

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
CONSTITUTIONAL & JUDICIAL REVIEW DIVISION
PETITION NO. E031 OF 2025

HON. ATHMAN RAMA MWAMWIRI.....
....PETITIONER

-VERSUS-

SPEAKER OF THE COUNTY

ASSEMBLY OF MOMBASA.....1ST
RESPONDENT

COUNTY ASSEMBLY OF MOMBASA.....2ND RESPONDENT

PRISCILLA MEMA MUMBA.....3RD RESPONDENT

RULING

1. By a petition dated 25 August 2025, filed in this Honourable Court on 26 August 2025, the petitioner has sought the following orders:

“i. A declaration that the purported removal of the Petitioner, Hon. Athman Rama Mwamwiri, as the Leader of the Majority Party in the Mombasa County Assembly, was unconstitutional, unlawful, null and void ab initio for want of compliance with the Constitution of Kenya, the County Governments Act, the Standing Orders of the Mombasa County Assembly, the Political Parties Act, and the Constitution of the Orange Democratic Movement (ODM) Party;

ii. A Declaration that the actions of the Respondents in effecting and/or endorsing the purported removal of the Petitioner without

prior approval of the Orange Democratic Movement Party, without a valid resolution of the majority members of the County Assembly, and without affording the Petitioner an opportunity to be heard, violated Articles 27, 35, 47, 48, 50 and 236 of the Constitution of Kenya;

iii. A declaration that the Respondents' failure to provide the Petitioner with the requested documents forming the basis of his purported removal contravened the Petitioner's constitutional right of access to information under Article 35 of the Constitution, and further violated the principles of transparency, accountability and fair administrative action;

iv. An order of certiorari quashing and setting aside the resolution of the Mombasa County Assembly dated 5th August 2025, together with all consequential actions, proceedings, communications and/or decisions purporting to remove the Petitioner from the position of Leader of the Majority Party;

v. An order of mandamus compelling the Respondents to forthwith reinstate the Petitioner, Hon. Athman Mwamwiri, as the duly recognized Leader of the Majority Party in the Mombasa County Assembly with full rights, privileges and benefits appurtenant thereto;

vi. An order of prohibition restraining the 1st 2nd and 3rd Respondents whether by themselves, their servants, agents, officers or any other person acting under their authority, from recognizing, presenting, or otherwise purporting to install the 3rd Respondent as the Leader of the Majority Party in the Mombasa County Assembly:

vii. General damages and/or compensation for the violation of the Petitioner's constitutional rights, including but not limited to, his right to fair administrative action, political rights, and dignity as guaranteed under Articles 27, 28, 35, 38 and 47 of the Constitution;

viii. Costs of the petition be borne jointly and severally by the Respondents;

ix. Any such other or further relief as this Honourable Tribunal may deem just, fit and expedient to grant in the circumstances of this case.”

2. Alongside the petition, the petitioner filed a motion under certificate of urgency seeking, among other prayers, a prayer for conservatory orders.

The prayers for the primary orders were couched as follows:

“3. That this Honourable Court be please to issue an interim order of injunction, restraining the Respondents either by themselves, agents, servants and/or employees, from preventing, barring, restricting and/or interfering with the petitioner's/applicant's performance, discharge and/or execution of his duties as the Leader of Majority, Mombasa County Assembly, whatsoever and/or howsoever pending the hearing and determination of this application.

4. That this Honourable Court be please to issue an interim order of injunction, restraining the Respondents either by themselves, agents, servants and/or employees, from preventing, barring, restricting and/or interfering with the petitioner's/applicant's performance, discharge and/or execution of his duties as the Leader of Majority, Mombasa County Assembly, whatsoever and/or howsoever pending the hearing and determination of the Petition herein.

5. That this Honourable Court be please to issue an Interim Conservatory Order to protect, preserve and/or conserve the status of the petitioner/applicant as the Leader of Majority. Mombasa County Assembly as prevailed as at 4th August, 2025 pending the hearing and determination of this Application.

6. That this Honourable Court be please to issue an Interim Conservatory Order to protect, preserve and/or conserve the status of the petitioner/applicant as the Leader of Majority. Mombasa County Assembly as prevailed as at 4th August, 2025 pending the hearing and determination of the Petition herein.

7. That the Conservatory Orders, if any, granted by this Honourable Court to be implemented and/or enforced by the County Police Commander, Mombasa County and/or such other officer as the honourable court may decree.”

3. The petitioner also sought for an order on costs. The application is expressed to be brought under “*rules 18 and 23 of Legal Notice No.117 of 2013.*”
4. The petition and the application are supported by the petitioner’s own affidavit in which he has sworn that he is a Member of the County Assembly of Mombasa County and that he is also the Leader of Majority Party in the County Assembly. According to Athman, upon his re-election to the County Assembly in the 2022 General Elections, he was rewarded this position by his party, the Orange Democratic Movement (ODM) party, because of his loyalty to the party and also because of his diligence in execution of his duties to the party.

5. As the Leader of Majority, the petitioner is charged with offering leadership of the party in the County Assembly. It has been sworn by the applicant that at no point, since his election in 2022, has the ODM Party members of the County Assembly of Mombasa held a meeting to discuss changes in the assembly leadership.
6. That notwithstanding, Athman was surprised to learn through the Assembly Order paper of 5 August, 2025 and the communication from the Speaker, to the effect that there was change of leadership of the Majority Party in the County Assembly and that the 3rd respondent was now the majority party leader.
7. Immediately upon the announcement, a vote by acclamation, apparently on the change of leadership of the majority party was taken, despite the fact that the power to choose the leader of majority is solely vested in the majority party and not the entire assembly.
8. Athman then wrote two letters on 6 August, 2025 to the Clerk of the 2nd Respondent requesting minutes of any meeting that formed the background information for the change of leadership of the Majority leader and, subsequently, the communication to that effect from the Speaker. As far as Athman is concerned, no such meeting took place. As a matter of fact, the ODM Party communicated to the Speaker denying being aware of any meeting in which the party had endorsed change of party leadership in the County Assembly.

9. In an apparent defiance of the Orange Democratic Party's communication, the Speaker retorted that that the communication had been overtaken by events and, in any event, according to the Speaker, the proper procedure for the removal of the petitioner as the leader of the majority had been followed.
10. Athman has reiterated that the majority party reserves the right to make a decision on the position of the Majority Leader and not the entire assembly as happened in this case. It is contended that prior to the announcement of change of party leadership, no meeting of the members of the Majority Party was ever held to make the decision and the purported communication by the speaker is a blatant disregard of the law.
11. Subsequent to what the petitioner insists is an illegal removal from his position as the leader of the majority, the 2nd respondent has terminated the services of the petitioner's personal assistant and withdrawn the rest of the benefits that the petitioner has hitherto enjoyed as the leader of the majority.
12. It is against this background that the applicant has sought conservatory orders pending the hearing and determination of the main petition.
13. When the motion was brought to my attention under a certificate of urgency on 1 September 2025, I certified the application urgent and also granted a conservatory order. In the meantime, I also issued directions on

the disposal of the application. To be precise my ruling at the *ex parte* stage was in the following terms;

“I have read the applicant's 2 applications dated 25 August 2025, the first of which seeks this Honourable Court's indulgence that the second application which is the substantive motion be heard during the current High Court recess. I am satisfied that the applications are urgent and are so certified. I direct that the main motion together with the petition be served upon the respondents within 7 days of the date of this order. The respondents are directed to file and serve their response within 7 days of the date of service of the applicant's application. The application shall be mentioned on 17 September 2025 for directions on the manner of its disposal. Meanwhile, an interim or conservatory order is hereby issued restraining the Respondents either by themselves, agents, servants and/or employees, from preventing, barring, restricting and/or interfering with the petitioner's/applicant's performance, discharge and/or execution of his duties as the Leader of Majority, Mombasa County Assembly, whatsoever and/or howsoever pending the hearing and determination of this application. It is so ordered.”

14. By an application dated 8 September 2025, the 1st respondent moved this Honourable Court to set aside the conservatory order. In particular, the 1st respondent prayed that:

“4. The interim conservatory order of this court made by Justice Jairus Ngaah on 1st September 2025 be and is hereby set aside forthwith.”

This is the application that is the subject of this ruling.

15. The application is expressed to be brought under Rule 25 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 and Article 159 (2) (b), (d) and (e) of the Constitution and is supported by the affidavit of Aharub Khatri who is the Speaker of the County Assembly of Mombasa County.

16. According to Khatri, the conservatory order was obtained through non-disclosure of material facts by the Petitioner. In particular, the Petitioner is alleged to have misled the court to believe that the decision to remove him from office was made by a vote in the County Assembly of Mombasa when, in fact, he was removed from office by majority vote of members of ODM Party in their meeting held on 3 July 2025.

17. Khatri has also sworn that once the decision to remove the applicant as the majority leader was communicated to him, he did not require any

further sanction of the ODM Party to make a communication to the County Assembly of Mombasa about the removal.

18. The speaker has also denied that the 1st and 2nd Respondents participated in the decision or process of removal of the Petitioner from office. According to him, this decision “*was purely an ODM Party affair*”.

19. In his communication to the County Assembly on 5 August 2025, Khatri has sworn, he erroneously indicated that the Petitioner was removed in a meeting of ODM Party held on 18 February 2025. The date is said to have been an inadvertent error as the Petitioner was removed from office in a meeting held on 3 July 2025 and not 18 February 2025.

20. The error was corrected during the proceedings of the County Assembly held on 20 August 20225 during which the Majority Whip indicated that the meeting in which the Petitioner was removed was held on 3 July 2025 as reflected in her letter to the speaker dated 4 July 2025 and the minutes of the ouster meeting.

21. Khatri has “sworn” that the dispute between the petitioner and his party ought to have been resolved under the Political Parties Act cap.7D and, therefore, this Court lacks jurisdiction to entertain the petition. I hasten to state that this is more of a point of law than evidence and ought to have been addressed as such. Being of that character, this issue has no place in an affidavit.

22. The petitioner opposed the application and, to that end, filed grounds of opposition dated 10 September 2025 in which it has been averred that the 1st respondent's application is incompetent, misconceived, bad in law and incurably defective. The application is said to be devoid of any merit. It is further contended that the 1st respondent has not given any proper reason why the impugned order should not have been granted. The application, it is alleged, is based on fraudulent documents intended to mislead this Honourable Court that a meeting was held and minutes taken when none of these things happened.

23. According to the petitioner, the 1st respondent has not established a case for the grant of mandatory injunctions as per threshold set in **Kamau Mucuha –v- Ripples Ltd (1993)] eKLR** and that his, is not a clear and exceptional case to warrant a mandatory injunction. It is also urged that the 1st respondent is seeking an equitable remedy yet he has come to court with unclean hands. In any event, he has no cause of action against the petitioner and the application is an abuse of the due process of this Honourable Court.

24. The petitioner has also invoked the decision of the Court of Appeal in **Nabro Properties –v- Sky Structures (2002) KLR 299** where the court is said to have held that a party cannot base his claim on his own wrong. The 1st respondent's wrongs upon which its application is based are what the petitioner says to be the failure by the 1st respondent to comply with

the law on changes in the leadership of the County Assembly and to provide information on the purported changes when required to do so. It is the petitioner's position that a party who withholds material documents cannot benefit from such a conduct and, to this end, he has cited the case of **Kenya Akiba Micro Financing Ltd v Ezekiel Chebii & 14 Others (2012) eKLR**, where the Court held that adverse inference may be drawn against a party withholding particular documents.

25. Both the 1st respondent's application and his supporting affidavit are said to be premised on falsified documents which did not exist prior to the filing of the petition and issuance of the order of 1 September, 2025.

26. Having listened to the parties and considered their submissions in support of and in opposition to the 1st respondent's application, it is not in dispute that a conservatory order may be granted at an *ex parte* stage pending the hearing and determination of an application for such an order while a constitutional petition, within which the application has been filed, is pending determination. Rule 23 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 makes provision for such an order. It reads as follows:

23. (1) Despite any provision to the contrary, a Judge before whom a petition under rule 4 is presented shall hear and determine an application for conservatory or interim orders.

(2) Service of the application in sub rule (1) may be dispensed with, with leave of the Court.

(3) The orders issued in sub rule (1) shall be personally served on the respondent or the advocate on record or with leave of the Court, by substituted service within such time as may be limited by the Court.

27. And rule 25 of the same Rules provides a window to a party dissatisfied with the order for conservatory or interim order to apply to have it set aside. The rule reads as follows:

25. An order issued under rule 22 may be discharged, varied or set aside by the Court either on its own motion or on application by a Application under rule 21.

28. As earlier noted, this is the rule that the 1st respondent has invoked in his application to set aside the conservatory order granted on 1 September 2025.

29. In **Munya v Kithinji & 2 others (Application 5 of 2014) [2014] KESC 30 (KLR) (2 April 2014) (Ruling)** the Supreme Court had the following to say on what conservatory orders entail in a constitutional petition and when they ought to be granted:

“86. “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, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as “the prospects of irreparable harm” occurring during the pendency of a case; or “high probability of success” in the supplicant’s case for orders of stay. 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.”

30. Bearing this in mind and, considering that the substantive motion for conservatory orders pending the hearing and determination of the constitutional petition is yet to be heard, I am cautious not delve into the merits of the application for conservatory orders and the petition at this stage of the proceedings. It is for this reason that I will only say so much as is necessary for the disposal of the application before me.

31. As far as I understand the 1st respondent, he wants the conservatory order granted on 1 September 2025 set aside mainly on the ground that when the petitioner first approached this Honourable Court *ex parte*, he

suppressed facts material to the application and the petition and which, if disclosed, the court may have as well declined to grant the conservatory order. This is what I gather from the 1st respondent's deposition in the affidavit in support of the application where he has sworn that:

“3. The order was obtained through non-disclosure of material facts by the Petitioner. The Petitioner lied to this honourable court that the decision to remove him from office was made by a vote in the County Assembly of Mombasa yet the truth is that the Petitioner was removed from office by majority vote of members of ODM Party in their meeting held on 3rd July 2025. Annexed herewith and marked as "AK 2" is a true copy of a letter dated 4th July 2025 by Majority Whip of ODM Party communicating the decision to remove the Petitioner from office to the Speaker of County Assembly of Mombasa together with the attached minutes”.

32. Both the petitioner and the 1st respondent are in agreement that the removal of the petitioner as the majority leader of the County Assembly of Mombasa County is the majority party affair. But, at the very outset, the petitioner has denied that the party ever met, deliberated or resolved to remove him as the majority leader in the assembly. In proof of this fact, he has exhibited on his affidavit in support of the application, a copy

of a letter from his party duly signed by Oduor Ong'wen, the Executive Director of the Orange Democratic Movement Party who, like the applicant, has denied knowledge of any change of leadership of the party in the County Assembly. The letter is dated 7 August 2025 and is addressed to the 1st respondent. It reads as follows:

“Dear sir,

***RE: PURPORTED OUSTER OF THE LEADER MAJORITY -
COUNTY ASSEMBLY OF MOMBASA***

The abovementioned matter refers.

It has been brought to our attention through a communication dated 5th August 2025 of the ongoing schemes to make changes in the office of the Leader of Majority Party in the County Assembly of Mombasa.

As we attempt to ascertain the propriety or otherwise of the issues at play, we urge the status quo be maintained. This will also avail us the opportunity to convene a stakeholders meeting within the next two weeks to address any underlying issues.

We look forward to your cooperation on this matter.

Yours sincerely,

Signed

Oduor Ong'wen

Executive Director

The letter was copied to clerk, County Assembly of Mombasa, the majority leader and the majority chief whip of the Assembly.

33. The petitioner's party described the ouster of the petitioner as "*purported ouster*". It is also apparent from the letter that it does not make any reference to the meeting or meetings that are said to have been held for the removal of the petitioner as the assembly leader; rather, he refers to "*the ongoing schemes to make changes in the office of the Leader of Majority Party in the County Assembly of Mombasa.*"

34. The 1st respondent did not take this letter kindly as the depositions in his affidavit in response to the motion and the petition would show. The respondent swore, *inter alia*, as follows:

"43. The letter dated 7th August 2025 from the Executive Director of ODM Party which the Petitioner refers to at paragraph 64 of the petition was of no legal consequence because of the following reasons:

i. The letter was addressed to me yet as the Petitioner rightly points out had no role in the removal of the Petitioner from office. a pure ODM Party affair. The letter by the Executive

Director was addressed to the wrong person and was therefore of no legal consequence.

ii. In any event, in the discharge of his duties as the Speaker of the County Assembly of Mombasa. I cannot be directed by the Executive Director of the ODM Party. Therefore, even assuming that I had a role in the Petitioner's removal, I could not take orders from the Executive Director of the ODM Party. The Petitioner's allegation that I disregarded communication from the Executive Director is made without appreciating that the Executive Director of ODM Party cannot direct THE Speaker on how to discharge his duties.

iii. The letter was overtaken by events since it was dated and received by me on 7th August 2025, long after the Petitioner had been removed from office on 3rd July 2025: after the 1st Respondent had been notified of the removal on 4th July 2025 in accordance with Standing Order 15(5): and after the removal of the Petitioner from office had been communicated to the County Assembly on 5th August 2025. The only status quo obtaining at the material time and which could be maintained as at that date was for the 3rd Respondent to continue serving as the Leader of

Majority Party because she was the newly elected Leader of Majority Party.

iv. The Executive Director of ODM Party ought to have invoked the dispute resolution mechanisms of the party to resolve the dispute surrounding the removal of the Petitioner from the office of the Leader of Majority Party rather than writing to me who had nothing to do with the removal.

v. Under Article 20(1) of the Constitution of the ODM Party, the Secretary General is the party spokesperson and the only person who is authorized to communicate on behalf of the ODM Party. The Executive Director had no authority to write to me on behalf of the ODM Party and his letter was inconsequential. Annexed herewith and marked as "AK 4" is a true copy of the ODM Party Constitution.”

35. Whether the “meeting held on 3rd July 2025” to which the 1st respondent has made reference is what the executive director of the Orange Democratic Movement party had in mind when he spoke of the “the ongoing schemes” is a question that I am not prepared to render my opinion on at this stage of the proceedings.

36. But the 1st respondent’s statement on oath with respect to the executive director’s letter reveals, at least one thing that is pivotal to the

determination of the instant application: whether the pre-requisite protocols were taken for the removal of the petitioner and whether, for purposes of determination of this application, any meeting was held in which it was resolved that the petitioner should be ousted as the leader of the majority is an issue that is hotly contested.

37.As a matter of fact, there is an application on record for cross-examination of the 1st respondent on depositions made in his affidavit on the very question of whether any party meeting or meetings were convened to deliberate on the change of leadership of the majority party in the County Assembly. In these circumstances, the court cannot proceed and discharge or set aside the conservatory order on the basis that a meeting was held, and a particular resolution passed, when these are the very issues that are in dispute and pending for determination in this petition.

38.If it turns out that indeed no such meeting took place, then the question whether the respondents or any of them would proceed, or was entitled to proceed, as if a meeting had taken place and, further, based on that presupposition, effect changes in the assembly on the leadership of the majority party, would be a valid question for determination by this Honourable Court.

39.That said, the question whether this court has jurisdiction to determine this petition has been raised by the 1st respondent as a peripheral issue in

the instant application. The substantive application before court is for the court to set aside its order of 1 September 2025 and not strike out the petition for want of jurisdiction. If the 1st respondent is convinced that it is a substantive issue that ought to be determined *in limine*, nothing stopped him, or any other respondent for that matter, from raising it as such an issue for the court's determination as a preliminary point. It is apparent on the face of the instant application that the question of jurisdiction of this Honourable Court to determine the petition before it has not even been raised as one of the grounds upon which the application has been made. For now, I will do well to reserve my remarks on this question.

40. For the foregoing reasons, I am not persuaded that I need not have granted the conservatory order of 1 September 2025. I reject the 1st respondent's application of 8 September 2025 and, for the avoidance of doubt, the order made on 1 September 2025 shall remain in force pending the hearing and determination of the substantive motion for conservatory orders. Costs of the application will abide the outcome of the petition.

41. On 19 December 2025, I informed the parties' learned counsel that since the court was proceeding on Christmas recess, this ruling would be posted on the Case Tracking System portal on 30 December 2025. The ruling having been circulated in the absence of the parties, I proceed to issue

directions on the hearing of the substantive motion for conservatory orders as follows:

- (a) The motion shall be disposed of by way of written submissions.
- (b) The petitioner is directed to file and serve his submissions within 14 days of the date of this ruling.
- (c) The respondents' submissions shall be filed and served within 14 days of the date of service of the applicant's submissions.
- (d) Highlighting of submissions shall be on 17 March 2026.

42. Directions on the disposal of the petitioner's application dated 17 November 2025 to cross-examine **Aharub E. Khatri** on the depositions in his affidavit filed in response to the petition, and the motion for conservatory orders, shall be given after the disposal of the application for conservatory orders. Orders accordingly.

Signed, dated and posted on the CTS on 30 December 2025

Ngaah Jairus
JUDGE