



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

PETITION NO.8 OF 2015

IN THE MATTER OF ARTICLES 23, 258, 259 & 260 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE ALLEGED CONTRAVENTION OF CHAPTER SIX (LEADERSHIP & INTEGRITY) & MISUSE AND ABUSE OF OFFICE UNDER ARTICLES 35, 48, 50, 73, 74, 75, 76, 193, 194, 201, 225, 226, 227, 232 AND 235 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA (SUPERVISORY JURISDICTION AND PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS) HIGH COURT PRACTICES & PROCEDURE RULES

AND

IN THE MATTER OF THE CIVIL PROCEDURE RULES 2006 AND ALL OTHER ENABLING PROVISIONS OF THE LAW

AND

IN THE MATTER OF VIOLATION OF PUBLIC PROCUREMENT AND DISPOSAL ACT OF 2010 LAWS OF KENYA

AND

IN THE MATTER OF VIOLATION OF CHAPTER SIX OF THE CONSTITUTION BY BOGICHORA COUNTY ASSEMBLY WARD REPRESENTATIVE COUNTY GOVERNMENT ACT AND THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF LEADERSHIP AND INTEGRITY ACT NO.19 OF 2012 SECTIONS 10,11,12,38 AND 41.

AND

IN THE MATTER OF ILLEGAL APPROVAL & SIGNING OF FALSIFIED TENDER DOCUMENTS ON THE PROCUREMENT & AWARD OF INSURANCE COVER FOR THE NYAMIRA COUNTY MEMBER OF THE COUNTY ASSEMBLY AND THEIR FAMILIES

AND

IN THE MATTER OF SUITABILITY OF HON. BEAUTTAH OMANGA TO CONTINUE
SERVING AND HOLDING OFFICES A MEMBER OF COUNTY ASSEMBLY IN NYAMIRA
COUNTY ASSEMBLY AS A MEMBER FOR BOGICHORA WARD

BETWEEN

ZACHARIA KEANGO MECHA (Suing On His Behalf And On Behalf

Of Other Voters And Residents Of Bogichora Ward Of Nyamira County)

.....PETITIONER

VERSUS

HON. BEAUTTAH

OMANGA.....RESPONDENT

JUDGMENT

By a chamber summons dated 5th February 2015 under **articles 1, 2, 10, 23, 47, 48, 73, 74, 75, 76, 159, 165, 175, 176, 177, 201 and 232** the petitioner herein **Zacharia Keango Mecha** (*Suing in his behalf and on behalf of other voters and residents of Bogichera*) petitioned this court for the following orders:-

1. Spent.
2. **This Honourable court be pleased to grant the petitioner/Applicant conservatory order by way of an order restraining the respondent from chairing any procurement meeting in Nyamira County Assembly tender and procurement and award till the hearing and determination of this application interpartes.**
3. **The Honourable court be pleased to set an urgent date for hearing of this application inter parties and the respondent be served into this application.**
4. **The costs of this application be provided for.**

The above application was ordered on the affidavit of Zacharia Keango Mecha claiming that he is a voter of Bogichora Ward and he was filing the present application with authority of the attached list of voters of Bogichora Ward. That the respondent is his member of County Assembly who was elected by the Bogichora electorate and by virtue of the respondent chairing the County Tender Committee Board, the said Board evaluated the tender for provision of insurance cover for members of the County Assembly and their families. Consequently, the respondent signed the minute as the chairman while the procurement officer signed as a secretary. Thereafter, the clerk of the County Assembly and other members of the County Board were subjected to interrogation by the Public Investment and Accounts Committee of Nyamira County (PIAC).

Later, the said report was used to sack the speaker of the County Assembly but selectively left the respondent still in office despite the recommendation to have him also dismissed. Therefore, the petitioner now contends that upon the irregular award of the Insurance tender aforesaid, the acting clerk of the Assembly hastily prepared the payment voucher and paid a company by the name **Johncele Insurance Brokers**.

The above application was opposed by the respondent's replying affidavit dated 16th February 2013. In his replying affidavit the respondent has termed the above application as incompetent and a witch hunt mission by busy bodies aiming at tarnishing his name. He further contends that some time last year a petitioner from Bogichora Ward in Nyamira County filed a similar petition in the Chief Magistrate's

Court at Nyamira on issues similar to the ones raised in which he later withdrew upon his counsel's raising objections on the competence of the Petition. He however acknowledged that there was an attempt to remove him as leader of majority party in the County Assembly of Nyamira by a section of some members of the majority party but he moved to court and stayed the said attempt vide Miscellaneous Civil Application No.10 of 2014 which matter is pending determination. Hence, he contends that allegations that he was removed as leader of majority party in the County Assembly of Nyamira as untrue.

He further averred that he is still the duly elected and recognized leader of majority in the County Assembly of Nyamira in accordance with the standing orders of the said county. He thus contended that his removal as leader of majority party in the county assembly of Nyamira was as a result of his participation in the deliberations in the meeting of County Assembly Service Board and signing of minutes emanating out of the same and he did so pursuant to common resolutions and thus he should not be discriminated as against other members who equally participated in the said meeting.

Further, he contends that as a member of the County Assembly Service Board, he enjoys immunity from any cause either civil or criminal emanating from actions taken in the course of ordinary business of the County Assembly Committee Meeting in reference to the Public Accounts Committee report attached in the petitioner's exhibit marked '2KN-2' the petitioner contended that the said Committee did not recommend that he (*respondents*) be removed either as a leader of majority nor as member of County Assembly of Nyamira and therefore he did not see how such report would advance the petitioners case.

In addition to this he contended that there was a misrepresentation of the typed minutes attached at pages 91 to 92 of the petitioners bundle of **MIN.01/CASB/25/03/2014 COUNTY ASSEMBLY TENDER BOARD REPORT** in which is presented at paragraph 1 thereof that 'the secretary to the service board took members through the report of the County Assembly Board' instead on the correct version which is the chairman of the service board took members through the report of the County Assembly Tender Board'

Lastly, he contended by dint of **Section 4 of the National Assembly (powers and privileges) Act, Cap.6 Laws of Kenya** he is immune from any civil proceedings for things written in a report presented to the Assembly, the petition filed by the petitioner is incompetent as it fails to disclose any triable issues against him nor does it disclose with precision the rights of the petitioners alleged to have been breached and no leave of the court was sought by the petitioner to file it on behalf of the alleged residents of Bogichora Ward in Nyamira County.

When the matter came before me on 11th March 2015 Mr. Ondieki learned counsel for the petitioner orally submitted to this court stating that on 20th June 2014 the respondent acted as the vice chairman of County Service Board together with the chairman who was the speaker of Nyamira where both were involved illegally in awarding tender and in a meeting by the County Service Board held on March 2014 in the speaker's office, the respondent signed as a chair person. That by the said action, the Nyamira Local Government lost Ksh.30,000,000/= that on investigations by Accounts Committee, a report was made under which action was taken against the speaker but the respondent was still in office. The petitioner thus urged the court to grant prayer 2 of the Chamber Summons.

Mr. Begi, learned counsel for the respondent also submitted orally by stating that the respondent was a leader of majority and under the law, **County Government Act** and **Standing Orders**, as a leader he becomes an automatic vice chairman. In reference to the resolution made by the Parliamentary Accounts Committee, he submitted that the board was over sighting thus there was no objection. He thus referred the petitioner as an investigator, prosecutor and judge, he also contended that there was a lot of malice in the matter, referring the court to **Section 85**, and in proving malice he submitted by questioning who did the valuing.

Thus he contended that the application by the petitioner was premature and deceiving and thus termed it as an abuse of court process.

Mr. Ondieki in reply to the above submission stated that the petitioner's application was a constitutional petition which can be brought up by any person and thus he urged the court to grant a conservatory order.

After considering the above application by the petitioner, the replying affidavit by the respondent's oral submissions in court and finally the petitioners filed authorities. The following are issues to be determined by this court:-

1. Did the petitioner have locus standi to bring this petition before this court?

In **John Kipng'eno Koech & 2 others v Nakuru County Assembly & 5 others [2013] eKLR** Emukule J held:

The case of ANARITA KARIMI NJERU [1979] KLR 154 settled this proposition that where a person is alleging a contravention or threat of contravention of a constitutional right, he must set out the right infringed and the particulars of such infringement or threat.

However as recent decisions have shown, that the case of Anarita Karimi Njeru though laying an important principle must be seen in the context of Section 84(1) of the Constitution of Kenya (1969 – Consolidated) and now repealed). That section provided -

“84(1) Subject to subsection (6), if a person alleges that any of the provisions of Section 70 to 83 (inclusive) has been, is being or is likely to be contravened in relation to him (or in the case of a person who is detained, if another person alleges a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may apply to the High Court for redress.”

Locus standi under Section 84(1) was established in two respects. Firstly, if the contravention related to the Petitioner personally, and Secondly if the contravention related to a detained person. Those were the only instances where locus standi was conferred upon an individual, under the said Section 84(1) of the repealed Constitution. That is the extent in my humble view of the authority of ANARITA KARIMI NJERU.

In contrast, the Constitution of Kenya, 2010 confers upon every person in Kenya, the obligation to respect, uphold, protect and defend the Constitution of Kenya, and any attempt to establish a government otherwise than in compliance with this Constitution is unlawful (Article 3), and 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, (Articles 22(1) and 258 (1) & 2). In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by persons, acting in the public interest (Articles 22(2)(c) and 258(2)(c).

Articles 22(1) & (2) and 258(1) & (2) of the Constitution 2010, thus confer upon any person the right to bring action in more than two instances firstly in the public interest, and secondly (where a breach of the Constitution is threatened in relation to a right or fundamental freedom.

The national values and principles of governance which bind all state organs, state officers, public officers and all persons whenever any of them makes or implements public policy decisions, and these national values and principles of governance include patriotism, national unity sharing and devolution of power, the rule of law, democracy and participation of the people, good governance integrity transparency and accountability (Article 10, (1)(2)).

Consequently the Constitution of Kenya 2010, grants the individual much wide scope in terms of locus standi than Section 84(1) of the repealed Constitution. The comment in **TRUSTED SOCIETY OF HUMAN RIGHTS ALLIANCE VS. AG. & 2 OTHERS [2012] eKLR** regarding the decision in Anarita Karimi Njeru is very apt. The Judges said -

“We do not purport to overrule Anarita Karimi Njeru as we think it lays down an important rule of constitutional adjudication; a person claiming constitutional infringement must give sufficient notice of the violations to allow her adversary to adequately prepare her case and to save the court from embarrassment on issues that are not appropriately phrased as justiciable controversies. However we are of the opinion that the proper test under the new Constitution is whether a Petition as stated raises issues which are too insubstantial and so attenuated that a court of law properly directing itself to the issue cannot fashion an appropriate remedy due to the inability to concretely fathom the constitutional violation alleged.

The test does not demand mathematical precision in drawing constitutional Petitions. Neither does it require talismanic formalism in identifying the specific constitutional provisions which are alleged to have been violated. The test is a substantive one and inquires whether the complaints against the Respondents in a constitutional petition are fashioned in a way that gives proper notice to the Respondents about the nature of the claims being made so that they can adequately prepare their case.”

In other words under the new Constitution, the Court is bound to inquire and determine matters on their merit, and where the matter in issue could be deciphered from the pleadings, then the court was bound to determine such matter even when the particulars of breach had not been specifically pleaded.

Emphasizing the point, the Court of Appeal in **MUMO VS. TRUSTED SOCIETY OF HUMAN RIGHTS ALLIANCE & 5 OTHERS (supra)**, said -

“Our commitment to the values of substantive justice, public participation, inclusiveness, transparency and accountability under Article 10 of the Constitution by necessity and logic broadens access to the courts. In this broader context, this court cannot fashion nor sanction an invitation to a judicial standard of locus standi that places hurdles on access to the courts, except only when such litigations is hypothetical abstract or is an abuse of the judicial process.”

However, we must hasten to make it clear that the person who moves the court for judicial redress in cases of this kind must be acting bona fide with a view to vindicating the cause of justice. Where a person is acting for personal gain or private profit or out of political motivation or other oblique consideration, the court should not allow itself to be seized at the instance of such person and must reject the application at the threshold.”

In addition, Article 258(1) grants every person the right to institute court proceedings claiming that this constitution has been contravened, or is threatened with contravention. Court proceedings may also be instituted by any person acting in the public interest (Article 258(2)).

In the present case, the Petitioners filed their Petitions on their own behalf as residents of County of Nyamira, and also in the public interest. They have a genuine interest in the functioning of the County Assembly and in particular over the manner in which procurement and tendering of the health cover in favour of the members of the County Assembly of Nyamira, whose functions not only impact upon him, but also over ordinary residents of the County of Nyamira.

2. Does the petitioners’ application want court to grant him a conservatory orders. In Petition No. 16 of 2011, Nairobi – CENTRE FOR RIGHTS EDUCATION AND AWARENESS (CREAW) & 7 OTHERS Hon. Justice Musinga stated that:-

.....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 the Conservatory Order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution.” that an applicant seeking Conservatory Orders in a Constitutional case must demonstrate that he has a “prima facie case with a likelihood of success.” However, I think that it would be important for me to refer to a case from the Privy Council, ATTORNEY GENERAL – V- SUMAIR BANSRAJ (1985) 38 WIR 286 in which Braithwaite J.A. guided 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.

Similar sentiments were shared in MUSLIMS FOR HUMAN RIGHTS (MUHURI) & 2 others v ATTORNEY GENERAL & 2 others [2011 eKLR] Ibrahim J held:

In an application for interim orders of the nature of Conservatory Orders or even one for an injunction, the court is not hearing and/or being called upon to determine the main Petition. The Constitutional court is being called upon to preserve the status quo pending the hearing of the Constitutional Petition or motion. The court does not have to take and hear all the evidence and delve into the entire case on its merits. The hearing of the Petition and determination of all issues and questions in dispute will be done at the “trial” and upon completion thereof when a final judgment is to be delivered.

As a result, at this stage I am not obligated to go into all the evidence and even consideration of all the matters of law. My function is to have a reasonable overview to enable me decide on the criteria or principles applicable when considering an application for a Conservatory Order and to what extent and principles are applicable to the facts and circumstances of this case.

The court must be careful for it not to reach final conclusions and to make final findings. By the time the application is decided, all the parties must still have the ability and flexibility to prosecute their cases or present their defences without prejudice. There must be no conclusivity or finality arising that will or may operate adversely vis- a-vis the case of either parties. This principle is similar to that in temporary at or interlocutory injunctions in civil matters.

This is a cardinal principle and happily makes my function and work here much easier despite walking a tight legal rope that I could easily lose balance with the slightest slip due to any laxity or being carried away by the passion or zeal of persuasion of any one side.

In the present application the petitioner has contended that the actions of the respondent as vice chair of the County Tender Committee, of signing the minutes as chairman lead to the irregular award of the Insurance tender which tender was later interrogated by the Public Investment and Accounts Committee leading to the sacking of the speaker of the County Assembly. According to the petitioner, the sacking of the speaker selectively left the respondent still in office despite the recommendation to have him also dismissed.

In taking into due regard all the above authorities I have cited, does the petitioners’ application warrant merit to grant the orders he seek? In other words, does he have a prima facie case?

In my humble view, I think not. I say so because the fact that there was a report which recommended the chairman and the vice chair of the County tender committee to take responsibility for leading and guiding a board meeting which approved the award and payment by fraudulent process remained a recommendation and there is no evidence that the same was actually adopted or endorsed by the County Assembly of Nyamira. Also the petitioner has not attached any documentary evidence detailing and showing the circumstances that led to the impeachment of the speaker of Nyamira County. The fact that the committee recommended the speaker and the vice chair of the tendering committee should take responsibility for their action did not *per se* mean that the speaker and his vice chair should relinquish their chairman and vice chair seat in the tendering committee.

In addition to this the respondent has revealed in his replying affidavit the fact that there had been attempts to remove him from his office of majority leader and the respondent was granted leave to apply for a judicial Order by way of certiorari to bring before this court and quash the decision to replace him as leader of majority party in the County Assembly of Nyamira. By virtue of being the leader of majority party of the County of Nyamira, I believe the respondent was elected not by default but by virtue of the seat he occupies as the majority leader of the County Assembly in Nyamira.

Therefore for the above reasons the petitioners' application tilts in favour of the respondent not to grant prayer No.2 of the Chamber Summons dated 2nd February 2015. The costs of this application shall be borne in the cause.

Dated, signed and delivered at Kisii this 17th day of July, 2015

HON. C. B. NAGILLAH

JUDGE

In the presence:

M/S Ondieki for the Petitioner

M/S Begi for the Respondent

Mr. Samuel Omuga: Court clerk