



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
PETITION NO.38 OF 2015

IN THE MATTER OF: ARTICLES 2(1), 10(2), 22(1), 23(3), 75, 165 & 258 OF THE
CONSTITUTION, 2010

AND

IN THE MATTER OF: VIOLATION OF THE CONSTITUTION, 2010

AND

IN THE MATTER OF: THE COUNTY GOVERNMENT ACT, 2012

AND

IN THE MATTER OF: SECTION 143 OF THE PUBLIC FINANCE MANAGEMENT ACT, 2012

AND

IN THE MATTER OF: PUBLIC PROCUREMENT AND DISPOSAL ACT, 2005

AND

IN THE MATTER OF: DECLARATION OF SUITABILITY TO HOLD AND/OR CONTINUE
HOLDING PUBLIC OFFICE

AND

IN THE MATTER OF: REMOVAL OF HON. SAMWEL KEROSI ONDIEKI AS THE SPEAKER,
KISII COUNTY ASSEMBLY

AND

IN THE MATTER OF: KISII COUNTY ASSEMBLY, KISII COUNTY

AND

IN THE MATTER OF: THE CLERK OF THE COUNTY ASSEMBLY, KISII COUNTY

AND

IN THE MATTER OF: THE DIRECTOR OF FINANCE, KISII COUNTY ASSEMBLY

AND

IN THE MATTER OF: THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND
FUNDAMENTAL FREEDOM) PRACTICE AND PROCEDURE RULES, 2013

BETWEEN

JAMES OMARIBA NYAOGA.....1ST PETITIONER

JOSEPH MARANGA AMENYA.....2ND PETITIONER

AND

HON. SAMUEL KEROSI ONDIEKITHE SPEAKER OF

THE COUNTY ASSEMBLY – KISII COUNTY.....RESPONDENT

RULING

Background

On 17th August 2015, the petitioners herein filed a petition seeking orders against the respondent as follows:

- a. **Declaration be issued to the effect that the Petitioners are entitled to Protection under the Constitution, 2010.**
- b. **Declaration that the actions, omissions and/or conduct of the Respondent complained of constitutes and/or amounts to violation of the provisions of the law and the Constitution, 2010, which the Respondent was obliged and/or enjoined to respect, uphold, honour and/or adhere to.**
- c. **Declaration that the Respondent herein is unfit and/or unsuitable to hold and/or continue holding Public Office, in the Kisii County Government and/or in the Republic of Kenya, whatsoever and/or howsoever.**
- d. **Declaration that the Respondent herein has violated and/or contravened the provisions of Articles 2(2), 10, 75 (1), (b) & (c) of the Constitution, 2010 and hence same is guilty of gross Abuse of Office and thus should forthwith be removed as the Speaker of Kisii County Assembly.**
- e. **Permanent injunction, restraining the Respondent, from carrying on, performing, Discharging and/or undertaking the functions and/or mandate of the office of the Speaker, Kisii County Assembly, whatsoever and/or howsoever.**
- f. **Costs of the Petition be borne by the Respondent.**
- g. **The Honourable Court be pleased to issue such orders and/or writs as the Court may deem fit and/or expedient.**

Together with the petition, the petitioners also filed an application dated 17th August 2015 in which they

sought the following orders:

1. **Spent.**
 2. **Pending the hearing and determination of the instant Application, the Honorable Court be pleased to grant an Interim order of injunction prohibiting and/or restraining the Respondent from Carrying on, performing, discharging and/or undertaking the function of the office of the Speaker, Kisii County Assembly and the Kisii County Assembly Service Board, respectively whatsoever and/or however.**
 3. **Pending the hearing and determination of the instant application, the Honorable Court be pleased to grant an interim Conservatory Order barring/or prohibiting the Respondent from carrying on, performing, discharging and/or undertaking the functions and/or mandates of the office of the speaker, Kisii County Assembly and the Kisii County Assembly Service Board, respectively, whatsoever and/or however.**
 4. **The Honorable Court be pleased to grant conservatory Order, barring and/or prohibiting the Respondent from carrying on, performing, discharging and/or undertaking the pending and/or mandate of the speaker, Kisii County Assembly and the Kisii County Assembly Service Board, respectively, whatsoever and/or howsoever, pending the hearing and determination of this Petition.**
 5. **That Honorable Court be pleased to grant Conservatory Order, barring and/or prohibiting the Respondent from carrying on, performing, discharging and/or undertaking the functions and mandate of the office of the speaker, Kisii County Assembly and the Kisii County Assembly Service Board respectively, whatsoever and/or howsoever pending the hearing and determination of this petition.**
 6. **The conservatory order, if any, granted by this Honorable Court to be implemented and/or enforced by the OCPD Kisii Central Police Division and/or such other officer as the Honorable Court may decree.**
 7. **The Honorable Court be pleased to give appropriate directions and or Orders towards the expeditions hearing and disposal of the petition herein.**
 8. **Costs of this application be borne by the Respondent.**
 9. **Such further and/or other orders be made as the court may deem fit and expedient.**
1. In response to the said application, the respondent filed a replying affidavit dated 18th September, 2015 together with a notice of preliminary objection. The following are the grounds upon which the preliminary objection was founded:
 - i. *That this court lacks requisite jurisdiction to hear and determine the instant petition.*
 - ii. *That this court cannot adopt and uphold the decision of a sister court without compliance with the provisions of **article 79 of the Constitution of Kenya 2010.***
 - iii. *That the petition as mounted is an abuse of due process of the law and sub judice therefore.*
 - iv. *That the petition as commenced is premature, incompetent and an abuse of the due process of the court ought to be struck out with costs.*
 2. When the matter came before me on 21st September 2015 for the hearing of the petitioner's application, Mr. Bosire, counsel for Respondent asked that I hear the respondent's Preliminary Objection on the jurisdiction of this court to entertain the petition itself in the first place.

Respondent's Submissions

3. In his submissions on the Preliminary Objection, Mr. Bosire concentrated on the first ground only and stated that the petition is not sustainable as the same has been filed without jurisdiction since the Respondent who is the Speaker of the County Assembly- Kisii County, was elected pursuant to **Article 178 of the Constitution. Article 178(3)** empowers parliament to enact legislation for election and removal of speaker from office and in compliance with the Constitution, Parliament passed the County Government Act, **Act No.17 of 2012** which at **Section 11** specifically provides for the procedure for removal of the speaker from office. He further submitted that the same Act provides that a speaker can only be removed by a resolution of the county assembly supported by not less than 75% of all the members of the said assembly which resolution shall be initiated by a motion made in writing to the clerk of the county assembly signed by at least 1/3 members of the assembly stating grounds for removal.
4. Mr. Bosire proceeded to outline, in detail, the steps to be undertaken in the removal of the speaker from the inception of the motion, the resolutions, hearing, debate all the way to the voting stage as stipulated in the said **County Government Act No. 17 of 2012**. According to the respondent, the High Court has no power to remove the speaker as the procedure to be followed is clearly spelt out in the Act.
5. Counsel for the respondent further submitted that under the **County Assembly Standing Order No.58** which is a replica of **Section 11** of the **County Government Act**, the proceedings before the county assembly are privileged in line with the doctrine of separation of powers and as such, the court cannot interfere with the matters that are the preserve of the assembly as to do so would be tantamount to interference with the internal affairs and procedures of the assembly. He explained that where a party feels the integrity of the speaker is in question, specific procedure for removal can only be undertaken in the assembly.
6. Counsel for the respondent added that **Section 11** of the **Ethics & Anti-corruption Act**, gives the mandate to receive complaints on the breach of code of ethics by public servants to the Ethics and Anti-Corruption Commission (EACC) and therefore, according to the respondent, the petitioners' remedy lies in moving to EACC to investigate and recommend appropriate action. Under **Section 4** of **Ethics & Anti-corruption Act**, EACC can only seek the assistance of the High Court in regard to compliance and enforcement of the provisions of **Chapter 6** of the **Constitution**. In view of the above submissions, the respondent contended that the Petitioners, in bringing the petition, were misguided, the petition amounted to abuse of the court process and was an attempt to obtain court orders through the back door. He observed that the petitioners being a clerk of the assembly and the director of finance respectively ought to have known the correct procedure for removal of the speaker from office and that where there is a specific procedure to be followed, the court lacks jurisdiction. He further submitted the Petitioners' reliance on the decision of the Industrial Court that the speaker had abused his office was not proper as the industrial court's decision was merely advisory and thus not applicable in this case.
7. Lastly, the respondent prayed that the court strikes out the entire petition for want of jurisdiction with costs to the Respondent.

The Petitioners Submissions

8. Mr. Oguttu, advocate for the Petitioner, submitted that the Preliminary Objection is misconceived and untenable. He referred to the decision in **Supreme Court Petition No.9 of 2013 (unreported)** which sets out the applicable law before a Preliminary Objection can be raised and contended that one of the paramount principles is that the court abhors the Preliminary Objection where it has to interrogate facts and also prohibits the raising of Preliminary Objection when the issues are those that require the exercise of the court's discretion. In submitting that this court has and is seized of jurisdiction to entertain the petition, Mr. Oguttu referred to **Article 165(3)** of the **Constitution** which grants the high court unlimited jurisdiction in both civil and criminal matters and added that

the High Court, being a Constitutional Court, has jurisdiction to entertain Constitutional matters. He contended that the petition raises serious constitutional issues under **Article 10** and **73** of the **Constitution** and the fundamental issues pertaining to the findings by both the Employment and Labour Relations Court and the Court of Appeal in which the respondent was found guilty of abuse of office and the effect of the said finding to the instant petition. He thus contended that these are issues that the Petitioners desire to ventilate before this court and the position that this court lacks jurisdiction is therefore erroneous.

9. Mr. Oguttu further relied on the decision in the case of **CORD & Anor. Vs. the Attorney General & Anor. (2015) eKLR** in which it was held that the invitation by the Respondents for the court to down its tools in the face of **Article 165(3)** falls flat on the face and added that the Respondent had misread and thus misconceived the petition.
10. The petitioners' argument was that the long winding journey of removal of speaker from office by the county assembly under **Section 11** of the **County Government Act No.120 of 2012** is not applicable in the instant case as the Petitioner seeks to have the Respondent declared unsuitable and unfit to hold the Constitutional office of the speaker and any other public office on account of unsuitability. Moreover, he contended that declaration of unfitness and unsuitability to hold public office is not a prerogative of the county assembly or some other a quasi judicial tribunal unless such a tribunal has been enshrined in the constitution as in the case of the removal of judges of the High Court, the Court of Appeal and Supreme Court as stated in **Article 168 of the Constitution**.
11. The petitioners' position was that the provisions of **Section 11** of the **County Governments Act** cannot take away or derogate the explicit constitutional powers of this court to make the declaratory orders sought even if the declaration may have the ultimate result of having the respondent removed from office.
12. In respect to the decisions of both the Employment and Labour Relations Court and the Court of Appeal that found the respondent guilty of abuse of office, Mr. Oguttu submitted that the said decisions are decisions *in rem* that not only bind the parties to that suit but all parties in general in terms of the declaration on abuse of office. He further submitted that the decisions under reference were not merely advisory in nature and as such, the instant petition is a consequent of decisions which have not been appealed against and which are *in rem*. He thus contended that the petitioners are not asking this court to adopt or uphold the decisions in question but that the decisions form part of the evidence that the court will take into account in determining their relevance to the issue of abuse of office and the Respondent's suitability as a constitutional office holder. Counsel for the petitioners observed that the decision of the Employment and Labour Relations Court which was upheld by the Court of Appeal could not be subjected to interrogation and investigation by the Ethics and Anti-corruption Commission as proposed by the Respondent.
13. It was the petitioners' contention that the invitation to EACC investigations is therefore fraught with legal danger even though in the decisions by the Court of Appeal and Employment & Labour Court it was stated that certain issues be looked into by EACC but the issue of abuse of office was resolved. He referred to the case of Mummo **Matemu vs. Trusted Society of Human Rights Alliance and 3 others [2013] eKLR**.
14. On the respondent's argument that the petition amounts to abuse of the due process of court, counsel for the petitioners invited the court to peruse **Articles 22 (1) and 258 of the Constitution** which grants every person a right to go to court in pursuit of declaratory orders irrespective of whether or not they are employees of the county assembly or private citizens.
15. Lastly, Mr. Oguttu submitted that a petition of this nature in which the particulars of infringement, breach of constitution and statutory powers are clearly spelt out, cannot be said to amount to abuse of the due process of court and therefore it was the petitioners' case that the Preliminary Objection is merely intended to prevent the court from fulfilling its core mandate under **article 165 of the Constitution**. He thus prayed that the Preliminary Objection be dismissed.

Determination

16.I have considered the respective pleadings and submissions of the parties in this matter and I note that the genesis of the petitioner's claim is the respondent's alleged contravention of the standing orders, Acts of Parliament and breach of the provisions of the Constitution. The respondent has launched his own objection to the entire petition on the basis that the court lacks jurisdiction to entertain it. He argues that the petition is a violation of the provisions of **County Government Act No.17 of 2012, County Assembly Standing Order No.58** and the **Ethics and Anti-corruption Act**.

The main issue for determination in the Preliminary Objection is whether this court has jurisdiction to entertain the petition and grant the orders sought.

17.The law governing Preliminary Objections requires that there should either be consensus on the issues of fact which form the foundation of such objections or alternatively, that it be presumed that the facts as stated by the party against who the objections are raised are true.

18.In the celebrated case of **Mukisa Biscuits Manufacturing Co. Ltd –vs.- West End Distributors Ltd [1969] EA 696**-Law JA stated a Preliminary Objection to be thus:-

“So far as I am aware, 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 the suit to refer the dispute to arbitration.”

19.Sir Charles Newbold, President stated in the same judgment as follows:

“A Preliminary Objection is in the nature, 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.”

20.In the instant case, what the Preliminary Objection seeks to determine is whether this court has jurisdiction to determine this petition. The objection is well taken because if it succeeds, the court will be saved the cost of a lengthy trial and attendant costs on either side. Indeed, the respondents Preliminary Objection if determined in the Respondent's favour, will have the effect of determining the entire petition.

21. The Court of Appeal articulated the importance of jurisdiction in the case **Owners of Motor Vessel “Lilian S” vs. Caltex Oil (K) Ltd (1989)1KLR1** when it held as follows:

“Jurisdiction is everything without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of a matter before it the moment it holds that it is without jurisdiction.”

22.The question of where the court gets its jurisdiction was answered by the Supreme Court in the case of **S.K.Macharia vs. KCB & 2 others, Civil Application No.2 of 2011** as follows:

“A court's jurisdiction flows from either the Constitution or legislation or both. Thus a court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate itself jurisdiction exceeding that which is conferred upon it by law.....”

23.The claim before me is expressed to be brought under **Articles 1, 2(1), 10(2), 22(1), 23(3), 75,**

165 and 258 of the Constitution.

Article 158 of the Constitution grants every person the right to:

“Institute court proceedings claiming that this Constitution has been contravened or is threatened with contravention.”

24. **Article 23(1)** gives the High Court jurisdiction- *“ 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.”*

Article 165(3) provides, inter alia, that:

“Subject to Clause (5), the High Court shall have-

a) Unlimited original jurisdiction in criminal and civil matters

b) Jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;

c) Jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of person from office, other than a tribunal appointed under Article 144;

d) Jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of -

i. The question whether any law is inconsistent with or in contravention of this Constitution;

ii. 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;

iii. Any matter relating to Constitutional powers of State Organs in respect of County Governments and any matter relating to the Constitutional relationship between the levels of Government; and..”

25. In the case of **Benson Riitho Muriithi vs. J.W. Wakhungu & Anor. Petition No.19 of 2014** a similar question arose as to whether the High Court was seized with jurisdiction in a matter involving the integrity of a Public Officer under **Chapter Six of the Constitution** and Mumbi J, framed the contested issues as follows:

“The Petitioner contends that Article 165 (3) (d) of the Constitution grants the High Court jurisdiction to hear any question respecting the interpretation of the Constitution including the determination of whether anything said to be done under the authority of the Constitution or if any law is inconsistent with the Constitution. On their part, the Respondents take the position that the issues raised by the Petitioner regarding the integrity of the interested Party do not fall within the jurisdiction of this Court; and that there are procedures provided by law which the Petitioner has not invoked before coming to this Court. The Respondents allege that issues of integrity fall for determination under the provisions of the Leadership and Integrity Act and the Ethics and the Anti-Corruption Commission Act. Counsel for the Respondents has called in aid Article 79 of the Constitution which provides for the establishment of the Ethics and Anti-corruption Commission and the case of Michael Wachira Nderitu & Others V Mary Wambui Munene & Others [20131 eKLR for the proposition that

where mechanisms and procedures have been established by Statute, in this case the Leadership and Integrity Act and the Ethics and Anti-Corruption Commission Act, to address questions touching on the Integrity of a public officer, the Court has no jurisdiction to deal with the matter. On his part, the Interested Party questions the jurisdiction of the Court on two fronts. First, he contends that the Petition fails to raise instances of constitutional violation warranting the intervention of the Court, charging that the prayers sought are advisory in nature and thus fall outside the jurisdiction of this Court. Like the Respondents, the Interested Party argues, further, that the issues raised in this Petition fall for determination under the provisions of the Leadership and Integrity Act and the Ethics and Anti-Corruption Commission Act; that the Petitioner should have made a complaint to the 1st Respondent who would have referred the matter to the Commission, and if the 1st Respondent failed to Act on the recommendations of the Commission, then the Commission should have come to Court pursuant to the provisions of Section 4 (5) of the Leadership and Integrity Act."

26. In resolving the above controversy the learned judge held that the court had unlimited jurisdiction under **Article 165(3)** to hear and determine the issues raised in the petition touching on the integrity of the interested party.

27. I share the same reasoning of Justice Mumbi and take the view that to the extent that what is being challenged is the alleged conduct of the Respondent in the specific context of **Chapter Six** of the **Constitution**, then reading **Article 165(3)** and **Article 258** of the **Constitution**, this court is properly clothed with jurisdiction to interrogate those matters. It is therefore my finding and I do hold that this court has jurisdiction to determine the issues raised in the petition. Moreover, the prayer for a declaration of the respondent's unsuitability to hold public office due to alleged gross abuse of office is just one among the 4 other declaratory orders sought by the petitioners in the petition and therefore, allowing the Preliminary Objection would amount to preventing the petitioners from pursuing their petition in totality in respect to the other 4 prayers.

28. The upshot of this ruling is that respondent's Preliminary Objection dated 18th September, 2015 is hereby dismissed and I accordingly direct that the application and/or the petition herein be fixed for hearing on substantive arguments on their merits.

29. Costs shall abide the outcome of the petition.

Dated, signed and delivered in open court this 6th day of November, 2015

HON. W. OKWANY

JUDGE

In the presence of:

M/S Oguttu for the Petitioners

M/S Mose for Bosire for the Respondent

Mr. Ogega: court clerk