



IN THE HIGH COURT OF KENYA AT KERICHO

IN THE MATTER OF; Application for Judicial Review Orders of Certiorari, Mandamus and Prohibition

IN THE MATTER OF; Article 12,50(1) 236 And 247 of The Constitution of Kenya

AND

AND

BETWEEN

AND

HON. SPEAKER BOMET COUNTY ASSEMBLY2ND RESPONDENT

THE ATTORNEY GENERAL4TH RESPONDENT

THE COUNTY SECRETARY; BOMET COUNTY6TH RESPONDENT

Pursuant to leave granted on 5th September, 2013, **Daniel Suyianka Ole Nkere**, the exparte Applicant herein, took out the motion dated 19th September, 2013 in which he sought for the following orders:

2. Prohibition restraining the Governor, Bomet County from meddling and/or interfering with the deployment and tenure of Daniel Suyianka Ole Nkere as a Interim Clerk Bomet County Assembly and or in the general operations of the County Assembly of Bomet without the due observance of law and the constitutional doctrine of separation of powers between the Executive and the Legislative Arms of the County Government and Assembly of Bomet.

4. That the cost of these proceedings be provided for.

1. The High Court lacks jurisdiction and the High Court will be *ultra vires* jurisdiction on matters which are specifically barred by dint of Article 162(2) of the Constitution of Kenya and Parliament enacted legislation pursuant to article 162(3) being the Labour Relations Act 2010 and Labour Institutions Act 2010.

3. The question before the court fundamentality touches on private contract master/servant relations.

5. The court cannot exercise discretion on a subject which the industrial court of Kenya has jurisdiction otherwise it will be performing unconstitutional functions.

The 1st and 6th Respondents also filed a Notice of Preliminary Objection dated 4th November, 2013 outlining the following grounds:

2. This Honourable court lacks jurisdiction to hear and determine this matter.

4. The application has been instituted against the wrong party and it discloses no cause of action against the 1st and 6th Respondents.

When the motion came for interpartes hearing, learned counsels appearing in the matter recorded a consent order to have the Notices of Preliminary Objection to be heard and determined first by way of written submissions.

I have carefully considered the rival submissions. The first Preliminary Objection is to the effect that the dispute is that between an employee and an employer hence it should be determined by the industrial court. I find the Objection to be misplaced because the Applicant herein is an employee of the Public Service Commission and was only seconded by the Transition Authority to the Bomet County as the clerk to the County Assembly.

The Second Preliminary point raised is to the effect that the court is *functus officio* since the position has been duly advertised and filled. A careful perusal of the facts presented to this court will reveal that the position was allegedly advertised and filled after issuance and service of court orders restraining the Respondents from doing so. Such decisions are amenable to being declared null and void from the beginning. The issue can be interrogated when the motion is heard and determined substantively. It cannot therefore be said that the court is *functus officio*.

Dated, signed and delivered in open court this 7th day of March, 2014.

JUDGE

Mr. Meroka holding brief for Mungla for the applicant

<p justify;"=""> Miss. Maritim holding brief for Matwere for the 2nd and 3rd Respondent