



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: MUSINGA, GATEMBU & MURGOR, J.J.A.)

CIVIL APPEAL NO. 336 OF 2014

BETWEEN

THE COUNTY ASSEMBLY OF BUNGOMA 1ST APPELLANT

THE SELECT COMMITTEE OF THE ASSEMBLY

OF THE COUNTY OF BUNGOMA 2ND APPELLANT

THE CLERK OF THE ASSEMBLY OF BUNGOMA COUNTY.....3RD APPELLANT

AND

STEPHEN NENDELA 1ST RESPONDENT

H. E. THE GOVERNOR OF BUNGOMA 2ND RESPONDENT

THE GOVERNORS COUNCIL 3RD RESPONDENT

(Appeal From The Judgment Of The High Court Of Kenya At Bungoma, (Mabeya, J.) Dated The 7th Day Of October, 2014 In High Court Constitutional Petition No. 4 Of 2010)

JUDGMENT OF THE COURT

1. In a judgment delivered on 7th October 2014, the High Court at Bungoma (A. Mabeya, J.) in Constitutional Petition No. 4 of 2014 declared Section 40(3) of the County Governments Act, 2012 void on the basis that it violates Article 50(1) of the Constitution of Kenya.

2. The court also decreed that a Select Committee of Bungoma County Assembly, the 1st appellant, constituted under Section 40(3) of the County Governments Act, 2012, its actions, decisions and outcome reports are null and void. Further, the court issued an order of certiorari quashing “the decision of 1st 2nd & 3rd [appellants] and each of them from proceeding to hear or determine or continue to hear, investigate or make or receive a report in respect of Stephen Peter Nendela for contravening Article 47, 50(1) and (2) and 236 of the Constitution of Kenya.” Finally, the court issued a declaration that the County Assembly of Bungoma, the 1st appellant, cannot purport to control, manage, possess, implement, conduct or execute any county policy work plan or executive roles vested in the executive committee of

the County under Article 183(1) of the Constitution and Section 9(2)(a) and (b) of the County Government Act.

3. The appellants are aggrieved by the whole of that judgment and have lodged this appeal.

Background

4. In his amended petition before the High Court, the 1st respondent, Stephen Peter Nendela, (Nendela) averred that he was appointed as a member of the County Executive Committee in charge of roads and public works by the Governor of the County of Bungoma in the year 2013. He asserted that the County Government of Bungoma (the County) invited tenders for the execution of civil works in the County for the financial year 2013/2014; that he was thereafter inundated with telephone calls and personal appeals by members of the County Assembly of Bungoma and persons associated with them lobbying for awards of tenders for the civil works in the respective Wards of the County; that he considered those appeals and overtures by the members of the County Assembly to be *“improper and personal desire by members of the County Assembly of Bungoma to seize budgetary resources meant for general application to County Roads and urban roads for their own selfish aggrandizement”* and accordingly declined to accede.

5. In his view, his refusal to accede or accommodate those appeals did not sit well with members of the County Assembly of Bungoma. In a plenary session of the County Assembly in April 2014, a motion was passed, under Section 40 of the County Governments Act, for his removal as a member of the County Executive Committee in charge of roads and public works on trumped-up and unfounded allegations that he had failed to discharge his duties by failing to submit quarterly reports and work plans; harassment of his juniors; and withdrawal of wrongly advertised roads.

6. On 14th April 2014 at 4. 30 pm, Nendela received a *“Notification”* asking him to appear before a Select Committee of the County Assembly, the 2nd appellant, the following morning, the 15th April 2014. The notification read;

STEPHEN PETER NENDELA – CECC MEMBER, ROADS AND PUBLIC WORKS.

In accordance with Section 40 (1) of the County Government Act and the County Assembly Standing Orders Section 62(1) and 63(1) the County Assembly of Bungoma has initiated the process to have you removed from office.

A select Committee on the same will be sitting on 15th and 16th April, 2014 at the Kenya Industrial Estates Boardroom to receive presentations for and/or against your removal from the said office.

This is therefore to notify you to avail yourself before the Committee in order to answer to the charges leveled against yourself as herein below:-

Incompetence

- 1. Failure to submit quarterly reports to the County Assembly**
- 2. Failure to submit Sectoral work plans to the requisite committee**
- 3. Failure to develop and submit for approval an infrastructural development policy**

Gross misconduct

- 1. Placement of illegal advertisements and withdrawals of the same causing loss of public funds.**

2. Misrepresentation of KERRA roads to belong to the County Government of Bungoma

3. Harassment of County employees.

The sessions will run from 9.00a.m. to 12.30p.m. and 2.15p.m. to 4.30p.m. on both days.

Please notify the undersigned of your attendance or otherwise.

J. K. O. Mosongo,

Clerk to County Assembly/Secretary

To the select Committee

COUNTY GOVERNMENT OF BUNGOMA.

7. He responded to that notification by a letter dated 15th April 2014 addressed to the Clerk to the County Assembly and requested *“that the summons be deferred for one day to enable me collect evidence, information, prepare defence and consult counsel.”* He concluded that letter thus: *“I hope that one day is reasonable in the circumstances. Kindly consider my request.”*

8. There is some controversy about what transpired thereafter. According to Nendela, on 15th April 2014 at 8.30 am, the Select Committee declined to accede to his request. At 2.30pm on the same day, his advocate appeared before the Committee, made a request for adjournment that was also declined. His lawyer’s request to cross examine witnesses, he said, was also declined. In those circumstances, Nendela contended, the action by the Select Committee denied him fairness in the conduct of the purported investigations; he was denied reasonable time to prepare a response and was wrongly denied the right to cross examine witnesses. Nendela argued that the process and inquiry by the Select Committee is unconstitutional, capricious, arbitrary, pre-determined, injudicious and in violation of the rules of natural justice.

9. The appellants filed a response to the amended petition dated 13th May 2014 asserting that the procedure for removal of Nendela as member of the County Executive Committee was initiated on grounds that Nendela had not, since 4th June 2013, submitted any strategic work plan for approval by the County Assembly; they denied that members of the County Assembly had either sought favours from Nendela nor had they sought to execute tenders in their respective County Wards; that in initiating the process of Nendela’s removal, the members of the County Assembly were discharging their oversight role and not at all usurping the duties of the County Government.

10. In his replying affidavit, the Clerk to the County Assembly confirmed having, subsequent to the passage of the motion by the County Assembly to initiate the process of Nendela’s removal, issued notice to Nendela to appear before the Select Committee; that he participated in the proceedings of the Select Committee as secretary and the law imposes strict time lines within which the Select Committee must submit its findings to the County Assembly.

11. Edward Simiyu Barasa, the chairman of the Select Committee, confirmed in his replying affidavit before the court that a motion was indeed passed by the County Assembly under Section 40(3) of the County Governments Act to initiate the process of removing Nendela; that a notice was on 14th April 2014 issued to Nendela to appear before the Select Committee on 15th and 16th April 2014; that on 15th April 2014, Nendela’s application for deferral was denied; that Nendela and his advocate *“were duly informed that he will be allowed to defend himself or(sic) the 16th April 2014 from 2.30pm to 4.30pm”*; that Nendela and his advocate participated in the proceedings of the Select Committee during the morning and afternoon sessions on 15th April 2014 without complaining; that the following day on 16th April 2016 Nendela and his advocate appeared before the Select Committee and demanded that the Committee should listen to a tape; that on being requested to wait for his time at 2.30 pm, Nendela and his advocate

“chose to walk out of the sittings and declared that it's a kangaroo court”; that it is Nendela who refused to appear before the Committee during the time allocated to him on 16th April 2014 from 2.30 pm to 4.30 pm. According to Barasa, the Select Committee was required by law, to observe strict timelines and had to submit its findings to the County Assembly within 10 days of the passing of the motion.

12. Nendela’s petition was accompanied by a Notice of Motion seeking temporary conservatory order on the basis of which a consent order was recorded before the court on 17th April 2014 in terms that:

“Pending the hearing and determination of the petition herein, a temporary conservatory order be and is hereby issued restraining the Respondents writing the report to (be prepared by the 2nd Respondent) for discussion and or taking any steps beyond preparation and presentation of the report in respect of process of removal from office of the Honourable Stephen Peter Nendela as County Executive Member Bungoma County in charge of roads and public works.”

13. Thereafter, save the question of admissibility of a transcript of the proceedings of the Select Committee recorded at the behest of Nendela with respect to which oral evidence was taken, the petition was disposed of on the basis of the petition, the response and the respective affidavits without viva voce evidence.

14. Upon considering the material before him, the Judge was satisfied that Nendela was entitled to seek relief as he did as there was a threat of violation or infringement of his rights; that the court was seized of jurisdiction to hear and determine the petition; that the evidence of Nendela’s transcriber regarding the proceedings before the Select Committee, in the absence of production of the Hansard to discredit the same, was admissible as evidence of the proceedings before that Select Committee; that the rights enshrined in Article 50 of the Constitution are applicable in the circumstances of this case and that the Select Committee breached and violated the provisions of Article 236(b) and 50(c), (g) and (k) of the Constitution in that the notice given to Nendela was too short; he was denied a chance to engage an advocate of his choice; and that he was denied the chance to test the evidence produced against him through cross examination; that under Section 40 (4) of the County Government Act, deliberations of the Select Committee must accord with the rules of natural justice. Accordingly, the Judge granted Nendela the reliefs to which we have already referred.

15. The Judge did not stop at granting those reliefs. He declared Section 40(3) of the County Governments Act unconstitutional.

16. As we have stated, the appellants were dissatisfied with the whole of that judgment and lodged the present appeal.

The appeal and submissions by counsel

17. Appearing for the 1st to 3rd appellants, Miss Awour, (holding brief for Prof. Ojienda) and Mr. Situma, learned counsel, referred to their written submissions. Arguing that the High Court erred in declaring Section 40(3) of the County Governments Act, 2012 unconstitutional, counsel submitted that to give effect to the constitutional provisions on devolved government, Parliament enacted the County Governments Act, Act No. 17 of 2012; that under Section 40(1) of that Act, provision was made for the removal of a member of the Executive Committee on grounds of incompetence, abuse of office, gross misconduct, failure to attend meetings, incapacity and for gross violation of the Constitution or any other law.

18. The procedure for removal of a member of the Executive Committee was provided for under Section 40(3) of that Act, which, the trial court found to be inconsistent with Article 50 of the Constitution and declared it null and void.

19. According to counsel, the Judge misdirected himself in taking the view that the rules of natural

justice regarding impartiality and fair hearing apply uniformly to every case; that he failed to appreciate that where a disciplinary body is not a court of law, the right to fair hearing is to be administered in accordance with the rules and regulations of that body; that the right to a fair hearing under Article 50 does not apply to “*internal disciplinary hearings*” which are “*not bound by the strict rules*” applicable to a court of law.

20. Counsel found support for that proposition in the decisions of this Court in **Narok County Government and another v Richard Bwogo Birir & another [2015] eKLR**, **Judicial Service Commission v Mbalu Mutava & Another [2015] eKLR**, **Judicial Service Commission v Gladys Boss Shollei & Another [2015] eKLR**, **Municipal Council of Nakuru v Reliable Concrete Works Limited [2014] eKLR** amongst other decisions cited.

21. The effect of the impugned decision of the trial court, counsel argued, is to render the constitutionally mandated supervisory role of the county assemblies under Article 183(3) of the Constitution ineffective and ‘aesthetic’. Furthermore, without providing “*an alternative fallback provision*” the Judge, in declaring Section 40(3) of the County Governments Act, created a lacuna in the process of removal of a County Executive Committee member.

22. Counsel argued that to the extent that Section 40(3) of the County Governments Act is a replica of Article 152(6) of the Constitution on the removal of cabinet secretaries, the impugned decision has the uncanny and untenable effect of declaring a provision of the Constitution unconstitutional because under Article 2(3) of the Constitution, the constitutionality of the Constitution cannot be challenged.

23. In any case, it was the appellant’s case that Nendela failed to avail himself of the opportunity given by the Select Committee in that he and his advocate “*stormed out of the meeting without taking advantage of the right to defend himself.*” For that reason, and on the strength of the decision in **Martin Nyaga Wambora & 4 others v Speaker of the Senate & 6 others [2014] eKLR**, counsel argued that Nendela was not entitled to any remedy based on the claim that his right to a fair hearing was breached.

24. Counsel went on to say that a recommendation of the Select Committee appointed by the County Assembly to investigate a member of the County Executive Committee member cannot amount to a ‘*decision*’ capable of being quashed. Counsel argued that Section 40 of the County Governments Act provides a five tiered process that would ultimately result in a resolution of the County Assembly; that if the County Assembly resolves to dismiss a member of the County Executive Committee, the final act is performed by the Governor by dismissing the member.

25. The role of the Select Committee is merely to investigate and to “*report its findings*” to the County Assembly whether it finds the allegations against a committee member substantiated. According to counsel, an inquiry such as is undertaken by the Select Committee or a presentation of findings by that Committee is tantamount to a recommendation, which the County Assembly may or may not accept. Such a recommendation, counsel argued, cannot and does not amount to a decision. In that regard counsel referred us to the decision of **Martin Nyaga Wambora & 4 others v Speaker of the Senate & 6 others** (above); decision of the Supreme Court of Canada in the case of **Thomson v Canada (Deputy Minister of Agriculture) [1992] 1 SCR385, 1992 CanLII 121 (SCC)** and **R v MacFarlane (1923)HCA 36 (1923) 32 CLR 518**.

26. The Attorney General, who was not a party to the proceedings in the High Court and who was joined as a party, as the 4th appellant in this appeal, filed written submissions but was not represented during the hearing of the appeal. He submitted that the trial court failed to consider that the object and purpose of the County Governments Act is to give effect to Chapter Eleven of the Constitution when it determined that Section 40(3) of the County Governments Act is unconstitutional. That provision, he argued, is disciplinary in nature as it ensures that the powers of the executive are checked; that the Select Committee was properly and procedurally constituted and that Nendela did not establish or prove that that provision is unconstitutional. In support of those arguments, he referred to **Richard Bwogo Birir v Narok County Government, Petition No. 1 of 2014**; **County Government of Nyeri and another v Cecilia Wangechi Ndungu [2015] eKLR**; **Ndyanabo v AG of Tanzania [2001] EA495**.

With that, the appellants urged us to allow the appeal.

27. Opposing the appeal learned counsel for the 1st and 2nd respondents, Mr. Ateka, relied on his written submissions. He urged that the 1st respondent was within his rights under Articles 22(1) and 258(1) of the Constitution in approaching the court to protect and preserve his rights to a fair hearing that were threatened; that in granting him the reliefs that it did, the court properly exercised its jurisdiction under Articles 22 and 165(3) of the Constitution; that under Section 40(4) of the County Governments Act, the investigative proceedings of the Select Committee are not preliminary in nature and the deliberations of such committee should accord with the rules of natural justice.

28. Counsel stressed that the purpose of the Select Committee was not merely to investigate and table findings in the County Assembly but included the making of a recommendation on the removal of Nendela from office; that those proceedings are quasi-judicial and the rules of natural justice must therefore be observed; and that the court was within its mandate under Article 23 of the Constitution to give redress to Nendela to protect his fundamental rights and freedoms.

29. In counsel's view, the court was right in holding that Nendela's rights to a fair hearing under Article 50 of the Constitution were violated as he was not accorded due process in that he received less than 16 hours' notice to appear before the Select Committee; his request for adjournment was declined; and he was denied an opportunity to cross examine witnesses. The excuse that the Select Committee had strict timelines within which to complete its work was not a justifiable basis for violating Nendela's rights to a fair hearing, he argued.

30. Concluding his arguments, counsel for the 1st and 2nd respondents submitted that Article 50 of the Constitution is explicit that a dispute has to be decided in a fair manner by an independent and impartial body; that allowing partisan members of the County Assembly to form a Select Committee for the removal of a member of the County Executive Committee and then voting in plenary for the eventual removal of that member introduces caprice, personal and subjective standards incompatible with fairness, impartiality and absence of bias and therefore runs foul of Article 50 of the Constitution; and that an independent body should be the one to investigate.

31. In counsel's view, a process akin to that of impeachment of the President of the Republic of Kenya or that of a County Governor or for the removal of the DPP and members of independent commissions would safeguard fair hearing. For those reasons, counsel argued, the Judge was right that Section 40(3) of the County Governments Act is inconsistent with Article 50 of the Constitution and therefore unconstitutional and urged the Court to dismiss the appeal with costs.

32. Learned counsel for the 3rd respondent, Mr. Kituyi, did not offer any submissions.

Analysis and determination

33. We have considered the appeal and submissions by counsel. Although the appellants set out 13 grounds of appeal in their memorandum of appeal, we have coalesced those grounds into two main issues. The first issue is whether the court erred in declaring Section 40(3) of the County Governments Act, 2012 unconstitutional. The second issue is whether the court erred in granting the reliefs that it did.

34. We begin with the question of the constitutionality or otherwise of Section 40(3) of the County Governments Act, 2012.

35. One of the hallmarks of the Constitution of Kenya, 2010 is the sovereignty of the people^[1] exercisable at the national level and the county level,^[2] either directly or through democratically elected representatives^[3]. The sovereign power of the people is delegated, under the Constitution, to Parliament and the legislative assemblies in the county governments; the national executive and the executive structures in the county governments, and to the Judiciary and independent tribunals.^[4] Devolved government is therefore a central and fundamental pillar of our constitutional order. Under Article 176 of

the Constitution, a county government for each county consists of a county assembly and a county executive.

36. One of the objects of devolved government, under Chapter 11 of the Constitution, is to promote democratic and accountable exercise of power,^[5] and to enhance checks and balances and the separation of powers^[6]. Consistently with that objective, the county government, in addition to its legislative function, is empowered, under Article 185(3) of the Constitution “*to exercise oversight over the county executive committee and any other county executive organs.*” It may, under Article 185(4) of the Constitution receive and approve plans and policies for the management and exploitation of the county’s resources and the development and management of its infrastructure and institutions.

37. Executive authority of the county is vested in, and exercised by a county executive committee that consists of the County Governor and Deputy County Governor and members appointed by the County Governor with the approval of the Assembly. It is in that role that Nendela was employed/nominated with the approval of the County Assembly, appointed by the County Governor of Bungoma in 2013 to serve as a member of the county Executive in charge of roads and public works.

38. The nuts and bolts of the manner in which the county assembly would exercise oversight over the county executive committee were left for Parliament to legislate. Parliament did that by enacting the County Governments Act, 2012 (the Act). The object of that statute was to give effect to Chapter 11 of the Constitution; to provide for county governments’ powers functions and responsibilities to deliver services and for connected purposes.

39. Under Section 39(1) of the Act, members of the county executive committee are accountable to the Governor. Under Section 39(2) of the Act, a committee of the county assembly may require a member of the executive committee to appear before it and answer any questions relating to the member’s responsibilities.

40. Under Section 40(2) of the Act that deals with removal of a member of executive committee, a member of the County Assembly supported by at least one third of all members of the County Assembly may propose a motion requiring the Governor to dismiss a County Executive Member on grounds of incompetence, abuse of office, gross misconduct, failure to attend meetings, incapacity or gross violation of the Constitution or any other law.

41. If such motion is passed, a select committee comprising 5 of its members is appointed by the Assembly to investigate the matter and to report to the assembly, within 10 days, whether it finds the allegations against the County Executive Committee member to be substantiated. The County Executive Committee member has a right to appear and be represented before the Select Committee during the investigations. If the select committee reports that it finds the allegations unsubstantiated, then the matter ends there. If on the other hand, the select committee reports that it finds the allegations substantiated, the County Assembly votes on whether to approve the resolution requiring the County Executive Member to be dismissed. If the resolution is supported by a majority of the members of the County Assembly, the Speaker of the County Assembly shall deliver the resolution to the Governor who shall dismiss the county executive committee member.

42. The learned Judge was of the view, and held that the disciplinary process under Section 40(3) inherently violates Article 50 of the Constitution and for that reason declared it null and void. The reasoning by the Judge was that:

“To the extent that Section 40(3) of the CGA as read with Sub-section (5) (b) and (6) thereof, provides for the investigations to be carried out by a Select Committee of the Assembly and for the Assembly to vote for the removal of a County Executive Committee Member, the provision runs foul of the Constitutional principle of fair hearing. It is in violation of Article 50 (1) of the Constitution and is null and void to that extent. Under Article 259 of the COK, the purposeful interpretation requires that no Article of the Constitution violates the other. Article 185 was not meant to override Article 50 (1). The law to be enacted under Article 200

was intended to comply with the provisions of Article 50 (1) of the Constitution safeguarding fair hearing and not one that will concentrate the powers of accusation, investigation, prosecution and passing of judgment over Members of County Executive Committee in one body. Such a scenario has a likelihood of abuse of power.

Accordingly, this court holds that Constitutionally, no County Assembly can purport to remove a county executive committee member pursuant to Section 40 (3) of the CGA. That provision negates the principal of independence and impartiality stipulated by Article 50 (1) of the Constitution and is null and void to that extent. Parliament should enact a law that provides for a separate, independent impartial and unbiased body that will be charged with the jurisdiction of carrying out investigations once a motion is passed by a County Assembly under Section 40 (2). It is that separate and independent body that should carry out investigations and report to the Assembly on its findings for the latter to vote on. To the extent that no such independent and impartial body exists, County Assembly cannot purport to remove a member of the County Executive Committee under Section 40 of the CGA. That will be unconstitutional.”

43. We are unable, most respectfully, to subscribe to the same view. Whereas Section 40(4) of the Act provides that a County Executive Committee member, the subject of investigations by a select committee, “*has the right to appear and be represented before the select committee*”, that does not, in our view, translate or equate the nature of such proceedings to court proceedings for purposes of Article 50(2) of the Constitution. Neither is an executive committee member under such investigation in the same position as an “*accused person*” entitled to the same breadth of rights as an accused person under Article 50(2) of the Constitution.

44. In our view, the five-tiered process provided for under Section 40 of the Act that may lead to the removal of a member of executive committee, is tantamount to a disciplinary process in tandem with the oversight role of the County Assembly. The select committee plays an investigative role in that process. It must however discharge that role fairly. As this Court observed in Judicial Service Commission v Gladys Boss Shollei & another (above):

“The invocation of Article 50(2) (a)(b) & (c) of the Constitution was misplaced. In the context, it did not apply to the 1st Respondent who faced disciplinary proceedings and removal from office as Chief Registrar of the Judiciary. A careful perusal of the Constitution shows that Article 50(2)(a)(b) & (c) applies to criminal trials and not to civil litigation or disciplinary proceedings. That this is interpretation of the Article, it does not apply to disciplinary proceedings and the learned trial judge misdirected his mind in reaching the conclusion that it applied to the case before him. So too with regard to Article 25(c) relating to the constitutional right to fair trial, the learned trial judge failed to appreciate that the disciplinary proceedings were not a trial and the issue of fairness in the proceedings was addressed by Principles of natural justice and Article 47 which enjoined the appellant in the disciplinary proceedings to ensure that the 1st Respondent’s right to administrative action was observed.”

45. A similar view was expressed by this Court in Judicial Service Commission v Mbalu Mutava & another (above) where the Court stated that:

“It is clear that fair hearing as employed in article 50 (1) is a term of art which exclusively applies to trial or inquiries in judicial proceedings where a final decision is to be made through the application of law to facts. By article 25 that right cannot be limited by law or otherwise.

It was inappropriate therefore, for the 1st respondent’s counsel to invoke article 50 (1) in this appeal particularly article 50(2) (k) which refers to right of an accused person to adduce and challenge evidence. The right to fair hearing under article 50 does not apply to the decision of the JSC under appeal. Rather, it would apply to proceedings in the tribunal appointed by the

President.”

46. We are therefore not satisfied that the respondents established that Section 40(3) of the Act is unconstitutional. The learned Judge fell into error in declaring it unconstitutional based on a misdirection that Article 50(2) of the Constitution is applicable in this case.

47. We turn to the question whether the Nendela was entitled to the reliefs that he sought. Notwithstanding what we have said regarding the constitutionality of Section 40(3) of the Act, we do not think, in the circumstances of this case, the 1st respondent was treated fairly. As stated, it was the 1st respondent’s statutory right under Section 40(3) of the Act “*to appear and be represented before the Select Committee during its investigations.*”

48. The motion, under Section 40(2) of the Act, to initiate the removal of Nendela as a member of the Executive Committee, was, according to the respondents’ submissions, passed on 25th March 2014. Accepting, as we do, that the motion was passed on that date, it is not clear why the “*Notification*” asking Nendela to appear before a Select Committee of the County Assembly on 15th April 2014 was not served on him until 14th April 2014 at 4.30 pm.

49. It is hardly surprising that on receiving that notification, Nendela responded with a letter dated 15th April 2014 addressed to the Clerk to the County Assembly thus: The letter in its entirety read:

The Clerk to the Assembly,

County Assembly of Bungoma,

P. O. Box 1886-50200,

BUNGOMA.

Dear Sir,

Ref: DEFERRAL OF SUMMONS

Reference is made to your letter dated 14th April, 2014 which was received in my office at 4.12pm.

In accordance to the rules of natural justice and fair hearing in the Constitution under Article 50, I request that the summons be deferred for one day to enable me collect evidence information, prepare defence and consult legal counsel.

I hope that one day is reasonable in the circumstances. Kindly consider my request.

Yours faithfully,

Stephen Nendela

County Executive Committee Member

Roads & Public Works

50. In our view, the request by Nendela was not unreasonable. The position taken by the chair of the Select Committee, Mr. Barasa, that Nendela’s request was denied because, “*he needed not attend all the sessions in person but would be allowed to make presentations in his defence*” amounted, in our judgment, to denying Nendela’s right to appear. We are therefore in agreement with the Judge that “*the notice given to...[Nendela] was too short.*” The fact that the Select Committee had time constraints

within which to report to the County Assembly, though a relevant consideration, should have stirred the Committee to optimally utilizing the time it had without undermining Nendela's right to appear.

51. Having said that, and while we entertain no doubts that the court was within its jurisdiction to grant the orders that it did, we do not consider that the appropriate remedy was to prevent the Select Committee and the County Assembly from discharging its duties. Under Article 165(7) of the Constitution, the court was at liberty to "make any order or give any direction it considers appropriate to ensure the fair administration of justice." The appropriate remedy, in our view, was for the court to give appropriate directions to the County Assembly and to the select committee to ensure Nendela's rights under Section 40(3) of the Act are respected by ensuring he is given adequate notice of proceedings and the right to have representation in those proceedings.

52. The result of the foregoing is that the appeal succeeds. The Judgment of the High Court delivered on 7th October 2014 is hereby set aside in its entirety. Each party shall bear its own costs.

Dated and delivered at Eldoret this 24th day of March, 2017.

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A.K. MURGOR

.....

JUDGE OF APPEAL

I confirm that this is a true copy of the original.

DEPUTY REGISTRAR.

- [1] Article 1(1) of the Constitution
- [2] Article 1(4) of the Constitution
- [3] Article 1(2) of the Constitution
- [4] See Article 1(3) of the Constitution
- [5] Article 174(a) of the Constitution
- [6] Article 174(i) of the Constitution