



THE REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

PETITION NO 24 OF 2015.

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS SECURED AND GUARANTEED UNDER ARTICLES 20, 22, 23, 47, 50, 176, 177 AND 251 OF THE CONSTITUTION OF KENYA 2010

AND

THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2010

BETWEEN

ROSEMARY MULEE.....PETITIONER

VERSUS

THE COUNTY ASSEMBLY OF MACHAKOS.....1ST RESPONDENT

THE SPEAKER OF MACHAKOS COUNTY

ASSEMBLY.....2ND RESPONDENT

RULING

The Petition

The Petitioner is the Secretary to the Machakos County Public Service Board. She filed a Petition dated 19th June 2015, in which she averred that on 14th May 2015, the County Assembly of Machakos notified her that it had received, discussed and approved a motion for her investigation with a view to have her removed from office. The grounds advanced for her removal were:

- a. Gross violation of the provisions of the Constitution
- b. Gross violation of the various Acts of Parliament including the County Government Act No. 17 of 2012, the Public Ethics Act and leadership and integrity Act No. 19 of 2012.
- c. Gross misconduct including abuse of office
- d. Incompetence.

The Petitioner further averred the Respondent formed an *ad hoc* committee to investigate her and that she appeared before the said committee on 21st May 2015, where she was served with a list of grounds and particulars of the charges which she claimed to be unsubstantiated and vague. Additionally, the Petitioner averred that she requested for time to prepare herself and seek legal representation, but that the committee

unreasonably declined to grant an adjournment and proceeded to hear the witnesses while she was not represented. She claimed that the statements of witnesses and documents in support were not availed to her in advance, and that the members of the committee did not specify the rules and procedures to be followed. She further took issue with the procedure to investigate her which she claimed to be unlawful.

The Petitioner's claim is that the *ad hoc* committee has infringed on her right to fair trial and protection under the Constitution, as she stands to lose her job and suffer irreparable damage in her career. She sought an injunction against the Respondents to restrain them from investigating her through the *ad hoc* committee; and an order of certiorari to quash the proceedings, orders, findings, rulings and decision of the Respondents and its *ad hoc* committee.

The Petitioner also filed an application by way of a Notice of Motion simultaneously with her Petition, in which she sought interim conservatory orders restraining the *ad hoc* committee from conducting any further proceedings investigating her pending the hearing and determination of her application and appeal. This Court (Mutende J.) granted the interim orders on 26th June 2015.

The Preliminary Objection

The Respondents thereupon filed a Preliminary Objection dated 26th June 2015 against the petition and application dated 19th June 2015. The grounds for the objection are firstly, that the Petitioner's pleadings were general, speculative and did not disclose a real dispute capable of resolution by the court. Further, that the petition and application thereof are predicated on unspecified anticipated actions by the Respondents who are separate and distinct legal entities. Secondly, the Respondents contended that the pleadings did not disclose adequate particulars in support of the alleged cause of action relating to the alleged violations of the Constitution, to enable the court to grant the reliefs sought.

Thirdly, the Respondents further claimed that the petition and application were seeking to impede the functions of constitutional office holders and as such were frivolous, vexatious and an abuse of the judicial process. Fourthly, that the jurisdiction to interpret the Constitution conferred by Article 165(3) does not exist in a vacuum, and the court can only invoke its mandate to interpret the provisions of the Constitution when there is a real issue in controversy.

The fifth ground raised by the Respondents was that this Court had no jurisdiction to supervise constitutional bodies carrying out their mandate within the confines of the Constitution. Sixthly, that the Petitioner's pleadings offend the doctrine of separation of powers as they are inviting this Court to direct Parliament and county assemblies which are legislative branches of government, on their procedures and how to run their affairs.

The Respondents further argued in their seventh ground that the ramifications of the orders sought if granted would be asking the court to re-write Article 181 of the Constitution and section 33 of the County Governments Act, No. 17 of 2012, which was beyond the mandate of this court. In their eighth ground it was also argued by the Respondents that the Petitioner had not demonstrated the need to give any interpretation of facts that amount to gross misconduct.

The ninth and last ground raised by the Respondents was that the issues raised in the petition were being directed against parties who have not infringed any rights of the Petitioner or any members of the public, and are intended to protect parties who have neither been enjoined in the petition nor shown any interest in the protection sought by the Petitioner.

The parties were directed by the Court to canvass the Preliminary Objection by way of written submissions. The Petitioner filed submissions dated 22nd September 2015, while the Respondents filed submissions dated 10th September 2015.

The Submissions

The Respondents submitted that it was common ground that the Respondents are a constitutional bodies having been created under Articles 176 and 179 of the Constitution. They noted that it was also common ground that the Petitioner, as Secretary to the County Public Service Board, was also a creature of the Constitution as envisaged under Article 251 thereof read with section 58 of the County Government Act.

The Respondents advanced the argument that under section 58(5) of the County Government Act the members of the board may only be removed from office on grounds set out for the removal of members of a constitutional commission under Article 251(1) of the Constitution. Further, that it was therefore incorrect for the Petitioner to state that the procedure adopted for her removal was unlawful and not provided for under the law.

The Respondents contended that the 1st Respondent has in compliance with section 14(1) of the County Government Act made standing orders consistent with the Constitution, that regulate the procedure of committees. They cited Article 196(3) of the Constitution and section 17 of the County Government Act as providing for the law regulating the powers and privileges of County Assemblies.

Further, that chapters eight, nine and ten of the Constitution are clear that each of the arms of government of the Legislature, Executive and Judiciary, are independent of each other, and shall perform their respective functions in accordance with the Constitution. In addition, that Article 175(a) of the Constitution provides that County Governments shall be based on democratic principles and the separation of powers, and that Article 165(6) of the Constitution was not applicable in this case.

The Respondents relied in this regard on the decisions in **Bernard Muia Tom Kiala vs The Speaker of Machakos County Assembly & 4 Others, Mumo Matemu V Trusted Society of Human Rights Alliance & 5 Others, (2013) e KLR, Simon Wachira Kagiri vs County Assembly of Nyeri & 2 Others, (2013) eKLR , John Harun Mwau & 3 Others vs AG & 2 Others, and Johnston N. Muthama vs DPP,(2014) eKLR.**

The Petitioner on her part submitted that the preliminary objection was improper in that it was based on disputed facts, and that this was evidenced by the fact that the Petitioner had filed several affidavits and replies explaining the facts as they are in her case. She highlighted the principle set out in the celebrated case of **Mukisa Biscuits Co. Ltd V west End Distributors Ltd (1969) E.A 696**, and submitted that of all the grounds raised by the Respondents, only that of lack of jurisdiction can constitute a proper ground of a preliminary objection.

On the issue of jurisdiction of this Court, the Petitioner argued that the objection on account of the doctrine of separation of powers cannot stand. Her contention in this regard was that the Constitution guarantees fundamental rights in wide terms, and Article 10(1) binds all state organs, state officers, and public officers including the Respondents while applying, interpreting the constitution or the law or public policy. Further, that the Court has the jurisdiction and duty to intervene, stop, quash and/or reverse any action of the Respondents which is in breach of the Constitution or outside their area of operation.

The Petitioner stated that the provisions of the National Assembly (Powers & Privileges) Act and Article 117(2) of the Constitution must be read alongside Article 165(3)(d)(ii), which gives the High Court jurisdiction in matters that contravene the Constitution. The Petitioner also cited Articles 22(1) and 23 on the right to institute court proceedings claiming that a right of fundamental freedom in the Bill of Rights has been denied, violate or infringed or is threatened. It was her contention that the facts that triggered her petition clearly demonstrated infringement of her right to a fair hearing under Article 50 of the Constitution, and that her petition was not speculative but discloses a real controversy. She relied on the decisions in **Judicial Service Commission vs Speaker of the National Assembly, Attorney General & Others, H.C. PET. No. 158 of 2013; Richard Bwogo Birir vs Narok County Government & Others, Petition No. 1 of 2014** and **Stephen Nendela vs The County Assembly of Bungoma & Others, H.C Pet. No. 4 of 2014**

It was the Petitioner's submissions that the other grounds of objection raised by the Respondents go to the substance of the dispute, and are not proper points of preliminary objection. Further, that for the court to

make a decision on the said grounds it must look at the facts and evidence tendered by the parties , and this calls for the exercise of judicial discretion on the part of the Court.

Lastly, the Petitioner argued that Article 181 of the Constitution and section 33 of the County Government Act relate to the grounds for removal of a Governor from office and the procedure to be followed. Further, that this provisions do not relate to the grounds for removal of a member of the County Public Service Board, and that this cannot be a proper point of preliminary objection, as the Court will have to decide the issue as to whether this was a proper procedure followed by the Respondents.

The Issues and Determination

I have read and carefully considered the pleadings and submissions made herein. There are two issues for determination, the first is whether the Respondents' preliminary objection raises pure points of law, and if so, whether the said preliminary objection has merit and should be upheld. The circumstance in which a preliminary objection may be raised was explained by the Court of Appeal in the case of **Mukisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd (1969) EA 696**, as follows:

“a Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

The effect of a preliminary objection if upheld, renders any further proceedings before the court impossible or unnecessary.

A preliminary objection cannot therefore be raised if any fact requires to be ascertained. In the present objection, the facts that are not disputed are that the Respondents are constitutional bodies and that the Petitioner holds a statutory office. I have perused the grounds of objection raised and note that the first to fourth, and the seventh to ninth grounds do not raise any question of law, and are allegations which will certainly require further evidence and argument to establish their veracity or otherwise. In particular the issues of fact that the said grounds required to be first resolved are as to the nature of the Petitioner's dispute, the particulars of the allegations made by the Petitioner as against the Respondents, and the manner in which the Respondents' functions are being impeded and/or reorganized.

I agree with the Petitioner that the only question of law raised in the Preliminary Objection is that of this Court's jurisdiction, with the argument made by the Respondents that this Court has no jurisdiction on account of the doctrine of separation of powers. However, jurisdiction is always granted by law or other like legal instrument and not by way of political doctrine, as was held by the Court of Appeal in **The Owners of the Motor Vessel “Lilian S” –VS- Caltex (Kenya) Ltd [1989]** KLR 1 . The Court stated as follows:-

“By jurisdiction is meant the authority which a court has to decide matters presented in a formal way for its decision. The limits of this authority are imposed by the stature, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but except where the court or tribunal has been given power to determine conclusively whether exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given”

The Petitioner has in this respect argued that the Constitution does give this Court jurisdiction to hear and determine her claim as to infringement of her rights, and more specifically her right to a fair hearing

under Articles 47, 50 and 51 of the Constitution. She cited various Articles that give this Court jurisdiction, including Article 165 (3)(d)(ii), Article 22 and 23. She has also made various allegations as to how the Respondents have infringed on her right to a fair hearing in her Petition.

Article 165(3)(d)(ii) of the Constitution in this respect provides that the High Court shall have jurisdiction to hear any question respecting the interpretation of the Constitution including the determination of the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution. Article 22 (1) provides that 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. Lastly, Article 23(1) specifically gives jurisdiction to the High Court in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

As seen from the holding in **The Owners of the Motor Vessel “Lilian S” –VS- Caltex (Kenya) Ltd [1989]** KLR 1, any limitation as the jurisdiction of a court must also by law be granted. There is no provision in the cited Articles or any law that provides that the jurisdiction granted to the High Court is limited as regards the actions of County Assemblies, County Public Service Board or any other constitutional or statutory bodies.

The Respondents have also argued in this respect that Article 165(6) of the Constitution is inapplicable to them for reasons that the investigation for removal of a member of the County Public Service Board by an *ad hoc* committee is not judicial or quasi-judicial function. Whether or not the *ad hoc* committee will be exercising a judicial or quasi-judicial function is again a matter of definition and argument, that cannot be disposed of by way of a preliminary objection.

Likewise, the question of whether the Court in exercising its jurisdiction will be offending the doctrine of separation of powers is one that can only be decided upon after the parties have canvassed their respective positions, upon which the Court can then make a decision one way or another as to whether the dispute is one that can be resolved by way of judicial processes or by other processes. In other words, an objection as to infringement of the doctrine of separation of powers is not a jurisdictional issue, but a substantive and factual issue to be determined upon hearing of evidence and opinion.

Lastly, it must be emphasized that the jurisdiction of the High Court granted in the aforementioned provisions is of necessity is a supervisory one in terms of the processes and actions whose legality and constitutionality is disputed. In the instant case, in its supervisory role, the High Court has the power to to examine whether any law was violated by the County Assembly or *ad hoc committee* reaching its decisions. *Article 181* of the *Constitution* as well as *section 33* of the *County Governments Act* that have been relied by the Respondents cannot therefore be interpreted as clauses that oust the supervisory jurisdiction of the High Court, or limit the power of the High Court to interpret *the Constitution*, nor can they be construed as provisions that prohibit the right of a citizen to access a court of law where there is an allegation of infringement of a constitutional right.

The Respondent’s Preliminary Objection therefore fails for the foregoing reasons, and the Respondents shall bear the costs of the same.

Orders accordingly.

Dated Signed and Delivered at Machakos this 12th day of October 2015

P. NYAMWEYA

JUDGE