



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
MISC APPL NO. 1 OF 2014 (JR)
IN THE MATTER OF JUDICIAL REVIEW APPLICATION
AND
IN THE MATTER OF APPLICATION FOR LEAVE TO APPLY FOR ORDER OF
MANDAMUS & PROHIBITION AND IN THE MATTER OF ISIOLO COUNTY ASSEMBLY
BETWEEN
NURA DIBA BILLA.....APPLICANT
VS
THE SPEAKER ISIOLO COUNTY ASSEMBLY
THE CLERK ISIOLO COUNTY ASSEMBLY
COUNTY ASSEMBLY SERVICE BOARD, ISIOLO COUNTY.....RESPONDENTS

RULING

1. By a Chamber Summons application dated 30th January 2014 and brought pursuant to the provisions of Order 53 Rules 1 (1),(2),(3),(4), 2& 3 of the Civil Procedure Rules CAP 21 of the Laws of Kenya and Sections 8 &9 of the Law Reform Act CAP 26 of the Laws of Kenya, and Articles 10 (2) (B)and 159,(2), (a),(b),(c),(d) of the Constitution of Kenya, the Applicant has sought the following orders:

- a. **That court does grant the Applicant leave to apply for orders of mandamus to compel the Respondent to admit the Applicant into the membership and operations of the 3rd Respondent.**
- b. **That the Applicant be granted leave to apply for orders of prohibition to stop the Respondent from allowing and admitting Adan Ali Wako into the membership and operations of the 3rd Respondent**
- c. **That the grant of leave herein do operate as a stay of operations and functions of the 3rd Respondent until the substantive motion herein is heard or until the Applicant Nura Diba Billa, the Majority Leader is admitted to the County Service Assembly Board**
- d. **That costs be provided for.**

2. The said application is premised on the following grounds:

- a. **That the Applicant is a member of the County Assembly of Isiolo elected on the ticket of the Jubilee Coalition (URP) Party.**
- b. **The above Coalition forms the Majority in the Isiolo County Assembly**
- c. **The same Coalition has been represented by the Leaders of Majority in the Assembly, Adan Ali Wako up to 16/12/13 when the Coalition voted him out and elected Applicant as the Majority Leader vide Isiolo County Assembly Standing Order No.15 and communication to the 1st Respondent done on the 17/12/2013**
- d. **The Speaker (1st Respondent), has refused to effect change herein by way of replacing the voted out Majority Leader with the Applicant he has been allowing the voted out Leader of Majority to attend and represent Coalition in the 3rd Respondent's earn allowance and even act as Leader of Majority contrary to the law and the Standing Orders e.g. on 11/1/14 the board (3rd Respondent) met and approved advertisement of positions for the County Assembly. The elected Majority Leader was not allowed in the board meeting.**

3. The Applicant is seeking leave to file a Judicial Review seeking the writs of Mandamus and Prohibition against the 3rd Respondent, first to compel it to admit the Applicant to its operations and functions and second, to prohibit the 3rd Respondent from excluding the Applicant from representing the Jubilee Coalition in its Board as Leader of Majority as well as exclude the removed Majority Leader from representing the Jubilee Coalition in its Board.

4. It is the Applicant's contention that the Coalition has been represented by the Leader of Majority in the Assembly Adan Ali Wako up to 16th December, 2013 when the coalition voted him out and elected the Applicant as the Majority Leader vide Isiolo County Assembly Standing Order No.15 and communication to the 1st Respondent done on 17th December, 2013.

5. The Applicant further contends that the 1st Respondent has refused to effect the changes and that he has been denied participation in the 3rd Respondent's sitting and function contrary to section 12 of the County Governments Act.

6. The application is opposed. The 1st Respondent has filed a replying affidavit in which he contends that there was no official communication of the activities of the Jubilee Coalition to his office as alleged, and that none of the documents filed in court has an official stamp. He further contends that on 18th December 2013, the United Republican Party Isiolo County branch communicated to his office reiterating the party's position that the changes purportedly made by members were of no consequence as the party standards were not met.

7. He further contends that on 6th February 2014, his office received communication from United Republican Party headquarters indicating that Adan Ali Wako was indeed the Majority Leader of the Isiolo County Assembly. He beseeches the court to terminate the entire proceedings primarily at this stage.

8. The Respondents also filed Grounds of Opposition in which three grounds were raised namely:

- a. **The application lacks merit at law.**
- b. **The application is overtaken by events.**
- c. **The application is an abuse of due process and the Applicant is not entitled to the exercise of court's discretion in his favour.**

9. I have carefully considered the pleadings and the authorities relied upon by the parties. The Applicant filed this application and appeared before me under certificate of urgency on the 3rd February, 2014. I certified the matter urgent. However in exercise of discretion under Order 53(4) of the CPR and the proviso there under directed the Applicant to serve the Respondents with the chamber summons

application so that the issue of grant of leave to seek the writs sought, and the issue of whether leave should operate as a stay maybe urged *inter partes*.

10. That was done and the application heard on both issues. An interim stay of operations and function of the 3rd Respondent was granted on 10th February, 2014. This ruling will determine whether the stay granted will be confirmed pending the hearing and determination of the substantive Motion. Most importantly, the ruling will determine whether leave to file the substantive motion to seek the writs specified will issue.

11. At this interlocutory stage of the proceedings, the court must satisfy itself of three principle factors, one that the Applicant has a prima facie case with arguable grounds and that the application meets the technical form prescribed in law; two, that the Applicant has the *locus standi* to institute and maintain the application; and three, that the application is not time barred.

12. Does the Applicant have a prima facie case with arguable grounds and does the application meet the technical form prescribed in law? The Respondents' counsel, Mr. Ingutya urged that the Applicant had no prima facie case as the order of Prohibition sought was overtaken by events for reason the act sought to be prohibited had already taken place because one Adan Wako was already serving as a Member of the 3rd Respondent. Counsel urged that the writ of Prohibition seeks to prevent an act from occurring, and that having occurred, the application was too late.

13. Mr. Kariuki for the Applicant urged that the application was not overtaken by events because Prohibition has to do with preventing unlawful action and not merely preventing an act from occurring.

14. Prohibition looks into the future and deals not only with acts but omissions, and the same can be applied for at any time so long as the acts or omissions sought to be restrained persist. The Applicant has applied for Prohibition to restrain the 3rd Respondent from excluding the Applicant from representing the Jubilee Coalition in its Board as Leader of Majority, as well as exclude the removed Majority Leader from representing the Jubilee Coalition in its Board. He therefore seeks to restrain an act as well as an omission by the 3rd Respondent, both which persist as at the time the chamber summons was heard. Prohibition is not meant merely to restrain an act but also to restrain an omission.

15. The Respondents' counsel urges that the order of Mandamus sought if granted would have been made in vain as it cannot be executed as none of the parties to these proceedings had the power or mandate to enforce them. Mr. Kariuki for the Applicant urged that it is the Speaker who has the powers to act and that he was a party to the suit.

16. It has not been disputed that the Service Board whose Membership the Applicant challenges comprises four members, the Speaker of the Assembly who sits as Chair, Leaders of Majority and Minority and one other Member chosen by the County Assembly. The Chair is a party to these proceedings and it cannot be argued that the order once issued will not be enforceable.

17. The Applicant has shown that he was elected as Majority Leader of the Isiolo County Assembly by all the Members of the Jubilee Coalition which forms the majority in that Assembly. He has filed the documents to support his case. At this stage, the court is not concerned with the merit of the Applicant's case but only on whether the case is arguable. The Respondents' arguments regarding other communications they received will be considered at a later stage when the merits or de-merits of the substantive application will be urged *inter partes* and examined by Court. I am satisfied that he has an arguable case.

18. Secondly I am satisfied that technically the application meets the form prescribed in the law. The requisite documents required to accompany the application have all been filed. This is save one matter not urged and which is whether any Notice was served upon the Registrar. I will make an order regarding that at the end of this application.

19. Does the Applicant have the *locus standi* to institute and maintain the application. Mr. Ingutya urged that the Applicant had not demonstrated that he had been elected by a majority of the members of the Jubilee Coalition. Mr Kariuki relied on the further affidavit filed by the Applicant.

20. I have considered the further affidavit of the Applicant. It demonstrates clearly that the Applicant was elected by all Members of the Jubilee Coalition. I am satisfied he has *locus standi* to institute and maintain these proceedings.

21. Is the application time barred? Mr. Ingutya had urged that the application was overtaken by events. He did not urge the issue of it being time barred. From the circumstances of this case, the orders sought are to restrain some acts omissions and compel an act, all which persist even now. The application is therefore alive.

22. The final issue I wish to consider is whether the interim order of stay granted earlier should be confirmed pending the hearing and determination of the substantive Motion.

23. The stay was granted to stay the further operations and functions of the 3rd Respondent. The stay was granted on the basis that certain actions if taken by the 3rd Respondent would prejudice the Majority Coalition. Having heard the parties it has come out clearly that the person alleged to have been removed as Majority Leader and the Applicant who was elected to replace him are both Members of the Jubilee Coalition. The representation is not personal. Further, it was not demonstrated what the Coalition would stand to suffer if the “ousted” Leader rather than the newly elected to replace him sat in the Board. The Jubilee Coalition’s interest would still be represented either way.

24. On the other hand, the County Constituents will miss out on the services rendered by the Board if its functions and operations continue to be stayed. That would not be to the interest of the majority, and would not serve the interests of justice, or the greater common good of the County. The order of stay cannot be confirmed.

25. Having come to the conclusion I have of this application the orders I make are as follows:

1. **That the time set for service of the Notice to the Registrar under Order 53, if no service was done, be and is hereby extended for three days from the date of this ruling.**
2. **The Applicant is granted leave to file Judicial Review proceedings for the writs of Prohibition and Mandamus.**
3. **The Applicant should file and serve the substantive Motion within 21 days from the date of this ruling.**
4. **The Interim Order of Stay of the operations and the functions of the 3rd Respondent be and is hereby lifted.**
5. **The order on costs will abide the outcome of the substantive Motion.**

DATED, SIGNED AND DELIVERED THIS 6TH MARCH, 2014.

LESIT, J.

JUDGE.