



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO.418 OF 2014
BETWEEN
THE SECRETARY ISIOLO COUNTY ASSEMBLY.....1ST PETITIONER
THE DEPUTY SPEAKER ISIOLO COUNTY ASSEMBLY.....2ND PETITIONER
THE CHIEF WHIP (MAJORITY) ISIOLO COUNTY ASSEMBLY.....3RD PETITIONER
AND
THE SPEAKER (MOHAMMED TUBI) ISIOLO COUNTY ASSEMBLY....RESPONDENT

RULING

1. The Petition herein is principally a challenge to the continued presence of the Applicant, Mohammed Tubi, as the Speaker of the County Assembly of Isiolo. The Respondents/Petitioners had sought interim orders in that regard but by a Ruling delivered on 30th September 2014, I declined to grant any such orders and on the same day, Parties agreed to file Submissions in respect of the Petition for hearing on 13th October 2014.
2. I should pause here and note that the hearing date was set on a priority basis because apparently the County of Isiolo was facing difficulties as a result of differences between its top officials including Parties to this Petition and a quick resolution of the present dispute was therefore necessary.
3. In any event, on 13th October 2014, Parties took out the matter from the hearing list to enable the Respondent file a rejoinder to the Petitioner's submissions. Hearing was then set for 28th October 2014 at 2.00 p.m. but on 24th October 2014, the present Applicant filed a Notice of Motion premised on **Article 165(4)** of the **Constitution** seeking orders that;
 - i. The Petition be certified as involving a substantial question of law requiring the Chief Justice to empanel at least three Judges to hear and determine it.
 - ii. The Petition be transferred to the High Court at Meru for hearing.
4. When the Application came up for hearing on 28th October 2014, Prof. Ojienda who was leading the

Counsel on record for the Applicant, Mr. Kisaka, argued that the issue whether the Speaker of a County Assembly can be removed under any other provision of the law than **Article 178(3)** of the **Constitution** as is sought in the Petition is a weighty, novel and a substantial issue of law.

5. That since **Chapter Six** of the **Constitution** has been invoked in that regard, the issue would require more than one Judge to clarify the dichotomous issue raised.

6. As for the hearing at Meru, the argument made is that Isiolo County is administratively under the High Court at Meru and so that is the proper forum for the hearing to be conducted.

7. A number of authorities were filed in support of the Application and I will advert to them later.

8. In response, the Petitioners filed grounds of Opposition whose substance is that the issue of forum is *res judicata* as it was a matter determined by consent on 30th September 2014 when Parties agreed to have the matter determined expeditiously in Nairobi.

9. In his submissions, Mr. Ngatia, Counsel leading Mr. Ingutya for the Respondent added that the Application is an abuse of Court process as it was filed deliberately to scuttle the hearing of the Petition after Parties had filed their final Submissions and lastly, that the criteria applicable for the creation of a bench of Judges under **Article 165(4)** of the **Constitution** has not been met and the Application should therefore be dismissed and the hearing of the Petition concluded expeditiously as earlier agreed. A number of authorities were cited in support of the above Submissions and I will shortly say something about them.

10. On my part, firstly, the issue whether the Petition should be heard and determined at the High Court in Meru will depend upon the answer to the first question; Whether a bench of more than one Judge is required to do so.

11. Having so said, it is indeed true, as I indicated in my Ruling of 30th September 2014 that in the ordinary course of things, the Petition ought to have been filed in Meru but as I also indicated in the same Ruling, it only came to this Court as the Vacation Court during the 2014 Judges' Conference. On the same day, both Counsel agreed that the matter could be heard and determined in Nairobi for reasons of expediency and this Court took the same view because the unlimited original jurisdiction of the High Court under **Article 165(3)(a)** includes the jurisdiction to hear any matter from any part of Kenya, territorial issues notwithstanding.

12. Secondly, this Court also generally takes the view that in view of the concept of devolution as entrenched in the Constitution and the principle of access to justice, matters should be heard and determined as close as possible to the place where the disputed events occurred.

13. Thirdly, and turning to prayer (ii) above, what is the law relating to the establishment of a bench of more than one Judge under **Article 165(4)** of the **Constitution**? For avoidance of doubt, that **Article** provides as follows;

“(1) ...

(2) ...

(3) ...

(4) *Any matter certified by the Court as raising a substantial*

question of law under clause (3) (b) or (d) shall be heard by an uneven number of judges, being not less than three, assigned by the Chief Justice.”

14. The High Court has in a number of decisions answered the above question and the Parties provided

the following ones which are relevant to that issue;

- i. **Wambora & Others vs Speaker, County Assembly of Embu & 4 Others [2014]eKLR.**
- ii. **Chemical Mehta vs Century Spinning and Manufacturing Co. AIR 1962 SC 1314**
- iii. **Kiumo & 2 Others vs Cabinet Secretary Ministry of Interior & Co-ordination of National Government & 3 Others [2014] eKLR.**
- iv. **Omtata & Anor vs G & others, Milimani Petition No.58 of 2014**
- v. **County Government of Meru vs EACC Milimani Petition No.177 of 2014**
- vi. **Harrison Kinyanjui vs The A.G & Others, Milimani Petition No.74 of 2013.**

15. From the above decisions, I can distil some important considerations under **Article 165(4)** and for a favourable decision to be made, the following criteria must be met;

- i. The empanelling of a bench under the said Article should be the exception rather than the rule and a higher burden is cast on the party seeking such a bench.
- ii. There is something more to “substantial question” than novelty or complexity of the issue before the Court.
- iii. The Court ought to take into account the need to dispense justice without delay having regard to the subject matter and the opportunity afforded to the Parties to litigate the matter up to the Supreme Court.
- iv. Substantial question of law is of great public importance which directly and substantially affect the rights of parties and which have not been finally settled by the Supreme Court.

16. Applying the above principles to the present Application, the only point made by the Applicant is that the issue of removal of a County Assembly Speaker under **Chapter Six** of the **Constitution** is novel and requires a deeper interpretation than is required of one Judge. Is that a sufficient reason to refer the matter to the Chief Justice as is prayed?

17. With respect, novelty alone is not such a criteria as to warrant a bench to be constituted under **Article 165(4)** of **Constitution**. I say so and agree with Majanja, J. when in **Harrison Kinyanjui (supra)** he stated as follows;

“A matter may raise complex issues of fact and law but this does not necessarily imply that the matter is one that raises substantial issues of law. Judges are from time to time required to determine complex issues yet one cannot argue that it means that every issue is one that raises substantial questions of law. Thus, there must be something more to the “substantial question” than merely novelty or complexity of the issue before the Court. It may present unique facts not plainly covered by the controlling precedents. It may also involve important questions concerning the scope and meaning of decisions of the higher Courts or the application of well-settled principles to the facts of a case.”

18. In saying so, the issue of removal of a public officer under **Chapter Six** of the **Constitution** has previously been dealt with by this Court and in the case of **Lubwayo & Anor vs Gerald Otieno Kajwang, Petition No.120 of 2013** for example, where the 1st Respondent’s nomination as a Senator had been challenged under the provisions of **Chapter Six** of the **Constitution**, there was no need to involve more than one Judge and the matter was determined in favour of the 1st Respondent.

19. Having held as above, it follows that I see no reason to seek that this matter be referred to the Chief

Justice as prayed by the Applicant.

20. Turning back to the issue of transfer of the matter to the High Court at Meru, I reiterate that the policy of this Court is to let matters be heard nearest the place where the events occurred. Once this Court delivered its Ruling on 30th September 2014 however, I recall that Mr. Kisaka for the Applicant stated, at my prompting as to whether the matter should be transferred to Meru, that he was comfortable having the matter heard in Nairobi. Although I did not record that statement, as I saw no need to do so then, I doubt that he can deny that I fixed the matter for hearing before this Court on that understanding and to expedite it because of the reasons earlier set out. It is of course the right of a party and an advocate to change its/his mind and I cannot hold it against the said Advocate or his client that they did so.

21. In any event, Pleadings having closed, Submissions having been filed and judgment imminent, barring another reason to transfer the matter to Meru or “any other Court including Machakos” as Prof. Ojienda submitted in closing, I see no reason to burden another Judge with a matter which has come to an end as expeditiously as both Parties to it had prayed.

22. In the end, I see no reason to accede to the Application dated 24th October 2014. The same is instead dismissed with costs to the Petitioner.

23. Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 4TH DAY OF DECEMBER, 2014

ISAAC LENAOLA

JUDGE

In the presence of:

Kariuki – Court clerk

Mr. Ngatia and Ingutya for Petitioners

Mr. Kisaka for Respondent

Order

Ruling duly read.

ISAAC LENAOLA

JUDGE

By Consent

Let Parties have Submissions for hearing on 16/12/2014.

ISAAC LENAOLA

JUDGE