



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISII**  
**CONSTITUTIONAL PETITION NO. 4 OF 2014**

**IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF THE COUNTY GOVERNMENTS ACT, 2012**

**AND**

**IN THE MATTER OF DEVOLUTION OF GOVERNMENT ACT, 2012**

**BETWEEN**

**VINCENT MOSE GEKONE ..... PETITIONER/APPLICANT**

**VERSUS**

**THE CLERK OF THE COUNTY ASSEMBLY – KISII COUNTY .... 1<sup>ST</sup> RESPONDENT**

**THE SPEAKER OF THE COUNTY ASSEMBLY – KISII COUNTY - 2<sup>ND</sup> RESPONDENT**

**THE COUNTY ASSEMBLY – KISII COUNTY ..... 3<sup>RD</sup> RESPONDENT**

**THE COUNTY ASSEMBLY SERVICE BOARD – KISII COUNTY - 4<sup>TH</sup> RESPONDENT**

**AND**

- 1. HON. MOINDI PROTAS ARAMBA**
- 2. HON. ONCHONGA SAISI NYAGAKA**
- 3. HON. PETER N. ONGERI**
- 4. HON. CHARLES N. MOCHOGE**
- 5. HON. PIUS ABUKI BWONGERI**
- 6. HON. HENRY MORACHA**
- 7. HON. ROBERT NYAMACHE SIOCHA**
- 8. HON. MARITA GOTI**
- 9. HON. WILFRED MONYENYE**
- 10. HON. RONALD ONDUSO**
- 11. HON. OMBATI JOHN**
- 12. HON. TIMOTHY ONGUGU ..... INTERESTED PARTIES**
- 13. HON. CATHERINE MANZI**
- 14. HON. TIMOTHY N. NYARANGO**

- 15.HON. ONCHONGA C. MAINA
- 16.HON. ALBERT OINO
- 17.HON. OBOTE MOTONU PHILIP
- 18.HON. DENNIS OMBACHI
- 19.HON. VINCENT ONYANDOG
- 20.HON. RICHARD BUNDI MACHANA
- 21.HON. WRIGHT BONFACE OKENYE

### RULING

1. What is before me is the Notice of Motion dated 25<sup>th</sup> February 2014 which is expressed to be brought under **Articles 20 (1); 22 (1) (a) and (d), 47 and 159 (2) (d)** of the **Constitution, Sections 1A, 1B and 3** of the **Civil Procedure Act Regulation 7** of the **Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013** and the inherent jurisdiction of this court seeking orders THAT:-
  1. *The instant application be certified urgent and same be heard ex-parte in the first instance.*
  2. *Pending the Hearing and determination of the instant application, the Honourable Court be pleased to grant an Interim Order of Stay of Proceedings and/or further proceedings, more particularly, the scheduled hearing of the Notice of Motion Application dated 14<sup>th</sup> February 2014, now scheduled for hearing on the **25<sup>th</sup> day of February 2014**.*
  3. *The Honourable Court be pleased to grant Leave to the Interested Parties herein to joined and/or enjoined in the instant proceedings, to enable same vindicate their rights and/or interests in respect of the subject matter, which touches and/or concerns on the business and/or affairs of the County Assembly Service Board and the County Assembly, Kisii County.*
  4. *The Honourable Court be pleased to grant leave and/or liberty to the Interested Parties to participate in the hearing of the Petition dated 14<sup>th</sup> February 2014, together with the Notice of Motion Application dated 14<sup>th</sup> February 2014, respectively, as well as other subsequent proceedings.*
  5. *Costs of this Application do abide the cause.*
  6. *Such further and/or other orders be made as the court may deem fit and expedient.*
2. The application is based on the grounds set out on the face thereof and is also premised on the supporting affidavit sworn by Moindi Protas Aramba dated 25<sup>th</sup> February 2014. The main ground of the application is that since any orders made in this petition are bound to affect the affairs and/or management of the County Assembly Kisii County, it is imperative that the applicants herein be enjoined in the petition so as to take the lid off the suppression, misrepresentation and/or concealment of certain information and/or documents that will enable the court to make a just decision in this matter.
3. The application is opposed by the petitioner vide the Replying Affidavit sworn on 28<sup>th</sup> February 2014. The deponent of the said Replying Affidavit avers that the applicants herein have not demonstrated any reason(s) for them to be enjoined herein since as members of the County Assembly, they are properly represented by the 2<sup>nd</sup> to 4<sup>th</sup> Respondents. That in any event, the applicants herein are members of the 3<sup>rd</sup> Respondent; they are bound by the decisions of the said 3<sup>rd</sup> Respondent. The deponent also says that the application herein is not motivated by the pursuit of justice on the part of the applicants but is motivated by a desire to delay the determination of the petition herein. He urges the court to dismiss the application which he says has been filed by busy bodies.
4. The application is also opposed by 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents through Grounds of Opposition dated 27<sup>th</sup> February 2014 to the effect:-
  1. *That the Application is mischievous, frivolous and amounts to an abuse of the due process of the Law and ought to be dismissed.*

2. *That the Interested Parties have no interest whatsoever on the petition before the court as they don't represent the entire Assembly or the Service Board.*
  3. *That some of the Interested Parties have been dragged to these proceedings without even signing the alleged list of interested parties.*
  4. *That there is no consent filed or Authority to the deponent to the Affidavit as alleged in line with the Provisions of the Law.*
  5. *That the intention of the Interested Parties is to cause delay to the proceedings and therefore they have not demonstrated any prejudice they will suffer in any event.*
5. When the application came up for hearing before me on 28<sup>th</sup> February 2014 Mr. Momanyi Aunga, counsel for the applicants reiterated the averments that are on the face of the application and in the sworn affidavit of Vincent Mose Gekone and urged the court to allow the application so that the facts that have been hidden by the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents concerning the appointment of the Clerk of the County Assembly are laid bare to the court to assist it in determining the petition. He submitted that the 2<sup>nd</sup> Respondent in particular is guilty of material non-disclosure on the issue and that the applicants, once allowed to come on board will protect the interests of the county assembly.
  6. Mr. Minda, counsel for the Petitioner also reiterated the averments in the Petitioner's Replying Affidavit in opposing the application and urged the court to refuse the orders sought as allowing such orders would only cloud the proceedings that are now before court.
  7. Mr. G.M. Nyambati agreed with Mr. Minda in urging the court to dismiss the applicants' application, saying that the whole purpose of this application is to delay the finalization of the Petition herein. Mr. Ochwangi of the firm of M/s Oguttu Mboya & Co. Advocates who have been retained by Mr. James Omariba Nyaoga, around whom the dispute in the petition revolves, did not oppose the applicants' application to be enjoined in the Petition.
  8. I have now carefully considered the submissions made to me. I have also read the various provisions of the law and the question that arises for determination is whether the applicants have demonstrated to this court that there is a good reason for them to be enjoined. While the applicants say so, the 2<sup>nd</sup> to 4<sup>th</sup> Respondents together with the Petitioner think that the applicants who are MCA's, Kisii County, are mere busy bodies and should be treated as such and have their application dismissed with costs to the 2<sup>nd</sup> – 4<sup>th</sup> Respondents and to the Petitioner.
  9. In order to answer the question posed in the preceding paragraph the court has to consider whether the entry of the applicants into this Petition will achieve the overriding objective as envisioned by **Sections 1A and 1B of the Civil Procedure Act and Article 159 (2) (b) of the Constitution.**
  10. **Section 1A of the Civil Procedure Act provides that:-**

**“1A (1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable**

**(2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).**

**(3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.”**

11. **Section 1B of the Civil Procedure Act reads as follows:-**

**“1B. (1) For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims –**

- a. **the just determination of the proceedings;**
- b. **the efficient disposal of the business of the Court;**
- c. **the efficient use of the available judicial and administrative resource;**

- d. **the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and**
- e. **the use of suitable technology.”**

12. In essence, and from the above provisions of the law, the overriding objective of the **Civil Procedure Act** is to facilitate the just expeditious, proportionate and affordable resolution of the civil disputes governed by the Act. This overriding objective is also cushioned in **Article 159 (2) (b)**.

13. I am aware that this court has power to require any party to be enjoined in any proceeding before the court, but after perusing the entire pleadings in this matter, and after considering all the submissions made, I have formed the considered opinion that the applicants have not given any good reason why they should be enjoined in the petition. As members of the 3<sup>rd</sup> Respondent, I am satisfied that the interests of the applicants are already taken care of. If this application were to be allowed, the court would be aiding the applicants to defeat the principle of collective responsibility of the 3<sup>rd</sup> Respondent. It is also my considered view that the entry of the applicants into this Petition would only cloud and compound the issues in controversy in the petition, and would therefore not serve the overriding objective of the Civil Procedure Act.

14. For the above reasons, the Notice of Motion dated 25<sup>th</sup> February 2014 be and is hereby dismissed with costs to the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents as well as to the Petitioner.

15. Orders accordingly.

**Dated and delivered at Kisii this 3<sup>rd</sup> day of March, 2014**

**R.N. SITATI**

**JUDGE**

In the presence of:

Mr. Minda (present) for Petitioner

Mr. Ochwangi (present) for James Omariba Nyaoga

Mr. G.H. Nyambati for Respondents

Mr. Momanyi Aunga (present) for Applicants

Mr. Bibu - Court Clerk