



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CONSTITUTIONAL PETITION NO.8 OF 2014

**IN THE MATTER OF: AN APPLICATION BY PETER M. KINGOINA FOR LEAVE TO
APPLY FOR JUDICIAL REVIEW IN THE NATURE OF CERTIORARI AND PROHIBITION**

AND

**IN THE MATTER OF UNPROCEDURAL REMOVAL FROM OFFICE OF SPEAKER
OF THE COUNTY ASSEMBLY OF NYAMIRA**

AND

IN THE MATTER OF THE ELECTIONS ACT

AND

**IN THE MATTER OF THE WRONGFUL AND IRREGULAR ADOPTION AND USE OF THE
PUBLIC INVESTMENT AND ACCOUNTS COMMITTEE REPORT OF NYAMIRA COUNTY
ASSEMBLY ON THE PROCUREMENT AND AWARD OF INSURANCE COVER FOR
MEMBERS OF THE COUNTY ASSEMBLY AND THEIR FAMILIES TO DEBATE A MOTION
FOR THE REMOVAL OF THE APPLICANT AS SPEAKER OF THE NATIONAL ASSEMBLY
OF NYAMIRA COUNTY**

AND

**IN THE MATTER OF THE CONTRAVENTION OF THE COUNTY GOVERNMENT ACT AND
THE INTERIM COUNTY ASSEMBLY STANDING ORDERS OF NYAMIRA COUNTY
ASSEMBLY**

BETWEEN

PETER M. KINGOINA.....APPLICANT

VERSUS

THE COUNTY ASSEMBLY OF NYAMIRA.....RESPONDENT

RULING

Introduction

1. On 12th May 2014, the applicant herein, Peter M. Kingoina was removed from his position of Speaker of the County Assembly of Nyamira by the Members of the County Assembly. Being aggrieved by that action, the applicant has moved this honourable court vide the Chamber Summons dated 14th May 2014 seeking the following substantive orders:-

1. That the applicant be granted leave to apply for an order of Judicial Review in the nature of certiorari to remove into this court the undated report containing the decision of the respondent's Public Accounts and Investment Committee which inter alia recommended disciplinary action against the applicant as chairman of the County Assembly Service Board and the proceedings and decision of the respondent to impeach or remove from office of the Speaker of the County Assembly of Nyamira, the ex-parte applicant herein.

2. That leave be granted to the applicant to institute an application for Judicial Review in the nature of prohibition to prohibit the respondent from using the report of the Public Accounts and Investment Committee recommending disciplinary action against the applicant as a basis for any motion or debate intended at disciplining the applicant in relation to the Nyamira County Assembly procurement and tendering committee's decision to award the tender of the medical insurance cover for the members of the County Assembly and their families to Johncele Brokers.

3. That the leave so granted to institute Judicial Review applications in the nature of certiorari and prohibition do operate as an order staying:-

i. the respondent's decision made on the 12th day of May 2014 impeaching or removing the applicant from the office of Speaker of the County Assembly of Nyamira;

ii. Or, the withdrawal or deprivation or denial of any rights and privileges due to the applicant as Speaker of the County Assembly of Nyamira as set out in the County Government Act and the Interim County Assembly Standing Orders or any other Law;

iii. Or, the respondent from commencing any process put in my motion to replace the applicant as Speaker of the County Assembly of Nyamira.

4. That any other, further or alternative orders be made as the court may deem just and expedient.

5. That the costs of this application do abide the outcome of the substantive application for judicial review.

2. The application which is brought under **Order 53 rule 1** of the **CPR** and **Sections 8 and 9** of the **Law Reform Act, Cap 26** of the **Laws of Kenya**, is premised on the following 15 grounds:-

1. The applicant was appointed as per the provisions of the County Government Act prescribed procedure as Speaker of the County Assembly of Nyamira to serve for a period of five years until the end of the term of the respondent.

2. The County Government Act and the Interim County Assembly Standing Orders prescribe the procedure for the removal of the applicant from the office of the speaker of the County Assembly.

3. The procedure for the removal of the applicant from the offices of the speaker is therefore statutorily prescribed to be exercised as prescribed.

4. A tender was advertised by the Procurement and Tendering Committee of the respondent for the provision of the service of medical insurance cover to the members of the respondent and their families and after due process it was awarded to Johncele Brokers a contract entered into and Kshs.30 million paid in consideration thereof.

5. The respondent's Public Accounts and Investment Committee carried out investigations into the tendering process fore-mentioned at paragraph 4 and inter alia questioned the procurement officer, the purchasing officer, the tendering committee chairperson, the acting clerk of the County Assembly, members of the County Assembly Service Board and Mr. Ken Oguttu of Johncele Brokers and inter alia recommended that the applicant as chairman of County Assembly Service Board be subjected to disciplinary action.

6. The applicant is not a member of the procurement and tendering committee and the County Assembly Service Board has no role to play in the procuring and tendering process.

7. The respondent wrongfully and without reason used the foresaid report to illegally remove the applicant from office of the speaker of the County Assembly of Nyamira.

8. The motion for the debate on the removal of the applicant from the office of the speaker was un-procedural as it offended the express provisions of the standing **Order 44** of the respondent's Interim County Assembly standing orders.

9. The respondent convened a sitting on a Monday in contravention of standing order number 24 of the interim County Assembly standing orders to discuss, debate and remove the applicant.

10. The applicant in line with the constitutional provisions for a right to fair hearing and standing **Order 58** of the standing orders was not afforded an opportunity to defend himself against the allegations leveled against him before debate and voting was done by the members of the respondent.

11. The impeachment or removal of the applicant from the office of the speaker was in contravention of the prescribed procedure and the application of the report of the respondent's Public Accounts and Investment Committee as a basis for debate on the removal of the applicant from the office of the speaker was unreasonable discriminative and a politically orchestrated move to remove the applicant from office. The removal is therefore illegal, unconstitutional and unreasonable.

12. That in view of the contents of paragraph 11 foregoing the members of the respondents did not render a fair administrative action in line with **Article 47** of the **Constitution of Kenya**.

13. That as much as the respondent has statutory powers to put in motion a process for the removal of the speaker, the procedure applied in removing the applicant from office was not the statutorily prescribed one. This court has the power to protect all processes and procedure expressly set out in a statute, standing orders or any other law.

14. The applicant is a holder of an office that is prescribed by statute and his removal from office should accord to that law that prescribes the existence of that office.

15. Circumstances obtain for the leave sought to be granted and the stays do operate as an order preserving that office.

3. The application is also supported by the averments in the applicant's own affidavit sworn on 14th May 2014. The affidavit reiterates in detail the grounds on the face of the application. The applicant thus prays that his application be allowed because he was never given an opportunity to defend himself on the floor of the house before debate on his removal took place.

4. The application is opposed vide a notice of Preliminary Objection dated 14th May 2014 but filed in court on 15th May 2014. The notice of Preliminary objection raises the following 4 grounds:-

1. The court's jurisdiction to hear and entertain such kind of application is expressly ousted by the constitution of Kenya and by legislation.

2. *The respondent is privileged from litigations arising out of the circumstances complained of herein by dint of the provisions of **Section 4 and 6 of the National Assembly (Powers and Privileges) Act, Cap 6 Laws of Kenya as read together with the County Government Act No.17 of 2012.***

3. *The application amounts to an abuse of court process.*

4. *The issues raised herein are substantially in issue in Kisii **High Court Petition No.14 of 2014 between Nicholas N. Obare –vs- Speaker of the County Assembly of Nyamira County** which is pending before this Honourable Court and **Judicial Review No.7 of 2014** which has since been withdrawn.*

5. On the basis of the above grounds, the respondent prays that the chamber summons herein dated 14th May 2014 be dismissed with costs.

The applicant's case

6. Briefly, the applicant's case is that the applicant was, until 12th May 2014, the Speaker of the County Assembly of Nyamira, having been appointed as such in accordance with the Constitution and the **County Government Act, No.17 of 2012.**

7. Through a motion dated 5th May 2014, which motion was taken to the applicant's office on the same day, the Members of the County Assembly of Nyamira intended to present debate in the Assembly to discuss the applicant in relation to the Public Accounts and Investments Committee (PAIC) Report. On receipt of the said motion, the applicant made efforts through the mover of the motion and the clerk of the respondent not to have the motion tabled since, according to the applicant, the motion was contrary to the provisions of **Standing Orders 44 and 58 of the Interim County Assembly Standing Orders.** For clarity, Standing order 44 (1) (2) (3) provides:-

“44 (1) except as otherwise provided by these Standing Orders, notice shall be given by a Member of any Motion which the Member or Committee proposes to move.

(2) Before giving notice of Motion, the Member shall deliver to the Clerk a copy of the proposed motion in writing and signed by the Member; and the Clerk shall submit the proposed Motion to the Speaker.

(3) If the Speaker is of the opinion that any proposed motion –

a. is one which infringes, or the debate on which is likely to infringe, any of these Standing Orders;

b. is contrary to the Constitution or an Act of Parliament or of the County Assembly, without expressly proposing appropriate amendment to the Constitution or the Act of Parliament or County Assembly;

c. Is too long;

d. is framed in terms which are inconsistent with the dignity of the County Assembly;

e. contains or implies allegations which the Speaker is not satisfied that the Mover can substantiate; or

f. calls for commitment of public funds for which no provision is made in the Annual Estimates as adopted by the County Assembly, the Speaker may direct either that, the Motion is inadmissible, or that notice of it cannot be given without such alteration as the Speaker may approve or that the motion be referred to the relevant committee of the County

Assembly, pursuant to Article 114 (2) of the Constitution.”

8. On the other hand, and also for clarity, **Standing Order 58** reads:-

“58 (1) The Speaker may be removed from office by the assembly through a resolution supported by not less than seventy five percent of all the members of the county assembly.

(2) A notice of the intention to move a motion for a resolution to remove the Speaker shall be given in writing to the Clerk of the County Assembly, signed by at least one third of all the members of the county assembly stating the grounds for removal.

(3) A motion for a resolution to remove the speaker shall be presided over by a member of the county assembly elected to act as speaker as contemplated under Article 178 (2) (b) of the Constitution.

(4) Before the debate and voting on a motion under paragraph (3), the Speaker shall be accorded an opportunity to respond to the allegations on the floor of the assembly.”

9. According to paragraph 5 of the applicant’s supporting affidavit, the applicant spoke to the mover of the motion and to the acting clerk of the respondent concerning the reasons for the proposed impeachment which had to do with the report of the PAIC on investigations into the tendering and procurement of a tender for the provision of Medical Insurance Cover to the respondent’s members. The applicant therefore says that his impeachment based on the PAIC report was unfathomable and totally incomprehensible since the applicant has nothing to do with the tendering process.

10. The applicant also avers that if he had been afforded an opportunity to defend himself on the floor of the assembly, before debating the impeachment motion, he would have presented a solid rebuttal to the accusations. That in any event, the PAIC report was not supported by any documentary evidence such as minutes or proceedings showing that the applicant sat and approved the impugned tender. The applicant also alleges discrimination on the part of his accusers.

The Applicant’s Submissions

11. When the application came up for hearing, Mr. Minda, Counsel for the applicant submitted as follows:-

- *The applicant, as first speaker of the County Assembly of Nyamira came into office pursuant to the provisions of **Article 178 of the Constitution**;*
- *At a meeting of the County Assembly held on 12th May 2014, the applicant was removed from the position of Speaker;*
- *The said removal was unprocedural, illegal as the same was done beyond the powers bestowed upon the County Assembly by Statute;*
- *The action of the County Assembly of removing the applicant from office was contrary to the provisions of **Section 11 of the County Government Act** which provides as follows:-*

“11(1) A Speaker of a County assembly may be removed from office by the county assembly through a resolution supported by not less than seventy five percent of all the members of the county assembly;

(2) A notice of the intention to move a motion for a resolution to remove the speaker shall be given in writing to the clerk of the County assembly, signed by at least one third of all the members of the County assembly stating the grounds for removal;

(3) A motion for a resolution to remove the speaker shall be presided over by a member of the County assembly elected under Section 9 (4);

(4) Before the debate and voting on a motion under subsection

(3), the speaker shall be accorded an opportunity to respond to the allegations on the floor of the county assembly.

- *In the sense that the applicant was not afforded an opportunity to defend himself; the respondent's power to remove the applicant from office was not exercised within the confines of the law as the applicant was condemned unheard contrary to Standing Order 58 (supra);*
- *The meeting at which the applicant was removed from office was an irregular meeting since it was held outside the scheduled times for business by the County Assembly, namely the meeting was held on a Monday and without special permission of the Speaker, contrary to **standing Order 24**;*
- *No notice to remove the applicant from office was sent to the clerk of the respondent as required by **Section 11 of the County Government Act** and contrary to **Standing Order 44** (supra);*
- *The decision to remove the applicant from office on the basis of an undated PAIC report was unreasonable and discriminatory as the tendering and procurement of the insurance contract was done by the tendering committee of the respondent;*
- *The applicant, as chairman of the Public Service Board was not a member of the tendering committee; and it was thus unreasonable to hold him accountable for the sins of others;*
- *The respondent was guilty of unfair administrative action in failing to give advance notice to the applicant concerning the allegations against him and for failing to give the applicant a fair opportunity to respond to the allegations contrary to **Article 47 of the Constitution**;*
- *In removing the applicant from office, the members of the respondent misused their powers.*

12. To support the above arguments, counsel placed reliance on the case of **Mrao Limited –vs- First American Limited & 2 others [2003] KLR** a case cited by the Court (Hon. Mr. Justice Mathews N. Nduma) in **Nairobi Petition No.11 of 2014 (Formerly Nairobi HC Petition No.90 of 2014) – Nick Githinji Ndichu –vs- Clerk, Kiambu County Assembly & another.**

13. In the **Ndichu case**, the petitioner, Nick Githinji Ndichu was, until his removal, the Speaker of the Kiambu County Assembly elected to that position pursuant to **Article 178** of the **Constitution**. He was removed from the position of speaker pursuant to a motion of impeachment moved by a member of the County Assembly on 25th February 2014. The motion was passed by the requisite numbers hence the removal of the petitioner from the office of speaker on allegations of financial impropriety which involved authorization of payment of Kshs.530,000/= by the Finance Department to be used by himself on a private trip to attend the Annual Law Society of Kenya Retreat in Brazil. It was alleged the payment was not authorized by the interim clerk of the Assembly and was thus said to be irregular.

14. Mr. Ndichu moved the court for orders, *inter alia*, a conservatory order reinstating the petitioner to the office of speaker as existing prior to 25th February 2014, and for an order of certiorari quashing the 2nd respondent's decision to impeach the petitioner. The petitioner also prayed for an order of permanent injunction restraining the respondents by themselves, their agents, servants, and/or employees or any person acting under them from advertising, recruiting, interviewing or in any other manner filling the alleged vacancy in the office of the petitioner.

15. In citing the **Mrao Limited case**, Mr. Minda for the applicant wanted this court to be persuaded that this is **"a case which on the material presented to court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to**

call for an explanation or rebuttal from the latter.”

16. In the **Ndichu case**, Hon. Mr. Justice Nduma was satisfied that considering the provisions of **Standing Order 63** – Right to be heard – and to Hansard report of the proceedings by the Kiambu County Assembly for the day in question, there existed a right which had apparently been infringed by the respondents as to call for an explanation or rebuttal. It is to be noted that Justice Nduma heard Mr. Ndichu’s case as an industrial dispute.

The Respondent’s Submissions

17. Mr. Begi together with Mr. Nyachiro appeared for the respondent. In his oral submissions, Mr. Begi highlighted the following points:-

- *The respondent is a creature of the Constitution by dint of **Article 177** of the Constitution with powers and functions that are protected.*
- *The speaker is an employee of the respondent as provided by **Article 178 (2)** of the **Constitution** and in that position the speaker can be removed by the respondent as provided by the **County Government Act, No.17 of 2012**.*
- *By dint of **Articles 196 and 198 (2)** the respondent enjoys certain powers, privileges and immunities as more particularly set out by the **County Government Act (supra)** and the **National Assembly (Powers and Privileges) Act, Cap 6 of the Laws of Kenya**, and in particular **Section 4 of Cap 6** which provides that “**No civil or criminal proceedings shall be instituted against any member for words spoken before, or written in a report to, the Assembly or a Committee, or by reason of any matter or thing brought by him therein by petition Bill resolution, motion or otherwise.**”*
- *The action taken by the applicant herein is barred and ousted by the provisions of **Section 4 of cap 6 (supra)** and that in the circumstances; this honourable court has no jurisdiction to entertain the applicant’s case in whatever form.*

18. During the submissions, counsel for the respondent placed great reliance on the case of **Ndichu case** (supra) for the proposition that this court lacks the jurisdiction to entertain this case, and, in particular, that the relationship between the applicant and the respondent being that of employee/employer falls outside the purview of the jurisdiction of this honourable court. That this is a matter fit for determination before and by the Industrial court, and that in any event, the grant of conservatory orders would not be the answer to the applicant’s problems.

19. Counsel also relied on the case of **Law Society of Kenya –vs- The Cabinet Secretary Treasury and another – Nairobi Petition No.213 of 2014**. In the case, the court refused to issue conservatory orders in the interim period stating that it is the burden of the petitioner to demonstrate that it is entitled to the conservatory orders sought on the basis of the facts presented. The court also was of the view that in considering whether to grant conservatory orders, public interest must be considered. The court was guided by the decision of the Supreme Court in the case of **Gitirau Peter Munya –vs- Dickson Mwenda Githinji and 2 Others SCK petition No.2 of 2013**, where the learned judges held, *inter alia*, that “**Conservatory orders consequently should be granted on the inherent merit of a case, bearing in mind the Public Interest, the Constitutional Values and the Proportionate Magnitude and Priority levels attributable to the relevant causes.**”

20. The court also considered whether the petition would be rendered nugatory if the conservatory orders were not granted and found that since no document, resolution proceedings or order from any person in authority capable of effecting was presented/annexed then it would be difficult to hold that the petition would stand but it would be a mere academic exercise.

21. Mr. Begi submitted further that it would be improbable to halt the operations of the Nyamira County

Assembly and contended that cases such as the instant case should be determined on a case by case basis depending on the prevailing circumstances. Counsel also contended that to issue the orders sought herein would mean that the Nyamira County Assembly cannot carry out its statutory mandate.

22. Mr. Begi also relied on the **Canadian case of Canada (House of Commons) –vs- Vaid [2005] 1 SCR 667** which touched on powers of privileges and immunities of parliament; and invited the court to respect the principle of separation of powers as stated in the said case. He submitted that the applicant was given a chance to be heard but was nowhere to be seen. Further that the sittings were properly convened as the County Assembly extended sitting hours in order to transact business as provided for in **Standing Order 27 (3) County Assembly of Nyamira**, and that the meeting held on 12th May 2014 was to transact business which was the motion to impeach the Speaker for Nyamira County of which he (Applicant) admits that he saw the motion although he does not say whether or not he approved it.

23. Mr. Minda in reply submitted that for the County Assembly to sit on any other day there must be a resolution to that effect (sub –rule 3) and that there was no evidence by the respondent that the said resolution was made on the issue of jurisdiction. Mr. Minda also submitted that the High Court has jurisdiction under **Article 162 of the Constitution** to hear and determine the dispute herein. That even without making a distinction as to whether or not there is employer/employee relationship this court has the jurisdiction to hear and determine this issue.

24. Concerning **Section 4 of Cap 6 Laws of Kenya** Mr. Minda submitted that judicial review are special proceedings by which the court is clothed with a supervisory role over public bodies. That the respondent cannot hide behind a privilege when it is itself flouting the law and submitted further that if such a situation were allowed to continue, the result would be anarchy.

25. On the **Law Society of Kenya case petition No.13 of 2014**, Mr. Minda submitted that the judge was very cautious in exercising his jurisdiction and said that the jurisdiction of the court should be determined depending on the circumstances before it, and that considering the circumstances of this case, this court has jurisdiction to determine this dispute which is between an M.C.A. and the County Assembly. That both have rights and privileges and the court is not precluded from enquiring into those rights.

26. Finally, Mr. Minda submitted that the instant case is distinguishable from the **Law Society of Kenya case** (above) in which parties were seeking to stop the respondent from carrying out its mandate whereas in the instant case this court is being asked to enquire into the procedure of removing the applicant from office and whether the same was abused. He submitted that a right belonging to the applicant was infringed without a good reason. He prays for the orders sought.

Issues for Determination

27. I have carefully read the application herein, the preliminary objection by the respondent and the authorities relied upon by parties. I have also carefully gone through the parties' oral submissions. From the arguments and/or submissions the issues that come to mind for determination are:-

- 1. Whether this court herein has jurisdiction to hear and determine the application herein.*
- 2. Whether the Respondent is immune from litigation arising out of the circumstances complained of herein.*
- 3. Whether the application amounts to an abuse of the court process.*
- 4. Whether the issues raised herein are substantially in issue in **Kisii High Court Petition NO.14 of 2014 – Nicholas N. Obare –vs- Speaker of County assembly Nyamira County and Judicial Review No.8 of 2014.***

Findings

28. On the first issue of jurisdiction, it has been argued by the Respondent's counsel that the dispute herein is that of an employee/employer relationship between the Speaker of the County Assembly and the County Assembly of Nyamira. The Respondent relied on the **Ndichu case** (supra) where the court found that the petitioner and the respondent had an employee/employer relationship and that in the circumstances; the dispute was for the Industrial Court.

29. On the other hand the applicants maintain that this court has jurisdiction to hear and determine the issues herein as provided under **Article 162 of Constitution**, that even without making a distinction as to whether or not there is an employer/employee relationship this court has the jurisdiction to hear and determine this issue.

30. Article 165 (3), 6 and 7 make plain provisions on the jurisdiction of the High Court. **Article 165 (3) (b)** states that “**(3) Subject to clause (5), the High Court shall have –**

a. -----

b. Jurisdiction to determine the question whether a right or fundamental freedom in the bill of rights has been denied, violated, infringed or threatened.

5. The High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6) and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.”

31. From the above constitutional provisions, and in cases where all other parameters are in place, this court has jurisdiction to exercise its supervisory role over public bodies. The only question that arises in the instant case is whether this court has jurisdiction to supervise the respondent in relation to the matters now in dispute. This takes me to the second issue.

32. On the second issue, namely whether the respondent is immune from litigation arising out of the circumstances complained of herein, thus taking away the jurisdiction of this court, counsel for the applicant contends that the respondent cannot hide behind a privilege or immunity when it is itself contravening the law. The respondent on the other hand argues what is at stake in this case is an issue of separation of powers. It is noteworthy that all the statutory provisions that have been cited by the respondent point to the fact that there is a clear procedure by which the respondent carries out its mandate, and which procedure, the applicant, as an employee of the respondent is subject. In light of those provisions which have been reproduced hereinabove, this is a matter between an employee and his employer and for that matter; it is only the Industrial Court which can enquire into it. It is not a matter for this court by way of Judicial Review.

33. The third issue is whether the instant application is an abuse of court process. I find that to be true. Various applications and counter applications have been made based on issues similar to the issues raised herein, with the respondent herein being a common denominator in all these suits. There was JR NO.7 of 2014 which was withdrawn though the issues therein were similar to the issues in the instant application. Petition No.14 of 2014 also contains issues substantially in issue in the instant application. There is also JR NO.8 of 2014 with substantially similar issues. This is clearly an abuse of the process of the court because of multiplicity of suits.

34. The applicant herein is seeking leave to apply for an order of Judicial Review in the nature of certiorari and prohibition which leave if granted is to operate as an order staying:-

1. The respondent's decision made on the 12th day of May 2014 impeaching or removing the applicant from the office of Speaker of the County Assembly of Nyamira.

2. The withdrawal or deprivation or denial of any rights and privileges due to the applicant as Speaker of the County Assembly of Nyamira as set out in the County Government Act and the Interim County Assembly Standing Orders or any other law.

3. *The Respondent from commencing any process put in my motion to replace the applicant as Speaker of the County Assembly of Nyamira.*

35. It is trite law that leave to commence judicial review proceedings will be granted when an applicant demonstrates an arguable case for grant of the judicial review orders sought. In **Aga Khan Education Service Kenya –vs- Republic and others [2004] 1 EALR 1** it was held “**once there is an arguable case, leave is to be granted and the court at that stage is not called upon to go into the matter in depth.**” This coincides with the standard in civil cases for granting of interlocutory injunctions as held by Platt JA in **Mbuthia –vs- Jimba Credit Corporation Ltd. [1988] KLR1** that in applications for interlocutory injunctions the court is not required to make final findings of contested facts and law, and the court should only weigh the relative strength of the parties cases. The test for leave therefore must be on an arguable case and not a *prima facie* basis.

36. In the case of **R. –vs- Registrar of Societies and 3 others Ex parte Samuel Maina and 2 others – Nairobi HC JR Case No.313 of 2013** Korir J. held that without an identified decision that can be challenged by way of judicial review proceedings, the court will be acting in vain if it grants leave to the applicant.

Conclusion

37. In the instant case, apart from the fact that the dispute herein is one between an employee and his employer, it is public knowledge that the respondent has elected a new Speaker who has already been sworn in and has taken office. In the circumstances, any leave granted to the applicant in this case would be an exercise in futility. The applicant’s remedy lies elsewhere and not in Judicial Review proceedings.

38. For the above reasons, I decline to issue the orders prayed for by the applicant and dismiss the application but with no orders as to costs.

Dated and delivered at Kisii this 5th day of June, 2014

R.N. SITATI

JUDGE.

In the presence of:

Mr. Minda for the Petitioner

M/s Begi & Nyachiro (present) for the Respondent

Mr. Bibu - Court Assistant