Government Co-ordinating Summit to set it up. He is further aggrieved that the Commission has to date not published or publicized the actual petition that is the subject of its intended proceedings. Finally, the applicant contends that the 1st respondent intends to carry out proceedings in Nairobi as opposed to Makueni, thus violating his rights as well as the rights of the people of Makueni.

57. It is perhaps useful to start with a brief consideration of the law relating to the suspension of County Governments. Article 192 of the Constitution sets out the conditions under which a County Government may be suspended by providing as follows:

(1) The President may suspend a county government-

(a) In an emergency arising out of internal conflict or war; or

(b) In any other exceptional circumstances.

(2) A County government shall not be suspended under clause (1) (b) unless an independent commission of inquiry has investigated allegations against the county government, the President is satisfied that the allegations are justified and the Senate has authorised the suspension.

58. The County Government Act supplements the constitutional provisions by setting out at section 123 thereof the procedure to be followed with regard to suspension:

(1) Subject to subsection (2), a person may petition the President to suspend a county government in accordance with Article 192(1)(b) of the Constitution if the county government engages in actions that are deemed to be against the common needs and interests of the citizens of a county.

(2) A petition under subsection (1) shall be supported by the signatures of not less than ten percent of the registered voters in the county.

(3) The President shall, within fourteen days after receiving a petition against a county government under subsection (1), submit a report on the averments made and grounds giving rise to suspension of a county government before the apex intergovernmental body (hereinafter referred to as the apex body) established under the law governing intergovernmental relations for approval.

(4) Upon approval by the apex body, the President shall nominate members of a Commission to inquire into and investigate the situation in the county and make recommendations on the suspension of the county government and shall, after approval by Senate, appoint the members of the Commission by notice in the Gazette *(Emphasis added)*

59. Section 123(5) then sets out the composition of the Commission, which I believe is not under challenge in this petition. Section 123(6) and (7) of the Act then provide that:

(6) The Commission shall have all or any of the powers vested in a Commission under the Commissions of Inquiry Act (Cap. 102), and at any inquiry directed under this section, the county government in question and any member thereof shall be entitled to be heard.

(7) The Commission shall inquire into the matters before it expeditiously and report on the facts and make recommendations to the President.

60. Section 2 of the County Governments Act defines the **"apex body"** referred to in section 123(4) of the County Government Act set out above to mean "***the body established under the law governing intergovernmental relations***." The apex body, as the applicant indicates in his affidavit, is the **National and County Government Coordinating Summit**, established under section 7 of the **Inter-governmental Relations Act of 2012**.

61. Did the petition presented to the President for the suspension of Makueni County Government meet the requirements of Article 192(1)(b) of the Constitution and section 123 of the County Governments Act? It is not disputed that the petition, which is dated 21st November 2014 and signed by nine petitioners, was supported by more than 50,000 registered voters from Makueni County, whose signatures were verified by the IEBC as required. A copy of the petition was produced in Court at the hearing of this application.

62. It was also, contrary to the allegations by the applicant, approved by the "apex body", The National and County Government Co-ordinating Summit. The evidence for this is contained in the letter dated 13th January, 2015 from the Cabinet Secretary for Devolution, Ms. Ann Waiguru, to Mr. Joseph Kinyua, the Chief of Staff and Head of Public Service, Executive Office of the President, which has not been controverted by the applicant. In the said letter, Ms. Waiguru informs Mr. Kinyua that the National and County Government Coordination Summit had resolved that a Commission of Inquiry be set up once the signatures appended to the petition for suspension were verified by the IEBC.

63. As a result, pursuant to the verification by IEBC, the 1st respondent was appointed by the President and gazetted vide Gazette Notice Number 1557 dated 10th March, 2015. The argument that there was no approval by the National and County Government Coordinating Summit of the decision of the President to constitute the Commission therefore has no merit.

64. The applicant has also argued that the petition to the President was not published and that the County Government of Makueni did not conduct any referendum or facilitate avenues for the participation of the people before they signed the petition. He relies for these contentions on the provisions of section 88 of the County Governments Act. The question is whether the County Governments Act imposes on a County Government an obligation to conduct such a referendum or provide such avenues for public participation during the signing of a petition for its suspension.

65. It must be observed that a petition to the President for suspension of a County Government is provided for, as set out above, under section 123 of the County Governments Act. On the material before me, and upon a careful consideration of the provisions of the County Governments Act, such a petition does not appear to me to be in any way similar to a County Government petition which is provided for under section 88 of the County Governments Act as follows:

1. ***Citizens have a right to petition the county government on any matter under the responsibility of the county government.***

2. ***Citizen petitions shall be made in writing to the county government.***

3. ***County legislation shall give further effect to section 88(1).***

66. In my view, the provisions of Section 88, as section 88(3) seems to suggest, are specific and limited to matters that are within the purview of the County Government. Under section 123 of the Act, the suspension of a County Government is outside the mandate of the County Government. Section 123 allows any person to lodge a petition with the **President** for the suspension of a County Government, provided that such petition is signed by not less than ten per cent of the registered voters in the County in question.

67. In my view, and again upon a careful perusal of the provisions of Article 192 of the Constitution and section 123 of the County Governments Act, there is no obligation on a County Government to conduct a referendum or public education or even publish the contents of a petition for its suspension before the petition is submitted to the President.

68. The applicant is also aggrieved that there has been no publication of the subject of the proceedings by the Commission, and that the Commission shall be conducting its sittings in Nairobi. First, I must observe that, from the evidence before me, this is not factually true. From the document annexed to the applicant's affidavit as annexure **"MM2",** it is evident that the 1st respondent has scheduled sittings, not only in Nairobi, but also in Makueni. Secondly, under the Commission of Inquiry Act, the 1st respondent has power, under section 3 of the Commissions of Inquiry Act, to make provisions pertaining to the issues that it is set up to deal with, and the places where it will sit. It states as follows:

1. ***The President, whenever he considers it advisable so to do, may issue a commission under this Act appointing a commissioner or commissioners and authorizing him or them, or any specified quorum of them, to inquire into the conduct of any public officer or the conduct or management of any public body, or into any matter into which an inquiry would, in the opinion of the President, be in the public interest.***

2. ***Every commission shall specify the matter to be inquired into, and shall direct where and when the inquiry shall be made and the report thereof rendered, and, where more commissioners than one are appointed, the commission may designate one such commissioner to be chairman, and, if the President so thinks fit, another such commissioner to be deputy chairman, of the commissioners***. (Emphasis added)

69. I note that the 1st respondent placed an advertisement in the Daily Nation newspaper of Thursday, April 16th 2015 with respect to its mandate and sittings. The advertisement, which informs the general public of the constitution of a Commission of Inquiry and the scope of its mandate, among other things, is in the following terms:

a. ***Inquire into the circumstances leading to the allegations in the Petition that the County Government of Makueni has irretrievably broken down with two governments operating parallel to each other;***

b. ***Inquire into the allegation in the Petition that the County Government of Makueni is completely dysfunctional and cannot discharge its constitutional mandate;***

c. ***Perform any other task that the Commission may deem necessary in fulfilling the Terms of Reference;***

d. ***Recommend such legal or administrative measures as the Commission may deem necessary, and report its findings and recommendations within six (6) months; and***

e. ***Report on the facts and make recommendations to the President in respect of the matter before it.***

> ***In exercising its mandate, the Commission shall be guided by the Constitution of Kenya and all relevant laws.***
>
> ***The Commission has caused to be gazetted its Rules of Procedure. Hearings will commence on Thursday, 23rd April 2015 at the Aberdare Hall at the KICC. The Commission will also on dates to be notified, schedule meetings in Makueni County in order to encourage public participation as required by law.***
>
> ***In the meantime, all persons who wish to submit memoranda or statements for consideration by the Commission may deliver the same to our office or via our Telephone Numbers 020-2217466 or 020-2217467 or 020-2217468, Email address makuenicoi@kenya.go.ke or care of P.O Box Number 62345-00200 Nairobi.***"

70. It is noteworthy that the present petition was filed on 22nd April 2015, a day before the sittings of the Commission were to commence, and some five days after the advertisement was placed in the media. The contents of the advertisement are clear with respect to the Commission's mandate, which is an inquiry into allegations that the Makueni County Government is dysfunctional and has failed to act in accordance with its constitutional mandate; and the Commission invites interested persons to submit memoranda or statements for consideration, and supplies contact addresses for the submission of statements and memoranda. It is clear therefore that the 1st respondent had publicised what it intended to do, and invited citizen participation in its inquiry.
71. It is thus evident that on the material before me, and bearing in mind the mandate of the Court at this stage, which is to consider whether or not to grant conservatory orders under Article 23, in respect of a claim under Article 22, I am unable to find that the applicant has established a prima facie case that either his rights or those of the residents of Makueni have in any way been violated or threatened.

72. As I have found above, the petition before the President was lodged in accordance with Article 192(1)(b) and section 123 of the County Government Act, not under section 88 of the Act. Secondly, the petition to the President was duly published, as evidenced by the copy produced in court, which was not challenged by the applicant. Further, the approval of the apex body, the National and County Government Coordinating Summit, was obtained. There was no obligation on the 8th respondent to facilitate public participation on the petition either before its presentation to the President, or before the Commission of Inquiry commenced its work, as it is not a petition to the County Government under section 88 of the County Governments Act.

73. In view of the above, I am constrained to find that the petitioner has not presented to this Court an arguable case that would justify the grant of conservatory orders in his favour.

74. More importantly, I believe that the balance of convenience and the public interest would militate against the grant of such orders. I take several matters into account in this regard. First, the petitioner is a Member of Parliament, not an ordinary resident of Makueni. The petition to the President has been in the public domain since November 22, 2014. The Commission of Inquiry was appointed on 6th March 2015 and gazetted on 10th March 2015. Its members were approved by the National Assembly, where the applicant sits, on 4th March 2015, according to the Hansard, the official record of parliamentary proceedings of that day.

75. As submitted by the AG, at no point throughout this period did the applicant raise any issue regarding the petition the subject of the inquiry, or any other matter regarding the constitution of

the Commission or the publication or publicisation of the petition. To raise these issues now, at the 11th hour, has not been shown to be in the interests of the public, and to grant the orders sought would be against the public interest in view of the fact that the state has expended considerable resources to set up the Commission, which was set to commence its sittings the day after this application was filed. All things considered, the balance of convenience, as well as the public interest, demand that the Commission proceeds with its mandate.

76. In the circumstances, I find that the application dated 22nd April 2015 has no merit and is hereby dismissed.

Whether the Present Petition should be struck out in its entirety

77. The 8th respondent has asked the Court to strike out the petition in its entirety on the basis, inter alia, that it is speculative, malicious, scandalous and only meant to delay and defeat the exercise of the constitutional mandate by the President and the rights of the people of Makueni County; and further, that it is based on the wrong premise that the petition for the suspension of the County is one brought under section 88 of the County Government Act.

78. I must state that given the nature of the issues raised by the applicant/petitioner, this Court has, had to address its mind to the issues that the substantive petition raises, including the application of section 88, 90 and 91 of the County Government Act. As a result, it has had to make definitive findings of fact and law at this interlocutory stage. The question is whether it should strike out the petition as prayed by the 8th respondent.

79. I am cognisant of the words of the Court in the case of **D.T Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & Another[1980] eKLR** with respect to striking out of pleadings, in which the Court of Appeal considered various decisions on the question and stated that the power to strike out pleadings should be exercised in cases which are clear and beyond all doubt, that ***"....the court must see that the plaintiff has got no case at all, either as disclosed in the statement of claim, or in such affidavits as he may file with a view to amendments."***

80. In the present matter, the 8th respondent has asked the Court to strike out the petition on various grounds, which were also at the core of its opposition to the application for conservatory orders. I have considered above the applicant's case, and the respondent's response thereto. Having done so, and in light of the conclusions which have led to the decision not to grant the conservatory orders sought, I am doubtful that any useful purpose would be served by maintaining this petition.

81. While the core of the petition is the alleged violation of the rights of the petitioners and the residents of Makueni under Articles 27 and 47(1) of the Constitution, nothing has been placed before me in the course of the hearing of the application that even remotely suggests violation of these rights. The crux of the petition is the failure by the 8th respondent to abide by sections 88-91 of the County Governments Act, which I have found do not apply to the petition in question; and the alleged failure by the President to obtain the consent of the National and County Government Coordinating Summit, which this Court has found was obtained.

82. With respect to other matters raised by the applicant such as whether the petition the subject of inquiry by the 1st respondent meets the criteria of Article 192(1)(b), and whether it was instigated by the Governor and Deputy Governor, I agree with the respondents that those are matters which fall squarely within the mandate of the 1st – 7th respondents.

83. In the circumstances, I am not satisfied that there is any issue worth canvassing that remains live in this petition, and I am inclined to agree with the 8th respondent that it should be struck out.

84. Consequently, the application for conservatory orders is hereby dismissed, and the petition is also struck out.

85. With regard to costs, which are in the Court's discretion, I direct each party to bear its own costs.

Dated, Delivered and Signed at Nairobi this 8th day of May 2015

MUMBI NGUGI

JUDGE

Prof. Ojienda & Mr. Okoth instructed by the firm of Prof. Tom Ojienda & Associates Advocates for the petitioner

Mr. Nyamu instructed by the firm of Nyamu & Co. Advocates for the 8th respondent

Mr. Bitta and Mr. Muiruri instructed by the State Law Office for 1st – 7th and 9th respondent

No appearance for the 10th respondent