



**Lekakimon v Speaker, County Assembly of Baringo & 3 others (Employment and Labour Relations Petition E010 of 2024) [2024] KEELRC 1948 (KLR) (29 July 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1948 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU  
EMPLOYMENT AND LABOUR RELATIONS PETITION E010 OF 2024**

**HS WASILWA, J  
JULY 29, 2024**

**BETWEEN**

**HON. WESLEY LEKAKIMON ..... PETITIONER**

**AND**

**THE SPEAKER, THE COUNTY ASSEMBLY OF BARINGO ... 1<sup>ST</sup> RESPONDENT**

**THE COUNTY ASSEMBLY OF BARINGO ..... 2<sup>ND</sup> RESPONDENT**

**HON SHADRACK MAILUK ..... 3<sup>RD</sup> RESPONDENT**

**THE CLERK, COUNTY ASSEMBLY OF BARINGO ..... 4<sup>TH</sup> RESPONDENT**

**RULING**

1. This Ruling is in respect of the Petitioner’s Notice of Motion dated 7<sup>th</sup> May, 2024, filed pursuant to Article 22 and 23 of the [Constitution](#), sections 12(1) and (3) of the [Employment and Labour Relations Court Act](#), 2011, Rules 3,4 and 23 of the [Constitution of Kenya \(Protection of rights and Fundamental Freedoms\) Practice and procedure Rules](#), 2013, Rules 17 of the [Employment and Labour Relations Court\(Procedure\) Rules](#) and all other enabling provisions of the law, seeking for the following Orders; -
  - a. Spent.
  - b. That pending the hearing and determination of this Application inter partes, the Honourable Court be and is hereby pleased to grant an order of status quo ante staying the decision made by the 1<sup>st</sup> Respondent on 20<sup>th</sup> March, 2024 to remove and/or uphold the removal the Applicant as a member of Baringo County Assembly Service Board and to replace the Applicant with the 3<sup>rd</sup> Respondent.
  - c. In the alternative, pending the hearing and the determination of this Application inter partes, the Honourable Court be and is hereby pleased to issue an interim order of mandatory



injunction compelling the 1<sup>st</sup> Respondent to immediately reinstate the Applicant to his position as a member of Baringo County Assembly Service Board.

- d. Pending the hearing and determination of the Petition, the Honourable Court be and is hereby pleased to grant an order of status quo ante staying the decision made by the 1<sup>st</sup> Respondent on 20<sup>th</sup> March, 2024 to remove and/or uphold the removal the Applicant as a member of Baringo County Assembly Service Board and to replace the Applicant with the 3<sup>rd</sup> Respondent.
  - e. In the alternative, an interim order of mandatory injunction be and is hereby issued compelling the 1<sup>st</sup> Respondent to immediately reinstate the Petitioner/ Applicant to his position as a member of Baringo County Assembly Service Board pending the hearing and determination of the Petition.
  - f. The Honourable Court grants any other relief that it deems fit and just to grant in the interest of justice.
  - g. The costs of the Application be provided for.
2. The Application is based on the grounds on the face of it and the supporting affidavit sworn by the petitioner on 7<sup>th</sup> May, 2024.
  3. The petitioner stated that he is a member of Baringo County Assembly Service Board, having been appointed pursuant to the provisions of section 12 of the [County Governments Act](#), and section 9 of the County Assembly Service Act.
  4. That as a member of the Board, his duties and responsibilities are outlined under section 11 of the [County Assembly Services Act](#) with the key mandate being to direct and supervise the administration of the services and facilities and exercise budgetary control over the County Assembly Service. In return, he is entitled to remuneration and allowances pursuant to section 15 of the [County Assembly Services Act](#).
  5. That on 20<sup>th</sup> March, 2024, a motion was tabled before the 2<sup>nd</sup> Respondent Assembly seeking the removal of the Applicant as a member of Baringo County Assembly Service Board and to replace him with the 3<sup>rd</sup> Respondent allegedly on a decision passed by the minority party members in the Assembly.
  6. This decision was made, presided over by the 1<sup>st</sup> Respondent, who gave directions on the said motion and upheld the alleged minority party's decision to remove the Applicant and effectively replaced the Applicant with the 3<sup>rd</sup> Respondent who has since been attending the sittings of the Board.
  7. He stated that he was neither present when the alleged minority party's decision was made nor was he in the Assembly when the notice of motion for his removal was tabled, having fallen ill and hospitalized. Hence, he did not have notice of the allegations levelled against him or the reasons given by the minority party for his removal. Therefore, he was condemned unheard.
  8. He stated that the tenure of office of the Applicant is specifically provided for under section 12(5) of the [County Government's Act](#) and the Applicant legitimately expected that he would vacate office only at the end of his term as a member of county assembly or if he ceased being a member of the county assembly. Additionally, that he would only be removed on the grounds stipulated under section 10 of the [County Assembly Services Act](#), i.e. violation of the [Constitution](#), inability to discharge duties, bankruptcy or conviction and sentence by imprisonment of more than six months.
  9. He stated that the basis for the removal of the Applicant as a member of the Baringo County Assembly Service Board was on alleged "lack of representation at the Board" which is not one of the grounds for



removal of a member of the county assembly service board under section 10 of the [County Assembly Services Act](#).

10. He contends that the design and architecture of the law on removal from office of any officeholder of the offices established under the [County Governments Act](#) and the [County Assembly Services Act](#) is such that the speaker has no decisive role but the power to remove vests in the members of the County Assembly. Therefore, the 1<sup>st</sup> Respondent acted *ultra vires* to the County Government Act, the [County Assembly Services Act](#) and Baringo County Assembly Standing Orders. Further that, his removal flouted the provisions of Standing Order 67 of Baringo County Assembly Standing Orders, which required the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to constitute a select committee to consider the matter of the Applicant's removal and the Applicant to be accorded an opportunity to be heard and to be furnished with the report of the select committee, together with any other evidence adduced and such notes or papers presented to the Committee at least 3 days before the debate on the Motion.
11. Based on the circumstances, it is his position, that his removal was procedurally and substantively unfair, unreasonable, illegal, and a gross violation of his constitutional rights and fundamental freedoms and his legitimate expectation. In any event, that his position had not fallen vacant to necessitate the appointment of the 3<sup>rd</sup> Respondent to replace him. Thus the appointment of the 3<sup>rd</sup> Respondent is a nullity.
12. He stated that his removal and immediate replacement was maliciously scheduled to coincide with the Applicant's illness and hospitalization so that the Applicant would not have time and strength to take reasonably immediate legal action to prevent his illegal removal.
13. He stated that this Court has jurisdiction to redress the violation of the Applicant's rights and fundamental freedoms by granting the reliefs sought both in the interim and in the Petition, as he is legitimately apprehensive that his rights and fundamental freedoms will continue being infringed, violated and/ or denied as long as the 3<sup>rd</sup> Respondent continue to occupy his position illegally.
14. That unless the orders sought are granted in the interim, the Petition, if successful, would be rendered nugatory, otiose and an academic exercise. In any case that the balance of convenience tilts in favour of the orders sought and the harm to be suffered by the Applicant is irreparable and far outweighs any damage the Respondents may suffer.
15. That the Application has been brought timeously, in good faith and in the interest of justice.
16. The Application is opposed by the Respondents with the 3<sup>rd</sup> Respondent filing a replying affidavit sworn on 31<sup>st</sup> May, 2023, stating that a member of County Assembly Service Board is not an employee under the Labour law framework in the Republic of Kenya. Therefore, the jurisdiction of this Court cannot be invoked and hence, it cannot determine the instant petition.
17. It is stated that the dispute herein ought to be resolved by the Political party or Coalition that deputed him and in default then the matter can be taken to Political Parties Tribunal.
18. It is averred that the Applicant herein was on 20<sup>th</sup> March, 2024 lawfully removed and replaced from office of the County Assembly Service Board. Hence this Court cannot undo that which has lawfully be undertaken.
19. He maintained that this Court lacks jurisdiction to hear and determine the Petition herein and as such, this Court should down its tools.



20. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents also opposed the Application by filling a replying affidavit sworn by Vincent Kemboi, the holder of the office of the 1<sup>st</sup> Respondent and the speaker of the 2<sup>nd</sup> Respondent sworn on 31<sup>st</sup> May, 2024.
21. In the affidavit, the affiant stated that this Honourable Court lacks jurisdiction to determine the Application and the petition herein for the following reasons:
  - a. This dispute does not fall under Section 12 of the *Employment and Labour Relations Court Act* for the reason that the Petitioner, who is a former member of the Baringo County Assembly Service Board, was not an employee of either the said County Assembly Service Board or any of the Respondents.
  - b. Pursuant to Section 12(3)(c) of the *County Governments Act* Cap 265, the Petitioner was a political nominee of his respective party into the membership of the Baringo County Assembly Service Board (“the Board”). His nomination into the said Board and his removal is a matter solely in the hands of his political party which makes such removal a matter of adjudication within the Internal Dispute Resolution Mechanism of the political party that nominated him and removed him from membership of the Board as contemplated by Section 40(1)(b) of the *Political Parties Act* and thus the dispute is not only prematurely brought before the Court, but it is also a non-justiciable matter before this Court.
22. He stated that the Petition is also an abuse of Court process and an attempt at forum shopping. This is because the Petition had previously filed in NakuruELRC No.E016 of2024 Wesley Lemweli Lekakimon v Daniel Tuwit Loreria & 7 Others With 2 Interested Parties (baringo County Assembly Service Board And Baringo County Assembly) which was withdrawn on 2<sup>nd</sup> May 2024. However, that the suit raised substantially the same issues as this new petition, only that this matter has been given cosmetic facelifts and filed as a Constitutional Petition. Therefore, he urged this Court to dismiss it for being an abuse of process and attempt at forum shopping.
23. It is averred that the dispute arises from the removal of the Petitioner from the Board, which removal was communicated to the 1<sup>st</sup> Respondent on 19<sup>th</sup> March 2024 by the Minority Party where they submitted minutes of meeting held on 18<sup>th</sup> March 2024, in which, a resolution had been passed by a majority of the members of the Minority Party to revoke the nomination of the Petitioner from the Board. he added that the meeting was attended by at least 8 members of the Minority Party excluding the Petitioner.
24. The deponent stated that he is the one that communicated the said decision of the Minority Party to the member of the County Assembly (the House) on 20th March 2024. That, under Standing Order 1 of the 2<sup>nd</sup> Respondent, the Speaker has a wide latitude and the discretion to decide one way or another on a matter that is not provided for expressly in the Standing Orders and since, there was no law that provided for the procedure of removal of a member of the Board nominated by either a Majority or a Minority Party in the House, the matter was left to the political party, considering that the nomination was also done by the respective Political party.
25. He contends that being a political appointment, neither the House nor the Speaker, had powers to interfere with a decision of a political party in regard to nomination of its representative to the Board. Therefore, that it is not true that on 20th March 2024, a Motion was tabled for consideration of removal of the Petitioner from the Board, as the house had no say in the Minority Party’s decision which had already been made.



26. The affiant stated that the provisions of law cited by the Petitioner in his Petition and Application, as supporting the grounds or hearing procedure before removal of the Petitioner from the Board, are inapplicable to the inherently political position he held in the Board. That in spite of the provisions of section 12(5) of the [County Governments Act](#), a Political Party cannot be barred from removing its nominated member to the Board in the event, for example, it loses confidence in his or her for reasons as may be grounded in the political parties' internal rules.
27. He stated that the procedure made reference to in Section 10 of the [County Assembly Service Act](#) only applies to the members of the Board appointed under Section 12(3)(d) of the [County Governments Act](#), who are persons from outside the membership of the House and the grounds in the said Section 12 may also be applicable to a Board member such as the Petitioner but they are not exhaustive since the mechanism of appointment is through nomination by a Political party with political considerations and hence other grounds to be determined by the Political Party or Political coalition may be applicable as per the parties internal rules.
28. He also stated that Standing Order 67 has no application whatsoever to a Board member such as the Petitioner. Therefore, that the Petition is misconceived in addition to the Honourable Court lacking jurisdiction.
29. The Deponent stated that a new Board member, that is the 3rd Respondent, has since been nominated by the Minority Party and has been sworn in and already discharging his duties and thus the Application has been overtaken by events.
30. The Application herein was disposed of by written submissions.

#### **Petitioner's Submissions.**

31. The Petitioner submitted on three issues; whether the Applicant has satisfied the threshold for the grant of status quo ante orders sought, whether, in the alternative, an order of interim mandatory injunction compelling the 1<sup>st</sup> Respondent to reinstate the Applicant to his earlier position pending hearing and determination of the Petition can issue and who bears the costs of the suit.
32. On the first issue, it was submitted that, Article 22 of the [Constitution](#) vests in every person a right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened. That Article 23 gives this Court broad jurisdiction in dealing with applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights. Some of the remedies which the court can grant in the interim include orders of injunction and conservatory orders. In support of this, he relied on the case of [Law Society of Kenya & 7 Others v Cabinet Secretary for Health & 8 Others; China Southern Co. Airline Ltd \(Interested Party\)](#) [2020] eKLR, it was held that;-  

“any other relief” as used in Article 23(3) of the [Constitution](#) was permissive and included any other relief not expressly stated in the Clause. In that case, the Court granted an order of structural interdict.”
33. Similarly, it was submitted that an order of status quo ante is an ancillary remedy aimed at restoring the position of the parties to how it existed prior to the decision complained of. In this case, the Petitioner seeks to restore his status as the member of Baringo County Assembly Service Board pending the determination of the Petition.
34. It was submitted that the removal of the Petitioner from the County Assembly service Board was done in violation of his right and his replacement was illegal, therefore that there is need to restore him back



to his position to ensure that the loss already suffered by the petitioner is capable of being remedied before it is late and becomes irreparable. To support his quest for this prayer, the Petitioner relied on the case of *Nyutu Agrovet Ltd v. Kabawa Nyumu Estate Ltd* [2003] eKLR, where the court emphasized that status quo ante orders are crucial to maintaining stability and preventing irreversible harm pending the resolution of disputes.

35. He also relied on the case of *Kenya Airline Pilots Association (KALPA) v Co-operative Bank of Kenya Limited & another* [2020] e KLR, it was stated as follows:

“...By maintaining the status quo, the court strives to safeguard the situation so that the substratum of the subject matter of the dispute before it is not so eroded or radically changed or that one of the parties before it is not so negatively prejudiced that the status quo ante cannot be restored thereby rendering nugatory its proposed decision.”

36. He further cited the decision by F. Tuiyot, J (as he then was) in the case of *Saifudeen Abdullahi & 4 Others*, Mombasa High Court Misc. Civil Cause No. 11 of 2012 (cited favourable in the case of *Athman & 3 others v Art 680 Limited & 2 others* (Environment and Land Case Civil Suit E021 of 2023) [2024] KEELC 217 (KLR)) as follows:

“In my view, an order for status quo to be maintained is different from an injunction both in terms of the principles for its grant and its practical effect. While the latter is a substantive equitable remedy granted upon establishment of a right, or at the interlocutory stage, a prima facie case, among other considerations, the former is simply an ancillary order for preserving the situation as it exists pending proceedings. It does not depend on proof of right or prima facie case. An injunction may compel or restrain certain acts, whereas a status quo order merely preserves the situation pending the hearing of the reference or complaint.”

37. It was argued that the allegations that the suit has been overtaken by event by dint of the fact that the 3<sup>rd</sup> Respondent was appointed in place of the petitioner is not justified because the appointment of the 3<sup>rd</sup> Respondent was illegal considering that his position had not fallen vacant.

38. It was argued that this Court has been given powers under Article 23(3) of the *Constitution* and section 12 of the *Employment and Labour Relations Court Act* to grant the Orders sought. In support of this, he relied on the case of *Thugi River Estate Limited & another v National Bank of Kenya Limited & 3 others* [2015] eKLR highlights the jurisdiction of the Court to grant orders of status quo as follows:

“Firstly, an order for status quo will issue through a judicial process. Where the court in exercising its general or statutory jurisdiction grants orders for maintaining a particular state or set of facts in situ... The alternative is an order for status quo issued by the court as a case management strategy, intended to assist the case. It maintains a particular state of affairs. Often the court would not have been moved by either party. The court expects the existing state of affairs to be preserved until further orders. It is crucial for the court to be specific in describing the state of affairs to be preserved.”

39. He also cited the decision of Lord Diplock in the case of *Garden Cottage Foods v Milk Marketing Board* [1984]AC 130 (cited favorably by EACJ in *British American Tobacco v A.G. of Uganda* (Application 13 of 2017) [2018] EACJ 86 (25 January 2018) where the learned judge stated that it is instructive in determining what status quo ante entails and held that:-

“The status quo is the existing state of affairs; but since states of affairs do not remain static this raises the query: existing when? In my opinion, the relevant status quo to which



reference was made in American Cyanamid is the state of affairs existing during the period immediately preceding the issue of the writ claiming the permanent injunction or, if there be unreasonable delay between the issue of the writ and the motion for an interlocutory injunction, the period immediately preceding the motion.”

40. Similarly, it was argued that it is evident that the decision to remove the Petitioner from his position was done in his absence and when he was unwell. Moreover, that the said removal was done without any notice, fair administrative action and hearing, therefore was unlawful. Additionally, that just because the decision to remove him may have been made by the party that nominated him, his removal cannot be done without due process as such the Respondents are not justified in folding their hands while injustice is meted on the petitioner through lack of due process of removal.
41. Overall, that the actions of the Respondents are not justifiable and run afoul of the *Constitution*, the *County Governments Act*, the *County Assembly Service Act* and Baringo County Standing Orders. That a due process would have entailed a constitutionally select committee to consider the matter of the Applicant’s removal and afford him an opportunity to be heard; and to be furnished with the report of the select committee, together with any other evidence adduced and such notes or papers presented to the Committee at least three days before the debate on the Motion, which were not done.
42. It was submitted further that considering the merit of the Applicant’s Petition, it is important that the Court restores the Applicant to the position. In any event, that there is no prejudice to be suffered by any of the Respondents.
43. On whether mandatory injunctive orders should issue, it was argued that the law regarding the grant of an interlocutory mandatory injunction is settled and reiterated in the case of *New Ocean Transport Ltd & Another v Anwar Mohamed Bayusuf Ltd* [2014] eKLR, the Court of Appeal held that a mandatory injunction;

“...is granted in cases in which monetary compensation affords an inadequate remedy to an injured party. See Halsbury’s Laws of England 3rd edition, vol. 21 at pg.343. Basically, there are 2 types of injunctions: positive and negative. The positive injunction would direct a party to do something whereas a negative one will restrain such a person from doing something. Among the positive injunctions will be mandatory injunction. This injunction orders some act to be done. Part of this is the restorative injunction being sought by the applicants in the instant. This type of injunction requires the person against whom it is directed to undo a wrongful act, to restore the status quo ante so that the damage does not continue. Then there is the mandatory injunction per se which compels a party to carry out some positive act to remedy a wrongful omission...”

44. The principles the court should apply in determining whether or not to grant of an order of mandatory injunction were laid out in the case of *Robert Mugo Wa Karanja v Ecobank (Kenya) Limited & another* [2019] eKLR, where the Court, citing the cases of *Canadian Pacific Railway v Rand* [1949] 2KB 239 at 249 and *Locabail International Finance Ltd v Afro-Export* [1988] ALL ER 901, that held as follows;

“...the principle governing mandatory injunction is as follows: “A Mandatory Injunction can be granted on an interlocutory application as well as at the hearing, but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied or if the Defendant attempted to steal a match on the Plaintiff mandatory injunction will be granted on an interlocutory application.”



45. Further, in *Nation Media Group & 2 Others v John Harun Mwau* [2014] eKLR the Court of Appeal rendered itself on mandatory injunctions where it held;

“It is trite law that for an interlocutory mandatory injunction to issue, an applicant must demonstrate existence of special circumstances... A different standard higher than that in prohibitory injunction is required before an interlocutory mandatory injunction is granted. Besides existence of exceptional and special circumstances must be demonstrated as we have stated a temporary injunction can only be granted in exceptional and in the clearest of cases.”

46. Accordingly, it was submitted that the Petition has highlighted manifest violations of rights and fundamental freedoms in that; the Applicant was removed from office unprocedurally and without any just cause when he was ill and hospitalized when the motion for his removal was tabled, discussed and upheld by the 1<sup>st</sup> Respondent. He was neither notified nor accorded fair hearing as stipulated under Standing Order 67 of Baringo County Standing Orders. Hence, the Applicant’s case is a clear one which can only be remedied by a grant of the orders of mandatory injunction at an interlocutory stage.

47. On him being replaced already and the Application being overtaken by events, the Applicant cited the Court of Appeal case of *Shariff Abdi Hassan Vs Nadhif Jama Adan* [2006] eKLR that:

“... where it is *prima facie* established as per the standards spelt out in law as stated above that the party against whom the mandatory injunction is sought is on the wrong, the courts have taken action to ensure that justice is meted out without the need to wait for full hearing of the entire case.”

48. Also in *Suleiman v Amboseli Resort Limited* [2004] 2 KLR 589 Ojwang, JA expressed himself as follows:

“It is the business of the court, so far as possible, to secure that any transitional motions before the Court do not render nugatory that ultimate end of justice...The argument that the law governing the grant of injunctive relief is cast in stone is not correct, for the law has always kept growing to greater levels of refinement, as it expands, to cover new situations not exactly foreseen before. Traditionally, on the basis of the well-accepted principles, the Court has had to consider the following questions before granting injunctive relief: (i) is there a *prima facie* case with a probability of success” (ii) does the applicant stand to suffer irreparable harm, if relief is denied” (iii) on which side does the balance of convenience lie” Even as those must remain the basic tests, it is worth adopting a further, albeit rather special and more intrinsic test which is now in the nature of general principle. The Court, in responding to prayers for interlocutory injunctive relief, should always opt for the lower rather than the higher risk of injustice...”

49. On that basis, the Applicant submitted that he has established a *prima facie* case with a probability of success to warrant the issuance of the orders of injunction sought herein. He added that the Applicant has ably demonstrated that his fundamental right to be heard and to due process was egregiously violated.

50. On irreparable harm, it was argued that the manner in which the Applicant was removed without notice, justification, or a fair hearing further exacerbates the irreparable harm and sets a precedent that elected officials and board members can be arbitrarily removed from office, undermining the principles of fairness, due process, and constitutional protections. Hence, rectifying such harm through financial



compensation alone would not adequately restore the Applicant to his previous standing or reverse the reputational damage caused.

51. It was also argued that beyond the Applicant's personal interests, there is a broader public interest in upholding Constitutional principles and ensuring accountability in public office because allowing unlawful removals without consequences, sets a dangerous precedent and erode public trust in democratic institutions.
52. On balance of convenience, it was argued that it tips in favor of the Applicant because maintaining the status quo ante and restoring him to his earlier position preserves the integrity of his rights and responsibilities pending the final determination of the case and prevents further injustice and ensures that any potential harm to the Applicant is mitigated pending a full hearing on the merits.
53. In conclusion, it was submitted that the Application herein meets the legal threshold for granting of mandatory injunctive orders as stipulated in *Giella v Cassman Brown & Co Ltd* [1973] EA 358 and is deserving of the interim injunctive reliefs sought. He thus urged this Court to exercise its discretion and grant the prayers sought with costs.

### Respondent's Submissions

54. The Respondent on the hand submitted on four issues; what are the conditions for grant of conservatory orders, whether the applicant has met the conditions enumerated above, whether the application for conservatory orders has been overtaken by events and whether this Honourable Court ought to disturb the status quo installed by actions of the 1<sup>st</sup> Respondent.
55. On the first issue, it was submitted that conservatory orders are plainly defined as a decision of a court to maintain the status quo of the circumstances of a case while the case is being decided and in granting conservatory orders, the courts are guided to balance the need to conserve proper order in conducting proceedings and the need to preserve adjudicative authority of the judicial system. In support of this, they relied on the case of *Gatirau Peter Munya v Dickson Mwenda Gitbinji* [2014] eKLR, where the court illuminated thus;

“Conservatory orders” bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest...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 magnitudes, and priority levels attributable to the relevant causes.”

56. These guidelines were adopted by the Court in *Havi & 3 others v Njenga & 10 others* (Civil Appeal E044 of 2021) [2022] KECA 928 (KLR) stating that;

“On the conservatory reliefs granted by the trial court and on an arguable case, we adopt the position taken by the court in *Nubian Rights Forum & 2 others v Attorney General & 6 others; Child Welfare Society & 8 others (Interested Parties); Centre for Intellectual Property & Information Technology (Proposed Amicus Curiae)* [2019] eKLR where the court was explicit inter alia that the principles that guide the court in granting conservatory orders are that the applicant ought to demonstrate an arguable prima facie case with a likelihood of success; that in the absence of the conservatory order he/she is likely to suffer prejudice; whether a grant or a denial of the conservatory relief will enhance the constitutional values and objects of a specific right or freedom in the Bill of Rights; whether if an interim



conservatory order is not granted, the petition or its substratum will be rendered nugatory; and, lastly, the Court should also consider the public interest. See also the Supreme Court decision in *Gatirau Peter Munya v Dickson Mwenda Kitbinji & 2 others* [2014] eKLR [supra]”.

57. That from the foregoing the conditions universally acknowledged from the established principles are as follows;-
- i. The Applicant ought to demonstrate a prima facie case with a likelihood of success.
  - ii. The Applicant ought to demonstrate suffering prejudice in the absence of the conservatory order.
  - iii. The determination of whether the grant or denial has a fundamental impact on a specific right or freedom in the Bill of Rights.
  - iv. A demonstration that the substratum of the petition will be rendered nugatory and
  - v. The status of the subject matter with regard to public interest.
58. On whether the applicant has met the conditions enumerated above, it was submitted that the Applicant is a nominee of a political party affiliated to Azimio Coalition in the Republic of Kenya, pursuant to Standing Order 160 of Baringo County Standing Orders, 2017 in which it is outlined that the criteria for nomination depends on/ought to reflect the relative majorities of the seats held by each of the County Assembly parties in the House. Hence the dispute before this court ought to have been adjudication through the internal dispute resolution mechanisms in the party to which the Applicant was nominated.
59. On whether the Applicant has demonstrated a prima facie case with a likelihood of success. the Respondent relied on the case of *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] eKLR in which the court stated that;
- “A *prima facie* case in a civil application includes but is not confined to a “genuine and arguable case.” It is a case which, on the material presented to the 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.”
60. It was argued that the Applicant has not demonstrated how a political party dispute is a genuine and arguable case. Further that he has not indicated why, he has not exhausted both internal dispute resolution mechanisms established at party level and those bestowed on the Political Parties Disputes Tribunal to warrant the filling of this suit. That since the ambit of the dispute is of a political nature, the Applicant has not shown how the employment court should handle this matter which does not raise any employment matters despite the Court holding that it is not restricted to employment matters only.
61. It is argued that the 3<sup>rd</sup> Respondent is already rightfully in office through the same democratic and political process that formerly the Applicant was nominated. Therefore, the Applicant will not suffer any prejudice in the absence of conservatory orders since the prayer to conserve the subject matter is overtaken by events. That if the court was to grant an order of status quo ante, it will amount to removing a democratically elected member into the office of County Assembly Service Board. In fact, that such an order would amount to a mandatory action, before the matter is heard and determined.



62. On the infringement of a fundamental right, it was submitted that the subject position being a position at the discretion of the party nomination procedures, the alleged injudicious exercise of the said discretion can only be challenged and determined preliminarily at the party level. In any event that the Applicant has not demonstrated how the substratum of this Application and indeed that of his petition will be rendered nugatory. Moreover, that the 3<sup>rd</sup> Respondent herein has already taken oath of office and already discharging his duties in that capacity as member of the County Public Service Board.
63. The Respondent argued that there is no iota of public interest in this petition. He defined what amounts to public interest by citing the case of *Okoti & 2 others v Attorney General & 14 others* (Petition (Application) 2 (E002) of 2021) [2023] KESC 31 (KLR) that;  
  
‘Public interest litigation aims to address genuine public wrongs where legal action is initiated for the enforcement and advancement of constitutional justice and public interest.’
64. On whether conservatory orders should issue, it was submitted that the removal of the nominee was a decision of the political party and not that of the 1<sup>st</sup> Respondent. Further that his replacement was made public and recorded on the 2<sup>nd</sup> Respondent’s Hansard of 20<sup>th</sup> March, 2024 as a transparent and democratic shift in the membership of the County Public Service Board. Therefore, that the 1<sup>st</sup> Respondent merely communicated a decision that had been passed by the members of the political party affiliated to the Applicant and thus, this Court should not interfere with the autonomous decisions enjoyed by the 2<sup>nd</sup> Respondent in determining how it will constitute its Select Committees.
65. On whether this Honourable Court ought to disturb the status quo installed by actions of the 1<sup>st</sup> Respondent. It was submitted the 3<sup>rd</sup> Respondent has been transparently, constitutionally and deservingly nominated by the political party he is affiliated to, to be a member of the County Public Service Board and the 2<sup>nd</sup> Respondent was only acting on the powers to ensure merit, competence and proper running of its governance institutions. Therefore, to order for reinstatement of the Petitioner will be in contravention of the critical role of the principle of separation of powers.
66. I have examined all the averments and sub missions of the parties herein. Pertinent issues have been raised concerning this court’s jurisdiction to entertain this application. In resolving this application, I will delve into this aspect first.
67. The applicant herein has averred that he is a Member of the County Assembly Service Board (CASB) having been so appointed to the said Board by virtue of Section 12 of the *County Government Act* (CGA) 2012.
68. It is submitted that the Applicant was appointed under section 12 (3) (c) of the *County Government Act* (CGA) which provides that the County Assembly Board shall consist of the leader of minority party or a Member of the County Assembly deputed by him or her.
69. My understanding of this provision is that such Member of the County Assembly Service Board (CASB) is an appointee or nominee of the minority party or the party that deputed him.
70. The Respondents have submitted the 2<sup>nd</sup> Respondents hansard of 20<sup>th</sup> March 2024. They have also submitted the minutes of the Coalition of the County Assembly of Baringo held on Monday 1<sup>st</sup> March 2024 at 11.45 am at office of the minority leader’s office where it was resolved that the Applicant was no longer sitting at the board on the position of the minority party. The minutes of minority party which made the decision were not presented to court.



71. But following this decision, the County Assembly resolved at its sitting of the same date 20/3/2024 to uphold the decision of the minority side and the Applicant was effectively removed as a Member of the County Assembly Service Board (CASB).
72. First the decision the Applicant is challenging seems to have been overtaken by events as he had already been removed and another-3<sup>rd</sup> Respondent taken over. This court cannot therefore grant orders revoking the decision made by the 1<sup>st</sup> Respondent at this stage as this would compromise the entire petition.
73. Secondly, the application only sought grant of orders of status quo which I have addressed and since other prayers can be addressed in the main petition, I will decline to grant interim orders at this stage and direct that the parties proceed with the main petition. Costs in the main petition.

**RULING DELIVERED VIRTUALLY THIS 29<sup>TH</sup> DAY OF JULY, 2024.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

In the presence of: -\*\*

Kiplangat for Petitioner – present

Kipkoech for 3<sup>rd</sup> Respondent – present

Bwingu for 1<sup>st</sup> Respondent – present

Court Assistant - Fred

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