



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

PETITION NO.3 OF 2014

IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF ARTICLE 10, 22, 23,35,47,50,165,179,181,185,196 AND 226

AND

IN THE MATTER OF ENFORCEMENT OF FUNDAMENTAL RIGHTS AND FREEDOMS

AND

**IN THE MATTER OF THE PRINCIPLES OF NATURAL JUSTICE, OPENNESS, FAIRNESS,
INTERGRITY TRANSPARENCY AND GOOD GOVERNANCE**

AND

IN THE MATTER OF PRINCIPLE OF SEPARATION OF POWERS

AND

IN THE MATTER OF THE COUNTY GOVERNMENT

BETWEEN

HON. MARTIN NYAGA WAMBORA.....APPLICANT

AND

THE SPEAKER, COUNTY ASSEMBLY OF EMBU.....1ST RESPONDENT

THE CLERK, COUNTY ASSEMBLY OF EMBU.....2ND RESPONDENT

THE COUNTY ASSEMBLY OF EMBU.....3RD RESPONDENT

THE DEPUTY GOVERNOR EMBU COUNTY4TH RESPONDENT

THE SPEAKER, SENATE PARLIAMENT OF KENYA.....5TH RESPONDENT

THE HON. ATTORNEY GENERAL.....6TH RESPONDENT

RULING

The petitioner herein Mr. Martin Wambora filed two petitions in this Court being petition NO. 3 and 4 of 2014 which were consolidated by consent of the parties on 5th February 2014. Subsequent to that consolidation, the petitioner filed an application dated 19th February 2014 under certificate of urgency seeking the following prayers:-

- 1. THAT this application be certified urgent and fit to be heard forthwith and ex-parte in the first instance.**
- 2. THAT this Honourable Court be pleased to issue conservatory orders of stay of the Gazette Notice No. 1052 of 17th February 2014 pending the hearing and determination of this application.**
- 3. THAT this Honourable court be pleased to issue conservatory orders of stay of the Gazette Notice NO. 1052 of 17th February 2014 pending the hearing and determination of this petition.**
- 4. THAT this Honourable court issues conservatory orders, restraining any person or authority from executing or presiding over the swearing in of the Deputy Governor for purposes of taking over the role of Governor of Embu under Article 182 of the Constitution of Kenya, 2010 pending the hearing and determination of this petition.**
- 5. THAT the 1st applicant herein remains in office and continues to discharge his mandate as the Governor of Embu county pending the hearing and determination of this petition.**
- 6. THAT this Honourable court be pleased to call for the record relating to the impeachment proceedings in relation to the Petition.**
- 7. THAT the costs of this application be provided for.**

The application is supported by his affidavit sworn on the same date.

The respondents filed replying affidavits and grounds of opposition to the same, while the Attorney General filed submissions on points of law.

The Speaker of the Senate though duly served with the application did not file any response and was not represented during the hearing of the application interpartes on 24th February 2014 when counsel present addressed us extensively on all the issues raised in the application.

The issue of this Court's jurisdiction to entertain this petition and application was canvassed at length by all parties and it is important that the issue is dealt with first because jurisdiction is everything and without jurisdiction, this Court must down it's tools.

In the case of ***OWNERS OF THE MOTOR VESSEL LILLIAN "S" V CALTEX OIL (KENYA) LTD 1989 KLR 1 at page 14***, the court of Appeal stated thus:

“Without jurisdiction 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 it's tools in respect of the matter before it the moment, it holds the opinion that it is without jurisdiction.”

After quoting extensively from the Constitution and case law on the issue of jurisdiction, Mr. Muite assisted by Mr. Ahmednassir, Mr. Mansur, Mr. Nyamu, Mr. Wanyama and Mr. Njoroge submitted that this court has jurisdiction to hear this matter and that since the applicant's impeachment proceeded in

disobedience of orders validly issued by this Court, he was entitled to the interim orders sought.

Mr Kibe and Mr Njenga for the respondents on their part submitted that the County Assembly of Embu and the Senate acted within their Constitutional mandates and that the Court should not interfere with their respective decisions. On the issue of disobedience of the Court orders, it was their submission that the Court would have to make a specific finding of the fact that there was actual disobedience before granting the orders sought by the applicant.

In his submissions Mr. Njoroge for the Attorney General urged this court to exercise restraint when called upon to intervene in functions of other State organs. Citing the case of NIXON V USA 506 US 224(1993), he added that this matter raises political questions and the Courts are ill suited to deal with it and should therefore decline the invitation to intervene. In our view the Nixon case does not impose a blanket prohibition on judicial interference. Indeed in the Nixon case (supra) Justice Stevens observed as follows:

“Of course the issue in the political question doctrine is not whether the Constitutional text commits exclusive responsibility for a particular governmental function to one of the political branches. There are numerous instances of this sort of textual commitment, and it is not thought that disputes implicating these provisions are non justiciable. Rather, the issue is whether the constitution has given one of the political branches final responsibility for interpreting the scope and nature of such a power.”

We have considered all the above submissions and it is our view that under Article 165 (3) (d) (i) - iii) of the Constitution, this Court has jurisdiction to hear any matter relating to any question with respect to the interpretation of the 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 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”***

Similarly, Article 159(1) of the Constitution provides as follows:-

“Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution.”

In the case of ***THE SPEAKER OF THE SENATE AND ANOTHER AND THE ATTORNEY GENERAL AND OTHERS (ADVISORY OPINION NO. 2 OF 2013)***, the Supreme Court which is the highest court in the land, in an opinion delivered on 1st November 2013 made the following observations:

“ We are persuaded by the reasoning in the cases we have referred to from other jurisdictions to the effect that Parliament must operate under the Constitution which is the supreme law of the land. The English tradition of Parliamentary supremacy does not commend itself to nascent democracies such as ours. Where the Constitution decrees a specific procedure to be followed in the enactment of legislation, both Houses of Parliament are bound to follow that procedure. If Parliament violates the procedural requirements of the supreme law of the land, it is for the courts of law, not least the Supreme Court to assert the authority and supremacy of the Constitution. It would be different if the procedure in question were not constitutionally mandated. This court would be averse to questioning Parliamentary procedures that are formulated by the Houses to regulate their internal workings as long as the same do not breach the Constitution”.

We have also considered the South African case of **DOCTORS FOR LIFE INTERNATIONAL VS SPEAKER OF THE NATIONAL ASSEMBLY AND OTHERS (CCT 12/05) (2006) ZACC** where the Court held as follows:-

“---- under our Constitutional democracy, the Constitution is the supreme law. It is binding on all branches of government and no less on Parliament. When it exercises its legislative authority, Parliament ‘must act in accordance with, and within the limits of the Constitution; and the supremacy of the Constitution requires that ‘the obligations imposed by it must be fulfilled. Courts are required by the Constitution ‘to ensure that all branches of government act within the law’ and fulfil their Constitutional obligations.”

Mr. Kibe, Mr. Njoroge and Mr. Njenga dwelt at length on the issue of separation of powers and tried to persuade this Court to find that it has no jurisdiction in trying to undo what the members of the County Assembly of Embu and the Senate had done. This Court is alive to the doctrine of separation of powers which is part and parcel of our Constitution’s architectural design but we are also of the view that it is the responsibility of the Court to ensure that each State organ complies with the Constitution and the law and that where a citizen alleges a contravention of his Constitutional rights, the Court has a duty to investigate and determine that complaint so long as it is justiciable. **BLACK’S LAW DICTIONARY** defines justiciability as:-

“The quality or state of being appropriate or suitable for adjudication by a court”.

It is clear from the above definition that whether a matter before a Court is justiciable or not depends on the facts and circumstances of each particular case. But the Court must first satisfy itself that it has jurisdiction to entertain the matter before it can resolve the issue of justiciability.

In this case, this Court is acutely aware that the three arms of Government that is to say the Executive, the Legislature and the Judiciary have their respective mandates clearly set out in the Constitution and that as far as possible, each arm of Government must desist from encroaching on the functions of the other arms of Government. Infact, the Court’s position has always been that it can only interfere with the exercise of the Executive and the Legislature’s mandates if it is alleged and demonstrated that they have threatened to act or have acted in contravention of the letter and spirit of Constitution.

For avoidance of doubt, this Court is not saying that the Members of the County Assembly of Embu and the Senate have no mandate to remove or impeach a Governor. **Section 33 of the County Government Act** gives them such power. What this Court would be concerned about is the manner in which those powers were exercised. Indeed, as early as 23rd January 2014 when Githua J issued the initial ex-parte orders in this case, the learned Judge was alive to that fact when she stated as follows:-

“I have noted the prayer sought in the application and in my view , it would not be appropriate for this court to grant the conservatory orders sought restraining the 1st to 3rd respondents from holding any proceedings aimed at removing the applicant from office under Article 181 of the Constitution of Kenya since it is their rightful mandate but in view of the complaint that the removal proceedings are set to be started without informing the applicant the grounds upon which the contemplated impeachment proceedings are premised, in the interests of justice, I hereby grant the conservatory orders restraining the 1st, 2nd and 3rd respondents from holding such impeachment proceedings without having first served the applicant with a notice containing the specific grounds/charges upon which his impeachment was being proposed and without giving him an opportunity to be heard”

The Court clearly appreciated that the Members of the County Assembly had the powers to set in motion the process of removing the petitioner from office.

Having considered what we have stated above, this Court finds and holds that it has jurisdiction to hear and determine the instant application and to investigate the issues raised in the petition.

We now wish to deal with the substantive prayers sought in the Notice of Motion dated 19th February, 2014. Prayers 1 and 2 have been spent.

Prayer 3 seeks conservatory orders of stay of Gazette Notice No. 1052 of 17th February 2014 pending determination of this petition. Prayer 4 seeks an order restraining anybody from swearing the Deputy Governor as the Governor of Embu County under **Article 182 of the Constitution**.

In **Muslims for Human Rights (Muhuri) & 2 Others V Attorney General & 2 others (2011) e KLR** Ibrahim J (as he then was) stated as follows with regard to the need for caution in the issuance of interlocutory orders:-

“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-à-vis the case of either parties. This principle is similar to that in temporary or interlocutory injunctions in civil matters. This is a cardinal principle and happily makes my functions 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”.

We agree with the reasoning of Ibrahim J (as he then was), and we are of the view that at this interlocutory stage, we are merely concerned with whether the conservatory orders sought can issue or not.

The principles which the Court ought to take into account in the exercise of its discretion in deciding whether or not to grant conservatory orders were well captured by Musinga J (as he then was), In **CENTER FOR RIGHTS EDUCATION & AWARENESS (CREAW) & 7 OTHERS VS ATTORNEY GENERAL PETITION NO. 16 OF 2011 (NBI)** where while considering an application for conservatory orders, he stated as follows:-

“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 grants the conservatory order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution”.

On the face of it, it is clear from the record that notwithstanding the Court orders dated 23rd January 2014 and 3rd February 2014, both the Embu County Assembly and the Senate proceeded with the impeachment of the applicant. Whether or not there was disobedience of the said order is a matter to be canvassed and determined in the petition. What we are required to consider at this stage is whether, unless the Court grants the conservatory order, there is a real danger that the applicant will suffer prejudice as a result of the alleged violation or threatened violation of the Constitution. Our answer to the above is in the affirmative. The applicant now stands impeached but he has challenged that impeachment before this Court. While the court is interrogating the merits or otherwise of this petition, it would be prejudicial to the applicant to allow any processes meant to give effect to the said impeachment before the matter is heard and determined. We therefore allow prayers 3 and 4.

As for prayer 5, the applicant seeks an order that he be allowed to continue in office. However, as matters now stand, he has already been removed from office and we cannot order his reinstatement at this interlocutory stage simply because we have not had the benefit of hearing arguments on the merits or otherwise of the petition. We think that this is a prayer whose determination must await the outcome of the petition.

In making the above orders, it is not lost on us that both Mr. Njenga and Mr. Kibe had urged the Court in their submissions to find that in the event that it is impossible to reinstate the applicant in office at this interlocutory stage and in order to avoid a power vacuum, **Article 182 (2) of the Constitution** should take effect so that the Deputy Governor assumes office as Embu County Governor. We are not inclined to

take that route because in our view, swearing the Deputy Governor would mean that she would have to serve for the remainder of the term of the County Governor. That would be prejudicial to the applicant should this Court eventually find in his favour when the petition is finally determined. We have agonized over this dilemma and in our view we think that it can be resolved by the application of **Article 179 (5) of the Constitution** which provides that;

“When the County Governor is absent, the Deputy County Governor shall act as the County Governor”

This provision should be read together with **Section 32 (4) of the County Government’s Act.**

In view of the above, we are not persuaded that there will be a power vacuum pending the hearing and determination of the petition.

As concerns prayer 6 where the applicant is asking the Court to call for proceedings related to the petition, we are unable to grant this prayer for the following reasons; Firstly, this prayer is ambiguous since it is not specific whether the proceedings to be called for are those before the County Assembly of Embu or the Senate. Secondly, the applicant has not claimed nor demonstrated that he has requested for any of those proceedings and that his request had been declined. Thirdly, the Senate proceedings are some of the annexures to the applicant’s supporting affidavit and therefore they form part of the Court record. It is important to note that none of the parties has challenged the authenticity of the annexed proceedings before the Senate.

In conclusion, we appreciate the great public interest involved in this matter especially for the people of Embu County and we are alive to the need to have its determination expedited. This Court is ready to hear this matter immediately on a day to day basis until completion. In the circumstances, we are urging all parties to facilitate its expeditious disposal.

Finally, we order that costs of this application be costs in the cause.

It is so ordered.

H.I. ONG’UDI

C. W. GITHUA

B.N. OLAO

JUDGE

JUDGE

JUDGE

5/3/2014

5/3/2014

5/3/2014

DATED, SIGNED AND DELIVERED AT KERUGOYA THIS 5TH DAY OF MARCH 2014.