



IN THE HIGH COURT AT MIGORI
JUDICIAL REVIEW APPL. NO.1 OF 2014
IN THE MATTER OF
ELECTION AND REMOVAL
OF THE LEADER OF MAJORITY PARTY
IN THE COUNTY ASSEMBLY
PURSUANT TO STANDING ORDER NO. 16 OF THE
MIGORI COUNTY ASSEMBLY STANDING ORDERS

BETWEEN

REPUBLICAPPLICANT

AND

COUNTY ASSEMBLY OF MIGORI1ST RESPONDENT

SPEAKER MIGORI COUNTY

ASSEMBLY2ND RESPONDENT

CLERK MIGORI COUNTY ASSEMBLY 3RD RESPONDENT

AND

ORANGE DEMOCRATIC MOVEMENT PARTY

MIGORI COUNTY SUB BRANCH & CORD

COALITION PARTIES 1ST INTERESTED PARTY

HON. RICHARD SOLO 2ND INTERESTED PARTY

EX PARTE

HON. JOHNSON OMOLO OWIRO

JUDGMENT

Introduction

1. Pursuant to leave granted on 11th July 2014, the *ex-parte* applicant ('the applicant') moved the court for the following orders;
 1. *That the Honourable Court do issue an order of Certiorari to bring before this court and quash the decision to replace him as leader of the majority party of the County Assembly of Migori.*
 2. *THAT the Honourable Court do issue an order of Prohibition restraining and/or prohibiting the respondents either by themselves, agents and/or employees from replacing as leader of majority party in the County Assembly of Migori.*
 3. *THAT costs of this application be in the cause.*
2. The application is supported by the verifying affidavit of the applicant sworn on 10th July 2014 and another affidavit sworn on 17th July 2014 and the amended statement of facts dated on the same day. The application is opposed by the respondents who rely on the affidavit of Patrick Wakine, the Clerk to the County Assembly of Migori, which is sworn on 12th August 2014. The 2nd interested party also opposes the application through his own deposition sworn on 28th August 2014. The Chairman of the Orange Democratic Movement, Migori County Branch, attended court to oppose the application but did not file any deposition in response.
3. The parties also relied on oral submissions made by their counsel supplemented by written submissions to support their respective positions.

Background and facts

4. The facts leading up to this case are common cause. The applicant is a member of the Orange Democratic Movement Party ("ODM") and an elected member of the Migori County Assembly ("the County Assembly"). At the time material to this cause, the applicant was the majority leader having been elected members of the Coalition of Reform and Democracy (CORD) which is the majority coalition in the County Assembly.
5. The gravamen of the applicant's case is that on 8th July 2014, a section of members of ODM, which is the majority party in the majority coalition in the County Assembly, led by the Chief Whip met without proper notice and made a decision purporting to elect the 2nd interested party, Hon. Richard Solo, as the Majority Leader. On the strength of the meeting and by a letter dated 8th July 2014, the Chief Whip wrote to the Speaker informing him of the election.
6. It is also common ground that the election of the Majority Leader in the County Assembly is governed by the **County Governments Act, Act No. 17 of 2013. Section 10(1) and (2)** of the Act provides as follows;
 - 10(1) There shall be in each county assembly a leader of the majority party and a leader of the minority party.*
 - (2) The leader of the majority party shall be the person who is the leader of the largest party or coalition of parties in the county assembly.*
7. The County Assembly **Standing Orders** deals with the manner in which the Majority Leader is elected. **Standing Order No. 16** provides as follows;
 1. *The largest party or coalition of parties in the County Assembly shall elect a member of the county Assembly belonging to the party or coalition of parties to be the Leader of the Majority Party;*
 2. *In electing members under paragraph (1), the largest party or coalition of parties in the County Assembly shall take into account any existing coalition agreement entered into pursuant to the Political Parties Act.*

3. A member elected under paragraph (2) may be removed by a majority of votes of all members of the largest party or coalition of parties in the County Assembly.
4. The removal of a member from office under paragraph (3) shall not take effect until a member is elected in the manner provided for under paragraph (1) in his or her place.
5. The whip of the largest party or coalition of parties in the County Assembly shall forthwith, upon a decision being made under this Standing Order, communicate to the Speaker, in writing the decision together with the minutes of the meeting at which the decision was made.

Submissions

8. The applicant's case is hinged on the manner in which he was removed as the Majority Leader. Mr Ng'ani, his counsel, submitted that the process of his removal was contrary to the *Standing Orders* and therefore null and void. The applicant relied on a report dated 8th July 2014 prepared by the County Whip addressed to the Speaker of the County Assembly informing him of the applicant's removal. The report, after setting out preliminary issues, stated that, "*It is also important to report to your office that a vote of no confidence was taken by members of the CORD Coalition, whereby members voted and those in support of Hon. Johnson Omollo Owiro were 5 members against 19 members with others walking out of the meeting.*" Attached to the said report were the minutes of a further meeting held on 8th July 2014, attended by 30 members of the majority CORD coalition which confirmed the election of the 2nd interested party as the majority leader after a vote.
9. Mr Ng'ani submitted that the meeting where the applicant was removed lacked the necessary quorum or majority in terms of ***Standing Order No. 16(3)*** which provides that the majority leader can only be removed by a majority of votes of all members of the largest party or coalition of parties in the County Assembly. Counsel contended that the CORD coalition has 51 members and only 24 members met and purported to remove him from his position contrary to the ***Standing Orders***.
10. The applicant also attacked the decision to remove him on the grounds of violation of the rules of natural justice. According to the report dated 8th July 2014 presented to the Speaker, the applicant was accused of failing to declare his interest in the recruitment of his relatives while conducting interviews for the County Service Board. That he encouraged the misappropriation of County resources and that he misused County Assembly vehicles assigned to him. He avers that he was condemned unheard in breach of the rules of natural justice and hence this court ought to interfere with the decision made to remove him from office.
11. Mr Ng'ani submitted that this court has jurisdiction to interfere with the decision to remove the applicant from office and that the applicant had established grounds for the exercise of that jurisdiction. Counsel cited several authorities to support the applicant case; ***Mumo Matemu v Trusted Society of Human Rights Alliance & Others NAI CA Civil Appeal No. 290 of 2012[2013] eKLR***, ***Simon Wachira Kagiri v County Assembly of Nyeri & Others NYR Petition No. 7 of 2013 [2013] eKLR*** and ***Federation of Women Lawyers Kenya (FIDA-K) & 5 Others v Attorney General NAI Petition No. 102 of 2011[2011] KLR***.
12. The Chairman of the ODM Migori County branch, who appeared in court, submitted that the matter of removal of the majority leader was a party matter and the removal of the majority leader was done without recourse to the party branch. He further submitted that the Court should allow the application to enable the party resolve the matter within the party machinery.
13. The respondents opposed the application. Mr Mwamu, counsel for the respondents, argued that the subject matter before the court was in essence a party dispute because the election of the majority leader was a matter for the party and the coalition of parties to resolve. As a result, he contended, the matter ought to be resolved through the political party machinery enacted under the ***Political Parties Act*** which provides for that resolution disputes between party members and coalition party through arbitration and the Political Parties Disputes Tribunal. Counsel called in

aid the case of *Speaker of the National Assembly v Karume*[2008] 1 KLR 425 and *Kones v Republic and Another ex p. Kimaniwa Nyoike*[2008] 3 KLR (EP) 291 which established the principle that where the law provides a particular procedure for redress for any particular grievance prescribed by the Constitution or any Act of Parliament, then the procedure must strictly be followed. In the circumstances, counsel submitted that the court lacks jurisdiction to entertain the dispute.

14. Mr Abisai, counsel for the second interested party supported the position taken by the respondents. He cited the case of *Kenya National Examinations Council v Republic ex-parte Gathenji and Others* CA Civil Appeal No.266 of 1996 [1997]eKLR and submitted that the order of certiorari and prohibition could not be issued in the circumstances of this case as the applicant has not established that the decision sought to be quashed was in excess of jurisdiction and that prohibition could not be used to correct a decision that had already been made. Counsel submitted that the grant of orders of judicial review would not be efficacious in the circumstances.

Determination

15. The jurisdiction of this court to inquire into the legality of any act cannot be gainsaid. This jurisdiction of the High Court under **Article 165(3)** of the Constitution to inquire into the legality of any act done or said to be done pursuant to the Constitution or under the law has been underscored in various decisions among them *Federation of Women Lawyers Kenya (FIDA-K) & 5 Others v Attorney General and Another* (Supra), *Kenya Youth Parliament & 2 others v Attorney General & Another*, Nairobi Petition No. 101 of 2011 [2012]eKLR, *Trusted Society of Human Rights Alliance v Attorney General* NAI Petition No. 299 of 2012 [2012]eKLR and *Jeanne W. Gacheche and 6 Others v Judges and Magistrate's Vetting Board and Others* NAI JR No. 295 et al of 2011 [2012]eKLR.

16. The question then is whether the court ought to intervene in this case. In *Commission for the Implementation of the Constitution v Parliament of Kenya and Others*, Nairobi Petition No. 454 of 2012 [2013]eKLR, the court observed that, “[38] Therefore, as regards the question as to whether the court has jurisdiction to entertain the petition, the answer can only be in the affirmative; as to what lengths the Court can actually go to in doing so is a second level inquiry based on the circumstances of each case.”

17. The matter before the court concerns the activities of the County Assembly and whether or not the court will grant the applicant's orders depends on the doctrine of separation of powers which underpins the manner in which the court should exercise jurisdiction in matters involving activities of the legislature, including the County Assembly. Removal and election of the Majority Leader is within the province of the County Assembly. Under **Standing Order No. 16(3)**, the members of the majority party or coalition are entitled to elect and or remove the Majority Leader.

18. In *Samson Vati Musembi & 6 others v Makueni County Assembly & 2 others* MSA Petition No. 18 of 2014 [2014] eKLR, Muriithi J., summarised the principle of separation of powers as follows, “As I understand it, the doctrine of separation of powers in relation to the legislature and the judiciary provides that the legislature and the judiciary should respect each other's sphere of competence with the court respecting the legislative mandate of Parliament and Parliament the adjudication role of the Courts. In the circumstances, the court may only interfere with legislative matters including the selection of members of committees through which the legislative agenda is carried out, where it is shown that the Assembly has acted, is acting or has threatened to act in contravention of the Constitution which the Judiciary must defend in accordance with its delegated sovereign judicial mandate of the people of Kenya.”

19. The applicant challenges two resolutions. The first resolution, which was passed to remove him from the position of Majority Leader, was done without the majority of members of the party voting. The second resolution was the one that appointed the 2nd interested party as the Majority Leader and was done by a majority of the members of the majority coalition. As the majority of

members of the coalition contemplated under **Standing Order No. 16(3)** have exercised the option to elect the 2nd interested party as the Majority Leader, the court ought to defer to that position as it represents the will of the majority of the members of that majority party and coalition. In my view, the election of the Majority Leader is a prerogative of the members of the party or coalition having the majority in the Assembly. A Majority Leader must have the confidence of a majority of the members of the Assembly. His position is in the hands of the members of the party or coalition of parties, which form the majority in the County Assembly. The Court cannot impose the Majority Leader by an order otherwise it may be forced to take over the conduct of the business of the County Assembly.

20. The applicant's position may be distinguished from that obtaining in **Federation of Women Lawyers Kenya (FIDA-K) & 5 Others v Attorney General and Another (Supra)** and **Trusted Society of Human Right Alliance v Attorney General (Supra)** cited by Mr Ng'ani. In the former case the position of Judges of the Supreme Court was at stake while in the latter it was the position of the Chairperson of the Ethics and Anti-Corruption Commission. Those positions are appointive and before a person is appointed to that position, there is a rigorous process to be followed which is underpinned by various provisions of the Constitution. The Court in those cases was called upon to interrogate whether the constitutional standards and process of appointment were met. Likewise the case of **Simon Wachira Kagiri v County Assembly of Nyeri & Others (Supra)** was brought by the petitioner whose nomination for appointment to the Nyeri County Executive Committee has been rejected by the County Assembly. In that case Abuodha J., was clear that for the court to interfere in matters of the legislature, "[40] [T]he applicant or petitioner ought to be demonstrate that the action or inaction by parliament or county assembly or any state organ for that matter, attacks the very fabric of the Constitution which if left unchecked would destroy the foundation of our sovereignty and nation. The issue so to speak must traverse beyond just personal rights and liberties of the petitioner."
21. The position of Majority leader in the County Assembly is an elective post open to all elected members of the Assembly. The election is in accordance with the **Standing Orders** which are the internal legislative rules governing such process. There is ample authority, as demonstrated in **Samson Vati Musembi & 6 others v Makueni County Assembly & 2 others (Supra)** and **Simon Wachira Kagiri v County Assembly of Nyeri & Others (Supra)** to support the proposition that the Court exercises great restraint in interfering with legislative processes. I am afraid that this case does not rise to the threshold requiring this court's intervention.
22. In **Peter O. Ngoge v Francis Ole Kaparo and 4 Others NRB HC Misc. Appl. No. 22 of 2004 [2007] eKLR** where the applicant challenged the election of the Speaker of the National Assembly, the court declared that, "*The invitation to the Court to intervene in the matter of the election of a Speaker which is clearly regulated by the Standing orders and which is required to be the first item of the agenda of a new session would in itself be a clear breach of the Constitution in that it is not the function of this court to interfere with the internal arrangements of Parliament unless they violate the Constitution. The doctrine of separation of powers as regards the internal arrangements of Parliament demands that we do not interfere with any such internal arrangements. The internal arrangements are those normally regulated by the Standing Orders of the House. There cannot be a valid cause of action based on what would clearly be a violation of the Constitution by the court if it was to intervene.*" The court further noted that, "*We must however not miss the chance to state that all organs of state namely the Legislative, Executive and the Judiciary are all subject to the Constitution. The High Court has the power to strike out a law or legislation passed by Parliament which is in conflict with the Constitution. The same applies to any privileges, immunities or powers claimed by Parliament which are in conflict with the Constitution. Nothing is immune from the courts scrutiny, if in conflict with the Constitution.*" I would hasten to add that the same position applies to the County Assembly which is the legislative arm of the County Government in our devolved structure of governance.

23. The application before the court is one for judicial review and is it well established that the grant of orders of certiorari and prohibition is discretionary. In *Sanghani Investment Limited v Officer in Charge Nairobi Remand and Allocation Prison* [2007] 1 EA 354, the court noted that, *“Judicial review being a discretionary remedy will only issue if it will serve some purpose. Certiorari is a discretionary remedy, which a court may refuse to grant even when the requisite grounds for it exist. The court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining. The discretion of the Court being a judicial one must be exercised on the basis of evidence and sound legal principles.....So that in this case, even though this application were properly before this Court and the application had merit, the court may not have granted an order of certiorari because it would not be the most efficacious remedy in the circumstances.”*

24. For the reasons I have stated above, I am not convinced that the grant of the orders of certiorari and prohibition in the applicant’s favour would be efficacious. Granting the order of certiorari would be in vain since the majority of the members of the governing coalition have already exercised their prerogative to elect a new Majority Leader. As regards the order of prohibition, I would quote the Court of Appeal in the *Kenya National Examination Council Case (Supra)* where the Court discussed the scope of the order of prohibition as follows, *“What does an ORDER OF PROHIBITION do and when will it issue? It is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings”* It is clear therefore the order of prohibition cannot issue as the decision to replace the Majority Leader has been made. Furthermore, the grant of an order of prohibition would tie the hands of the members of the County Assembly from exercising their prerogative to elect the majority leader.

25. As this matter concerned the removal and election of the Majority Leader under the *Standing Orders* and in view of the decision I have reached, I need not express a view on whether such a dispute ought to be resolved within the dispute resolution mechanisms provided under the *Political Parties Act*.

Disposition

26. It must now be clear that the Notice of Motion dated 16th July 2014 is for dismissal. It is dismissed.

27. As the application was brought by the applicant to protect his position, I do not see why the general rule on costs should not apply. The applicant shall therefore pay the respondents and 2nd interested party’s costs.

DATED and DELIVERED at MIGORI this 5th day of September 2014.

D.S. MAJANJA

JUDGE

Mr Ng’ani instructed by Ng’ani & Oluoch Advocates for the ex-parte applicant.

Mr Mwamu instructed by Mwamu and Company Advocates for the respondents.

Mr Philip Odero, Chairman of Orange Democratic Movement (ODM) Migori Branch.

Mr Abisai instructed by Abisai and Company Advocates for the 2nd interested party.