REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CONSTITUTIONAL PETITION NO. 33 OF 2015

In the Matter of:-

The County Government Act NO 17 of 2012; and the alleged Contravention of Rights and Freedoms under Articles 10(2) B, 20(1), 21, 22, 28, 47, 50(1) (2), 92(3) and 236(B) of the Constitution of Kenya

BETWEEN

MARTIN BIKURI..PETITIONER

Versus

SPEAKER, COUNTY ASSEMBLY OF MERU..................1ST RESPONDENT

CLERK, COUNTY ASSEMBLY OF MERU......................2ND RESPONDENT

THE SPECIAL COMMITTEE ON THE

ALLEGATIONS ON MARTIN BIKURI............................3RD RESPONDENT

H.E. THE GOVERNOR OF MERU COUNTY....................4TH RESPONDENT

RULING

Conservatory order

[1] I have been called upon, through the Motion dated 3oth November 2015 to decide whether the Petitioner is entitled to a conservatory order primarily to restrain the Respondents from proceeding to hear, determine, investigate, make or receive or act on a report in respect of the Petitioner pursuant to summons dated 27th November 2015 under Reference No MCA/INV/SMNS/VOL.11/203 until determination of the application herein. The Motion is expressed to be brought under Order 51 of the Civil Procedure Rules, the Constitution of Kenya, 2010, section 3A of the Civil Procedure Act and all enabling provisions of the law.The application is supported by the affidavit of Martin Bikuri as well as the grounds set out on the face of the application.

APPLICANTS' GRAVAMEN

County Assembly acting on a bad law

[2] Counsel for the applicant urged the application and ably amplified the petitioners' gravamen in a nutshell to be:

(i) That Section 40 of the County Governments Act was declared unconstitutional by Mabeya J in BGM PET No. 4 of 2014 and as such, no authority or state organ can pretend to act on the said provision of law. And, therefore, as long as the Respondents are purporting to act pursuant to section 40 of the County Government Act, their actions and the entire proceedings for removal of the Petitioner from employment are a nullity *ab initio.* Counsel insisted that they are not questioning the process; they are simply saying that there is no law to support the proceedings before the Assembly.

(ii) That in the circumstances of this case, unless conservatory orders are issued, the petitioner shall suffer outright prejudice due to the fact that the proceedings for removal were anullity *ab initio.*

(iii) In any event, the special committee set up to investigate the petitioner cannot be impartial, unbiased and independent because the membership is drawn from the County Assembly, thus, it will be acting as the accuser, investigator and the judge of the petitioner's cause. According to the Petitioner, this is contrary to the law and the Constitution.

[3] On the basis of the above reasons, Mr. Imanyara beseeched the court to issue a conservatory order sought. The 4th Respondent supported issuance of conservatory order

1st – 3rd Respondents: Court has no jurisdiction on Impeachment

[4] Mr. Maranya also eminently argued the case for the 1st – 3rd Respondent. He opposed the issuance of a conservatory order for the following reasons:

(a) That the process of impeachment is a matter of the Constitution and the law which should not be interfered with by the courts. He argued that the court will not have jurisdiction to interfere with the process at this stage. He was of the firm opinion that courts can only assume jurisdiction after the process is completed under its judicial review jurisdiction.

(b) That any interference with the process at this stage will only injure the law, the residents of Meru County as well as the entire Republic.

(c) That in any case, the petitioner has recourse to and remedy from court as he can come to court to have the decision of the Assembly quashed, and if it was recommending his removal, to be reinstated.

(d) That the petitioner is still in office and the process is not yet over until the special committee tables the report and it is adopted by the County Assembly. There is therefore no irreparable damage which he can say he is being faced with. In the premises, his application is pre-mature.

(e) That the process of impeachment is strictly time bound. It is supposed to be completed within 10 days after the resolution to investigate the petitioner lest it abates. Therefore, the orders sought, although labeled as conservatory orders, are indeed final orders, because, if granted there will be nothing the committee will proceed with after 10 days have lapsed. These orders are in their nature of specific performance and should be declined.

[5] On the basis of the foregoing, Mr. Maranya asked the court to decline the orders sought.

DETERMINATION

Of jurisdiction

[6] The sweetest canticle ever was composed by Nyarangi JA in the famous **''Lilian S'' Case** that; *''Jurisdiction is everything''*. Therefore, jurisdiction is sine qua non any adjudication of a case by a court of law, hence, it is a matter of preliminary importance once it has been raised.Mr. Maranya argued that process of impeachment is a matter of the Constitution and the law. It is also an internal process of the

County Assembly which has been shielded from interference by the court under section 17 of the County Government Act as read together with section 12 of the National Assembly (Powers and Privileges) Act. As a matter of principle, courts of law shall not interfere with the exercise of constitutional and statutory mandates of other state organs such as County Assemblies except where they are acting unconstitutionally. See what the Supreme Court said in its **Advisory Opinion No 2 of 2013** to the effect that courts will not question procedures of other arms of government as long as they act within the law and the Constitution. However, courts will not sit by and helplessly watch the other arms of government violate the Constitution or allow them to plead internal rules to wade off court's intervention where those arms of government have violated of the Constitution. There is ample judicial authorities on this matter but I will add some few, for instance, the case of **County Assembly of Kisumu and Hon. Gabriel O. Ochieng & others [2015] eKLR, Martin NyagaWambora& others vs. Speaker of the Senate & others [2015] eKLR** and also **South Africa Constitutional Court case decision in Doctors for Life International vs. Speaker of the National Assembly & others.** Therefore, court's intervention is supported by law where a state organ or agency acts unconstitutionally. The purpose of the law here is to ensure that all arms of government act within the law and fulfil their constitutional mandates in accordance with the Constitution. As a way of speaking, County Assemblies should know that the Constitution entrusted them with public power to exercise it on behalf of the people; public trust. See article 73 of the Constitution. Therefore, any exercise of this delegated power for any selfish or ulterior private or individual or mob benefit would be unconstitutional. And, the more the tendencies of improper exercise of public power by state organs, the more the people continue to loose trust in the persons entrusted with devolved government. And,with lower confidence in state officers manning county governments, the stronger the motives which will impel the people to spoliation and to bring more cases to court. Ultimately, courts of law will start to pick even microscopic instances of abuse of public power and intervene on behalf of the people and as custodian of justice. My view is that Courts have jurisdiction to intervene on a matter which is subject of proceedings before a County Assembly if the Assembly is acting unconstitutionally. Therefore, it is not a question of whether the court has jurisdiction or not but rather whether the facts of the case permit intervention by the court and the point at which any deserved intervention should be made. I will proceed on that basis.

Legal threshold

[7] The preliminary issue is now out of the way. I will move to the other matters. I have considered all arguments by counsels as well as the judicial authorities cited. First, I do not wish to re-invent the wheel. The Supreme Court in the case of **Gaitaru Peter Munya vs. Dickson MwendaKithinji& 2Others [2014]eKLR** stated the realm of and the primary considerations in granting conservatory orders as follows:

> **"Conservatory orders" bears a more decided *public-law*connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the court, in the *publicinterest*. 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. Conservatory orders, consequently should be granted on the *inherentmerit* of a case, bearing in mind the *publicinterest*, the *constitutionalvalues*, and the *proportionatemagnitudes*, and *priority levels attributes* to the relevant cause".**

[8] In the circumstances of the case, is a conservatory order deserved? Mr. Imanyaraplaced preponderant weight on the decision by Mabeya J in BGM PET. NO 4 of 2014. He stated that on the basis of the said decision, the action of the County Assembly as well as the entire proceeding for removal purportedly under section 40 of the County Government Act is a nullity *ab initio*, and therefore nothing in law. This point is the linchpin of the entire petition and its determination will decimate the petition. See the celebrated quotation of Lord Denning in **Mcfoyvs. United Africa Co. Ltd (1961) 3 All E R 1169-** that:

> **The defendant here sought to say therefore that the delivery of the statement of claim in the**

long vacation was a nullity and not a mere irregularity. This is the same as saying that it was *void* and not merely *voidable*. The distinction between the two has been repeatedly drawn. If an act is *void*, then it is in law a *nullity*. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.

But, Mr. Maranya added a twist to the entire discourse when he argued that the said decision is not binding on this court which is of concurrent jurisdiction, and that it has been appealed against.

[9] I must admit that the issues being raised here are substantial questions of law and the Constitution; they are of no mean significance on jurisprudence on devolution; and courts are enjoined to nurture jurisprudence by the command of the Constitution in article 259 on development of the law. Thus, at this stage it will not be appropriate to superficially discuss theabove decision, that by Muchemi J and others by other courts on this subject. Such a course will require proper and discriminating consideration of the entire available corpus of jurisprudence on the subject at the hearing of the main petition where the court will have the advantage of in-depth service by counsels, rather than decided such important matter on a single strand of conservatory orders and at such almost *inlimine* stage. I say this fully aware that a final order could be issued at interlocutory stage especially where a case is a straight forward one and which should be decided at once or where a party is trying to steal a match from the other. But, this case is not as clear or straight forward. It is also not a purely private litigation for it has public law connotations which will need a more reinforcing determination of the petition. I also reckon that this matter came under certificate of urgency yesterday and the respondents were served at 5.00 p.m. Hardly is the time that was permitted sufficient for a robust discourse on an elusive subject as this. I will, therefore, look at the very inherent merits of the case, as the Supreme Court called them,against ordered functioning of County Assembly of Meru County- a public agency, and determine whether a conservatory order is deserved or not.

[10] A conservatory order is one of the reliefs set out under article 23 of the Constitution. It bears repeating that, a conservatory order is granted on public Law considerations in order to prevent a violation or threatened violation of person's rights and individual freedoms whilst facilitating ordered functioning within state organs or public agencies. This is a novel balancing act which courts have to carry out as part of its role as adjudicator of such disputes involving the Constitution, the bill of rights and Constitutional process set out for public organs in the exercise of their constitutional mandate. And I am content to cite the work of Mwongo J in the case of **Hon Martin NyagaWambora vs. The County Assembly of Embu & Another [2014] eKLR** that:

''The court will only issue conservatory orders in exceptional circumstances and will be minded of the mandate of other organs in exercise of their constitutional mandate''.

[11] The above recapitulation of the law brings me to the arguments by Mr. Maranya that the Petitioner will not suffer any prejudice as the process is far from over; he is still in office; and he should come to court after the decision by the Assembly. Contrary to the submissions by the Petitioner, conclusion of the process of impeachment will not leave him without a remedy. The Petitioner has a variety of remedies; the decision by the Assembly may be quashed; he may be reinstated by court to his employment; implementation of the decision may be stayed pending determination of the petition etc. In any event, the allegations may be unsubstantiated and rejected by the Assembly. Therefore, at the moment, there exist only apprehensions that the Petitioner may be removed from office. I however note that, it was very prudent of the Petitioner to have sought in his application foran order restraining the 4thRespondents from receiving or acting on the report coming out of the impugned process of removal from office of a county executive officer through County Assembly. Again, should any adverse decision be made by the Assembly that prayer will suffice and the court will be in a position to appreciate the different and changed circumstances that will be obtaining at the timeand of course will consider the request on its merits and issue appropriate orders. This recourse to court is available to the Petitioner even under the cover of certificate of urgency. Meanwhile, given the decision of the court not to dwell on the merits of

the petition at this stage, and for ordered functioning of other state organs, in this case, the County Assembly of Meru County, the most appropriate order which commends itself to me is to refuse a conservatory order for now, and order the application to be heard in its entirety. I will give appropriate directions on, as well as assign the application a hearing date in order to determine it expeditiously. It is so ordered.

Dated, signed and delivered in court at Meru this 2nd day of December 2015

F. GIKONYO

JUDGE