



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CONSTITUTIONAL PETITION NO. 20 OF 2015

1. CENTRE FOR HUMAN RIGHTS & CIVIC EDUCATION
2. DANIEL MUOTI MUTEMI
3. NELSON KILONZI
4. REV. JACKSON M. KILUNDA
5. STEPHEN MUMU KIMEU
6. MUIMI MUTUA APPLICANTS

versus

1. THE SPEAKER OF THE COUNTY ASSEMBLY OF KITUI
2. THE CLERK OF THE COUNTY ASSEMBLY OF KITUI
3. THE COUNTY ASSEMBLY OF KITUI
4. THE GOVERNOR, COUNTY GOVERNMENT OF KITUI
5. THE CONTROLLER OF BUDGET RESPONDENTS

RULING

1. The petitioners herein moved this court pursuant to the provisions of Articles 1, 2, 10, 165, 159, 174, 185, 201, 206 and 259 of the Constitution of Kenya 2010; and the County Government Act, 2012 seeking orders that;
 - a. *A declaration that the decision made by the 1st, 2nd and 3rd respondents to demolish the existing County Assembly of Kitui premises and to erect new structures there on is contrary to Article 201(d) of the Constitution of Kenya, 2010 hence null and void.*
 - b. *A declaration that the 1st, 2nd and 3rd respondents violated Article 201(a) by not seeking the views of the members of the public on the demolition of the County Assembly premises and erection of new structures on the same land.*
 - c. *A declaration that the amendment to the report by the Budget and Appropriation Committee contrary to the standing orders is contrary to Section 14 of the County Government Act, 2012 hence a violation of Article 1, 2, and 10 of the constitution.*
 - d. *An order of certiorari to quash the resolutions made on the 15th April on the construction of new County Assembly of Kitui premises.*
 - e. *A declaration that the decision by the 1st, 2nd and 3rd respondents to engage in the tendering, entering into contracts and implementation of the County Assembly Development Project is an affront to the principles of separation of powers and violation of Articles 183 and 185 of the constitution of Kenya 2010.*

- f. *An order for injunction restraining the 4th and 5th respondents herein whether by themselves, servants employees or agents from releasing any funds towards the demolition and construction of new County Assembly of Kitui premises pursuant to the resolution passed by the 3rd respondent on the 15th April 2015.*
- g. *An order of injunction restraining the 1st, 2nd, 3rd and 4th respondents whether by themselves, employees, servants or agents from engaging in any demolitions in respect of the renovated County Assembly of Kitui premises.*
- h. *Any other relief that this Honourable Court may deem appropriate to ensure law, order and constitutionalism.*
- i. *Costs of the petition to be borne by the 1st, 2nd and 3rd respondents.*

2. Filed with the petition is an application for conservatory orders seeking to restrain the 1st, 2nd and 3rd respondents from implementing the amendment made to the report of the committee on budget and appropriations laid on the table of the Kitui County Assembly on Thursday, 9th April 2015 as amended by the 4th respondent on Tuesday, 15th April 2015 and from demolishing the premises of County Assembly of Kitui formerly known as the Municipal Council of Kitui; and that the 5th respondent be directed to ensure that the funds/monies set aside for the implementation of the report of the committee on budget and appropriations laid on the table of Kitui County Assembly on Thursday 9th April, 2015 as amended by the 2nd respondent on Tuesday, 15th April 2015 on the demolition and construction of the new County assembly premises be withheld.

3. The 1st, 2nd and 3rd respondents opposed the Notice of Motion (application) on the grounds that: the orders sought are ambiguous and untenable as the amendment was done in full compliance with the express provision of the **Public Finance Management Act (No. 18 of 2012)** and the Rules thereto as read together with the Constitution of Kenya, 2010; the 1st petitioner has not demonstrated her capacity of suing and being able to be sued therefore ought to be struck out as a petitioner; granting orders sought would be allowing the 1st petitioner to usurp the duties, powers and responsibilities of the 3rd respondent; reports and recommendation by select committees of the County Assembly are not absolute and are subject to approval with or without amendments by the County Assembly.

4. The 1st, 2nd and 3rd respondents also raised a Notice of Preliminary objection to the notice of motion dated 25.5.2015 on grounds that:

- i. *The 1st petitioner herein is non-suited as against the first three (3) respondents in that no pleading or evidence has been placed before this court on her behalf hence their names ought to be struck out at the earliest.*
- ii. *The 1st petitioner has not given any authority to either of the parties to swear any affidavit on their behalf.*
- iii. *The 1st petitioner has not made any allegations as against the first three (3) respondents.*
- iv. *Both the petition and the application herein are totally defective and seriously incurable which calls for striking out.*

5. The application was canvassed by way of written submissions which I have duly considered. From the submissions alluded

to, it is important to interrogate what a Preliminary Objection is.

In the case of **Oraro –vs- Mbaja (2005) ICLR. Ojwang J.** (as he then was) stated that:

“A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration. The first matter relates to increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be demurrer. It raises a pure point of law, which is argued on the assumption that all facts pleaded by the opposite side are correct. It cannot be raised if any fact is to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion confuse issue and this improper practice should stop... The principle is abundantly clear. A “preliminary objection” correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion, which claims to be preliminary objection, yet it bears factual aspects calling for proof, or seek to adduce evidence for its authentication, is not as a matter of legal principle a true preliminary objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point Anything that purports to be preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence”

6. The preliminary objection raised by the 1st, 2nd and 3rd respondents raises one point of law on *locus standi* therefore must be addressed.
7. Primarily the application was brought pursuant to Rules 4, 13, 19 and 23 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013) (Rules). These rules are made by the Chief Justice pursuant to Article 22(3) and Article 165(3)(b) of the Constitution.
8. Article 22 of the Constitution gives every individual the right to institute proceedings where a right is envisaged to have been infringed. It provides thus:

“22.(1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.

2. In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by:-

- (a) a person acting on behalf of another person who cannot act in their own name;**
- (b) a person acting as member of, or in the interest of a group or class of person;**
- (c) a person acting in the public interest; or**
- (d) an association acting in the interest of one or more of its members.**

(3)The Chief Justice shall make rules providing for the court proceedings referred to in this Article, which shall satisfy the criteria that:-

- a. **the rights of standing provided for in clause (2) are fully facilitated;**

- b. *formalities relating to the proceedings, including commencement of the proceedings, are kept to the minimum, and in particular that the court shall, if necessary, entertain proceedings on the basis of informal documentation;*
- c. *no fee may be charged for commencing the proceedings.*

(d) the court, while observing the rules of natural justice, shall not be unreasonably restricted by procedural technicalities; and

(e) an organization or individual with particular expertise may, with the leave of the court, appear as friend of the court.

(4) the absence of rules contemplated in clause (3) does not limit the right of any person to commence court proceedings under this Article, and to have the matter heard and determined by court.”

9. Looking at the petition dated 25th May 2015, the preamble states:

“The humble petition of Daniel Muoti Mutemi, Nelson Kilonzi, Rev. Jackson M. Kilunda, Stephen Mumbu Kimeu and Muimi Mutua the petitioners herein and whose address for purposes of this petition shall be care of Nyamu & Nyamu Co. Advocates”

The 1st petitioner is excluded as one of the petitioners. It is stated that the petitioner is a Non-Governmental Organization duly incorporated under the Non-Governmental Coordination Act. It was imperative for the 1st petitioner to demonstrate that indeed it is an organization that is incorporated hence qualifying to be a “person” as envisaged by the Constitution (See Article 260) and the Rules. An annexure of a certificate of registration would have sufficed.

10. The 2nd petitioner has described himself as a programme officer of the 1st petitioner. The 2nd and 5th Petitioners stated that they are members of the 1st petitioner. Evidence to that effect should have been adduced. There having been no such evidence they are improperly before the court.

11. The only persons who may be properly before the court would be the 4th and 6th petitioners as it could be envisaged that they may be acting in their own interest in safe guarding the constitution against contravention. However looking at the written authority they signed, they authorized a person who is improperly before the court to swear affidavits on their behalf. The question to be answered is therefore, whether the petition should be struck out? Rule 5 of the Rules provides:-

“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 person from whom redress should be sought, the petitioner may join two (2) or more respondents in order that the question as to which of the respondent in order the question as to which of the respondent is liable, and to what extent, may be determined as between all parties*
- b. *A person shall not be defeated by reason of the misjoinder of parties, and the court may in every proceeding deal with the matter in dispute*
- c.
- d. *The court may at any stage of proceedings either upon or without the application of either party, and on such terms as may appear just –*

(i) Order that the name of any party improperly joined, be struck out; 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.

- e. ***When a responded is added or substituted, the petition shall unless the court otherwise directs, be amended in such a manner as may be necessary, and amended copies of the petition shall be served on the new respondent and, if the court thinks fit on the original respondents.”***

12. It is apparent that in addressing the issue of contravention of

rights/constitution the court has a very wide discretion. The court may determine a formal petition instituted in writing or may even accept an oral application, letter or any other informal documentation. **(See Rule 10(3) of the Rules).**

13. A Person seeking redress pursuant to the Civil Procedure rules would be required to file affidavits in support of the pleadings. However, according to the Rules herein, it is not mandatory. Rule 11(1)(2) of the Rules which is self-explanatory provides thus:-

“(1) The petition filed under these rules may be supported by an affidavit.

(2) If a party wished to rely on any document, the document shall be annexed to the supporting affidavit or the petition where there is no supporting affidavit.”

14. In their submissions the applicants acknowledge the omission by stating that they have a right of reply; and they can seek leave to file a further affidavit in answer of the allegations, a right that still subsists. I am in agreement with them that they may rectify the anomaly that is obvious instead of the pleadings being struck out.

15. In the premises, I decline to strike out either the application or petition. For the reasons given, the preliminary objection must fail. Accordingly, it is dismissed with no order as to costs.

DATED, SIGNED and DELIVERED at MACHAKOS this 14th day of July, 2015.

L.N. MUTENDE

JUDGE