Mwangaza v County Assembly of Meru & another; Council of Governors (Interested Party) (Civil Application E093 of 2023) [2023] KECA 1599 (KLR) (27 October 2023) (Ruling)

Neutral citation: [2023] KECA 1599 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CIVIL APPLICATION E093 OF 2023

J MOHAMMED, LK KIMARU & AO MUCHELULE, JJA

OCTOBER 27, 2023

BETWEEN

HON KAWIRA MWANGAZA ..... APPLICANT

AND

COUNTY ASSEMBLY OF MERU ..... 1ST RESPONDENT

SPEAKER, COUNTY ASSEMBLY OF MERU ..... 2ND RESPONDENT

AND

COUNCIL OF GOVERNORS ..... INTERESTED PARTY

(Being an application for conservatory orders and preservation of status quo, pending lodgment, hearing and determination of an intended appeal from the Ruling and Order of the High Court of Kenya at Meru (Cherere, J.) dated and delivered on 18th October, 2023 in Constitutional and Human Rights Division Petition No. E019 of 2023)

RULING

1. The applicant, Hon. Kawira Mwangaza is the Governor of Meru County. On 17th October, 2023, the 1st and 2nd respondents, the County Assembly of Meru and the Speaker, County Assembly of Meru set in motion the impeachment process under Article 181 of *the Constitution* which may ultimately lead to the removal of the applicant from Office of Governor. The applicant was served with seven allegations of impropriety that constitute the grounds of her impeachment. She was required to respond to the same. The debate of the motion of impeachment was scheduled for the 25th October, 2023.

2. On 18th October, 2023, the applicant filed a constitutional Petition No. E019 of 2023 before the Meru High Court essentially seeking to challenge the entire basis upon which the impeachment process is predicated upon. She also challenges the procedure adopted by the respondents to impeach her. In summary, she is of the view that the entire procedure is flawed, illegal and unconstitutional.

Contemporaneous with filing the petition, the applicant filed an application seeking conservatory orders to stay the impeachment. Accompanying the application was a certificate of urgency by the advocate for the applicant requesting the learned Judge of the High Court-Meru to schedule the hearing of the application on priority basis, noting that the entire substratum of the petition would be defeated if the impeachment proceeded before the High Court, as a constitutional court, is not seized of the petition and render its decision on the weighty constitutional issues that the applicant pleaded in her petition.

3. When the petition was placed before the High Court (Cherere, J.), she declined to certify the application urgent. She instead directed the application to be listed for mention for directions on 28th November, 2023. A subsequent attempt by the applicant on 19th November, 2023 to have the court reconsider its decision, met the same fate.

4. This subsequent decision is the one that provoked the applicant to file a notice of appeal dated 19th October 2023 indicating that the applicant "being dissatisfied with the orders of the Honourable Lady Justice Wamae T. W. Cherere of the 18th October, 2023 and 19th October, 2023 intends to appeal against the said orders to the Court of Appeal".

5. On the basis of the notice of appeal, the applicant filed a notice of motion under Rules 5 (2) (b) and 47 (1) of the Court of Appeal Rules seeking, inter alia, that:

> " 1. ...this Honourable Court be pleased to set aside the order of Hon. Lady Justice Wamae T. Cherere issued in 18th October, 2023 and in its place issue interim CONSERVATORY ORDERS suspending the debating, considering, and/or acting upon impeachment motion against the petitioner dated 16th October, 2023 and tabled in the County Assembly on 17th October, 2023.
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> 2. ...
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> 3. ...
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> 4. THAT pending the hearing and determination of Meru High Court Petition No. E019 of 2023, this Honourable Court be pleased to issue CONSERVATORY ORDERS suspending the debating, considering and/or acting upon impeachment motion against the petitioner dated 16th October, 2023 and tabled in the County Assembly of Meru on 17th October, 2023."

6. The application is supported by the annexed affidavit of the applicant and the grounds stated on the face of application. In brief, the application depones that by the High Court declining to certify the Constitutional Petition urgent, it had denied her the right to be heard and to have the "weighty" constitutional issues that she had placed before the High Court to be determined before the commencement of the impeachment debate at the County Assembly. The applicant pointed out certain procedural irregularities that rendered the entire impeachment process flawed and unlawful. The applicant asserted that some of the issues that she is sought to be impeached for were sub-judice and were pending determination before the Court. She faulted the entire impeachment process and the grounds in support thereof and stated they had not met the constitutional threshold upon which a popularly elected Governor can be removed from office on impeachment. The applicant deponed that the County Assembly had from the word go been biased against her and has used its powers to frustrate her administration. It is on that basis that she was seeking interim reliefs from court as she was certain that the impeachment proceedings before the County Assembly will not be fair and it

would be conducted in contravention of the standing orders of the County Assembly, the law and *the Constitution*.

7. When the application was placed before this Court, the same was certified urgent and the applicant ordered to serve the respondents so that the application could be heard on 25th October, 2023. The application was duly served. The respondents and the interested party duly filed their responses. The applicant and the respondents filed written submission in support of their respective opposing positions. They also filed a bundle of authorities in support of their respective cases.

8. The 1st and 2nd respondents more or less filed similar responses to the application. Jacob Kirari, the Clerk to the County Assembly of Meru swore a replying affidavit on behalf of the Assembly opposing the application while Hon. Ayub Bundi Solomon, the 2nd respondent swore a replying affidavit on his own behalf opposing the application. In summary, they both contend that the impeachment of the applicant is above board and followed the due process as provided by the law. They urged the Court to consider public interest and the Constitutional and legal timelines provided for an impeachment process which ought not to be curtailed by the Court issuing injunctive or conservatory orders to stop the process. They pointed out that the applicant will have the opportunity to be heard and challenge each ground put forward in support of the impeachment both at the debate before the County Assembly and later, if impeached, in a hearing before the Senate. They raised a preliminary objection to the entire application pointing out that the Notice of appeal was vague as to what specific order was being appealed against to this Court. In particular, the respondents contended that the Notice of appeal contravened Rule 77 (3) of the Court of Appeal Rules as regards specificity. A more fundamental objection to the entire proceedings before this Court is the assertion by the respondents that the Supreme Court in a binding precedent of Justus Kariuki Mate & Another v Martin Nyaga Wambora Supreme Court Petition No. 32 of 2014 had held that an application such as the present one in impeachment proceedings should be shunned by courts as they have the effect of "effectively scuttle and emasculate constitutionally ordained and time bound accountability mechanism". In that regard, the respondents urged the Court to allow their preliminary objection and strike out the application as in their view, this Court lacks jurisdiction to consider it at this stage of the impeachment process.

9. The Interested Party supported the applicant's position and urged the Court to consider the entire circumstances of the case and uphold the applicant's right to be heard and be given a chance to ventilate her grievance before a competent Court of Law.

10. We have carefully considered the rival submissions made by the parties, both oral and written. We have benefited from the insights offered by the authorities cited by the parties. The applicant seeks to invoke this Court's jurisdiction granted under Rule 5 (2) (b) of the Court of Appeal Rules, 2022. This jurisdiction is both original and discretionary. This discretion is unfettered. However, it must be exercised judicially. In Republic v Kenya Anti- Corruption Commission & 2 Others [2009] eKLR this Court had this to say:

> "The Court exercises unfettered discretion which must be exercised judicially. The applicant needs to satisfy the Court, first, that the appeal, or intended appeal is not frivolous, that is to say, that it is an arguable appeal. Second, the Court must also be persuaded that were it to dismiss the application for stay and later the appeal or intended appeal succeeds, the results or success could be rendered nugatory."

11. In Gatundu –v- Wathukau [2022] KELA 959 (KLR) it was observed as follows in an application under Rule 5 (2) (b) –

> " This Court draws its jurisdiction to entertain an application under Rule 5 (2)

(b) from the notice of appeal duly filed pursuant to Rule 75 of the Rules of this Court. (See Safaricom Ltd –v- Ocean View Beach Hotel Limited & 2 Others [2010] eKLR). Such notice must be in respect to the impugned decision appealed from...".

12. In the present application, the respondents have raised a preliminary objection challenging the application on the ground of, firstly, the incompetence of the Notice of appeal and secondly, the jurisdictional question whether this Court can grant the orders sought by the applicant in the application. As a matter of procedure and good order, this Court is required first to consider the preliminary objection raised touching on the issue whether it has jurisdiction before addressing any other issue before it.

13. In Wavinya Ndeti v Independent Electoral & Boundaries Commission (IEBC) & 4 Others [2014] eKLR, this Court held thus:

> " As the Supreme Court held in Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & Others [2012] eKLR at paragraph 68:
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> 'A Court's jurisdiction flows from either *the Constitution*, or legislation or both. Thus a Court of Law can only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law... Where *the Constitution* confers power upon Parliament to set the jurisdiction of a Court of Law or Tribunal, the Legislative would be within its authority to prescribe the jurisdiction of such a court or tribunal by Stature Law'.
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> In Anarita Karimi Njeru v Republic (No.2) [1979] KLR 162 this Court held that the Court of Appeal enjoys no general supervisory role over the judicial process and only has such jurisdiction as expressly conferred on it by Statute".

14. The respondents have argued that the application, in so far as it is predicated on the Notice of appeal which was lodged in Court was incompetent in that it did not comply with Rule 77(3) of the Rules of this Court. In response, the applicant submitted that what it was required to do was to file the Notice of appeal specifying what order it was challenging and then later file a detailed memorandum of appeal setting out precisely what it was aggrieved about in the said order. In that regard, the applicant argued that it had satisfied the legal requirement under Rule 5 (2) (b) of the Court of Appeal Rules to enable her to file the present application which in her view is a competent application.

15. We have considered the rival submissions made in this regard.

Rule 77 (3) of the Court of Appeal Rules 2022 states thus:

> " Each notice of appeal under sub-rule (1) shall state whether it is intended to appeal against the whole or part only of the decision, and, where it is intended to appeal against a part only of the decision, shall –
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> a. specify the part complained of;
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> b. the address for service of the appellant and
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> c. the name and addresses of the persons intended to be served with copies of the notice."

16. As stated earlier in this ruling, the applicant was aggrieved by the decision of the learned Judge who declined to certify the application before her urgent. The decision whether or not to certify an application urgent is an exercise of judicial discretion which cannot be challenged on appeal unless the discretion was wrongly or capriciously exercised. As was held in the seminal case of Mbogo & Another v Shah [1968] EA page 15:

> " An appellate court will not interfere with the exercise of the trial court's discretion unless it is satisfied that the Court in exercising discretion misdirected itself in some matter and as a result arrived at a decision that was erroneous, or unless it is manifested from the case as a whole that the Court has been clearly wrong in the exercise of judicial discretion and that as a result there has been misjustice."

17. In the present application, can the decision not to certify an application urgent constitute a ground of appeal? Can such a decision be a "decision" in the judicial sense of it that can be appealed? We are not prepared at this stage of the proceedings to rule that such a decision constitutes a "decision" which can be appealed. The difficulty that exercised our minds is that the proceedings before the High Court have not yet even commenced, let alone the pleadings closed. As an appellate court, how will we assume jurisdiction when no appealable decision has been made by the High Court, no matter what the Notice of appeal purports to say? The exercise of discretion by the High Court Judge in such circumstances cannot constitute a ground of appeal.

And we so hold.

18. Another preliminary issue raised by the respondent is whether the High Court or any subsequent proceedings, the Court of Appeal has jurisdiction to intervene in an impeachment process that is provided by *the Constitution* and which has strict timelines for its determination. The respondents submitted that pursuant to the Supreme Court's decision of Justus Kariuki Mate & Another vs Martin Nyaga Wambora & Another [2017] eKLR, Courts have no jurisdiction in the first instance, to intervene in the impeachment of a Governor of a County Government under Article 181 of *the Constitution*. They submitted that any party aggrieved with the impeachment process has to wait until the impeachment proceedings are concluded then file suit to challenge its outcome.

19. On the other hand, it is the applicant's case that she should be allowed to ventilate her case before a Court of Law especially where allegations of breaches of *the Constitution* and procedural irregularities have been made. In the Justus Kariuki Mate case (supra), the Supreme Court, while considering a similar case as the present one where a Governor was facing impeachment by the County Assembly held thus:

> " 94. The effect is that, a methodical and conscientious inquiry would show the County Assembly to have been operating quite properly, within the Constitutional scheme of devolution and running its legislative processes within the ordinary safeguards of the separation of powers – and consequently, quite legitimately outside the path of the ordinary motions of the judicial arm of State. On that basis, there would have been hardly any scope for the deployment of the court's Conservatory Orders – more particularly without hearing the petitioners."

20. The Supreme Court further held [para 85 -90] that the constitutionally provided timelines within which certain acts must be done were not amenable to intervention by the court process, especially where a constitutional body like the County Assembly is conducting its legislative mandate.

21. We, therefore, agree with the respondents that the preliminary objection raised is valid. The courts cannot, in the first instance, intervene in the impeachment of the applicant. This is because of strict timelines provided by the law. The Supreme Court decision of Justus Kariuki Mate (supra) is binding on this Court. The preliminary objection is, therefore, upheld. This Court lacks jurisdiction in the first instance to consider the merits of the applicant's application which sought Conservatory Orders before the impeachment process has run its constitutional and legal course.

22. Finally, we have considered with anxiety the submissions made by the applicant to the effect that she would be shut out from the seat of justice if this Court were to uphold the preliminary objection. The applicant is in effect saying that she is being denied the right to be heard and to ventilate her allegation that her constitutional rights have been breached by the manner in which the impeachment process was commenced and is being prosecuted. We observe that the applicant's right to be heard and to defend herself from the allegations made against her in the impeachment debate at the County Assembly of Meru is provided under the Standing Orders of the County Assembly. If she is impeached, she will have another opportunity to present her case before the Senate during the hearing of the impeachment motion. Even after the Senate makes its decision, the applicant still has the avenue of petitioning the Court for appropriate relief, if the decisions were to go against her. We are, therefore, of the considered view that the applicant's right to be heard will not be circumscribed.

23. Enough said. This Court lacks jurisdiction to consider the application before it for the reasons stated in this Ruling. The notice of motion dated 19th October, 2023 hereby dismissed with costs to the respondents.

DATED AND DELIVERED AT MERU THIS 27TH DAY OF OCTOBER, 2023.

JAMILA MOHAMMED

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

A. O. MUCHELULE

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JUDGE OF APPEAL