



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT NAIROBI
PETITION NUMBER 208 OF 2019
BETWEEN
PAUL KARUNGO THANG'WAPETITIONER
VERSUS
1. THE SPEAKER, KIAMBU COUNTY ASSEMBLY
2. THE CLERK, KIAMBU COUNTY ASSEMBLY
3. KIAMBU COUNTY ASSEMBLY.....RESPONDENTS

Rika J

Court Assistant: Emmanuel Kiprono

Mbugua Ng'ang'a & Company Advocates for the Petitioner

Kibatia & Company Advocates for the Respondents

JUDGMENT

Petition.

1. Paul Karungo Thang'wa, was the Kiambu County Government Executive Committee Member for Youth Affairs, Sports, ICT and Communication, until 29th October 2019, when the Kiambu County Assembly resolved to have him removed from the docket, on the grounds of incompetence, abuse of office and gross misconduct.
2. He alleges that the Respondents acted in violation of the Constitution of Kenya; The Fair Administrative Action Act; The County Governments Act; and the 3rd Respondent's Standing Orders.
3. He filed this Petition on 7th November 2019 seeking the following orders: -
 - a. Certiorari to remove to this Court for purposes of quashing the resolution passed by the 3rd Respondent on 29th October 2019, removing the Petitioner from Office as County Executive Member.
 - b. Certiorari to remove to this Court for purposes of quashing the Resolution passed by the 3rd Respondent on 29th October 2019, requiring the Interested Party to dismiss the Petitioner from his position as a County Executive Member.
 - c. Certiorari to remove to this Court for purposes of quashing the proceedings and investigation committee's decision of 4th November 2019 and any subsequent report of the investigation committee to the Assembly on the matter of removal of the Petitioner from Office.

d. Prohibition restraining the 1st Respondent from transmitting the resolution of 29th October 2019 or any such resolution of the 3rd Respondent to remove the Petitioner from Office, to the Interested Party for action.

e. Prohibition restraining the Interested Party from acting on the resolution of the 3rd Respondent of 29th October 2019 or any other resolution whatsoever, requiring him to dismiss the Petitioner from his position.

f. Prohibition restraining the 3rd Respondent from adopting and/ or debating any report of the investigation committee pursuant to the proceedings of 4th November 2019, or any other proceedings touching on the removal of the Petitioner from Office.

g. Prohibition restraining the 1st Respondent from facilitating or allowing debate on any report of the investigation committee emanating from the proceedings of 4th November 2019, or any other proceedings touching on the removal of the Petitioner from office.

h. Permanent injunction restraining the Respondents from any further process to remove the Petitioner from Office on the grounds set out in the impugned motion, without following due process.

i. Costs of the Petition.

j. Any other order that this Court shall deem fit to grant in the circumstances.

4. The Petition is anchored on grounds listed in the Petition, and the Petitioner's Affidavit sworn on 6th November 2019.

5. He states that the 3rd Respondent passed the motion on 29th October 2019, without affording him an opportunity to be heard. During debate, the MCAs delved into details and merits of the charges, expressing deeply biased views against the Petitioner. Some of the statements are captured in the Hansard and an audio recording exhibited by the Petitioner. The statements include the following: -

§ You cannot stop an ejaculation whose time has come!

§ The motion is watertight and nothing will work in the Courts!

§ Karungo must go!

§ He is paying for his sins!

6. The Petitioner states that he was informed by the 2nd Respondent that the motion against him had been approved.

7. He was then invited to attend a meeting of a committee established by the 3rd Respondent, to investigate him, notwithstanding that a resolution to dismiss him had already been passed.

8. The committee was comprised exclusively of members who had voted in support of the removal motion, and who had, pursuant to Standing Order 87[1][c], affirmed the truth of the allegations made against the Petitioner.

9. The Petitioner was supplied a skeleton statement of the charges against him. He wrote to the 2nd Respondent asking for detailed statement. There was no response by the time the Petitioner appeared before the committee.

10. He raised the issue of detailed statement of charges at the hearing. He was advised there would be witnesses to testify against him. He did not have their statements. The committee rejected the Petitioner's request for details, explaining that the details were the same given in the motion for removal. The committee also stated it was operating under strict timelines imposed by the law, and there was no room for adjournment of proceedings, to accommodate the Petitioner.

11. At paragraph 43 of the Petition, the Petitioner explains that in light of the decision by the committee to deny him adequate facility to defend himself, and considering the prejudice he faced, he excused himself from the proceedings and asked for proceedings and decision to enable him enforce his rights in Court.

12. The Petitioner states that the 3rd Respondent violated his right to fair administrative action under Article 47 of the Constitution, Section 4 of the Fair Administrative Action Act, and Standing Order Number 87 [16].

13. Resolving to remove the Petitioner before the establishment of an investigation committee, violated the Petitioner's right to be presumed innocent, and violated express requirements of Section 40 of the County Governments Act.

14. Section 4 [3] of the Fair Administrative Action Act required the Respondents to supply the Petitioner with prior and adequate notice of the nature and proposed administrative action; and information, materials and evidence to be relied upon in making the decision, or taking the administrative action. Subsection [4] requires the Administrator to allow the person against whom administrative action is being taken, an opportunity to request for an adjournment of the proceedings, where necessary, to ensure a fair hearing. Standing Order Number 87[1][a] states that the mover of the motion shall state the grounds and particulars upon which the motion is made. Standing Order Number 87 [16] provides for the right of County Executive Member, to be heard by the County Assembly, during debate on removal motion.

15. The Petitioner submits that he was not availed written reasons for the adverse resolution to remove him from Office. The resolution to remove him from Office had already been passed by the time a committee was convened to investigate the same allegations. Fair hearing under Article 50 [1] was compromised by inclusion of MCAS who had resolved to remove the Petitioner from Office, in the investigation committee. Article 236 of the Constitution, which protects Public Officers from removal from Public Office without due process, was violated.

16. On 7th November 2019, the Petitioner filed this Petition and an Application for Conservatory Orders. The Court granted Orders certifying the Application as urgent. It was ordered also that, pending *inter partes* hearing or further Orders by the Court, there be a stay of proceedings for removal of the Petitioner from Office of the Kiambu County Executive Committee, and stay of the letter dated 30th October 2019.

17. The Petitioner states that despite service of the Orders, the Respondents went on with the removal process.

Response.

18. The Respondents rely on the Affidavit of Vincent Karumba, Principal Clerk Kiambu County Assembly, sworn on 15th November 2019.

19. It is conceded that the Petitioner was a County Executive Committee Member, serving the docket pleaded in his Petition.

20. The 3rd Respondent received a motion for removal of the Petitioner, from County Assembly Member, Hon. Margaret Njeri Mburu. The motion was dated 22nd October 2019. It was accompanied by necessary signatures in support. The grounds were laid out.

21. The 3rd Respondent moved under Section 40 of the County Governments Act.

22. Section 40 [3] of this Act requires that once the motion is supported by at least 1/3 of all the Assembly Members, the County Assembly shall appoint a select committee comprising 5 of its Members to investigate the matter. The committee shall report its findings to the Assembly within 10 days.

23. The motion was approved and a select committee appointed. The committee held its first meeting on 30th October 2019, electing its Chairperson and Vice-Chairperson.

24. The committee invited the Petitioner to appear before it, on 4th November 2019. He appeared, but walked out and did not participate in committee deliberations. He complained that he had not been supplied with the details of the allegations. He was advised the details were the same as contained in the motion, which had been supplied to him. He was accorded the opportunity to present his case.

25. The committee investigated the allegations and prepared its report. The Petitioner requested for the committee proceedings through his Advocates on 4th November 2019, which were supplied on 5th November 2019.

26. The process of the Petitioner's removal was not complete by the time the Petitioner presented this Petition on 7th November 2019. He had been invited to appear before the County Assembly on 19th November 2019 at 2.30 p.m. He had the opportunity to present his case before the full Assembly. The Assembly was not bound by the findings of the select committee.

27. Lastly, the Principal Clerk of the 3rd Respondent relies on Supreme Court of Kenya 3rd decision in **Julius Kariuki Mate & Another v. Martin Nyaga Wambora & Another [2017] e-KLR**, where it was held that no governmental agency should encumber another, to stall the constitutional motions of the other.

28. The issues as understood by the Court are, whether the Respondents violated the Petitioner's fundamental rights as specified in the Petition; whether orders of certiorari, prohibition and injunction specified in the Petition are merited; and who should meet the costs of the Petition. The Petitioner submits in his Closing Submissions that removal of the Petitioner from Office was in Contempt of the Court, hence also in violation of the Constitution. Were the proceedings on removal of the Petitioner before the 3rd Respondent, in Contempt of Court?

The Court Finds: -

29. The record indicates that the Court issued an *ex parte* Order, on 7th November 2019, barring the 3rd Respondent from going on with the process of the Petitioner's removal.

30. The motion for removal of the Petitioner had been approved by at least 1/3 of County Assembly members, on 29th October 2019.

31. The select committee to investigate the allegations made against the Petitioner, in the motion presented by Hon. Margaret Njeri Mburu, convened and invited the Petitioner to appear before it, on 4th November 2019.

32. The Petitioner walked out of the committee meeting, saying he had had been denied details of the allegations and statements of witnesses.

33. He walked into the Court on 7th November 2019, which granted him conservatory measures.

34. He served those Orders, but the process of removal did not stop. As stated by Principal Clerk of the 3rd Respondent in his Replying

Affidavit, the full Assembly was due to hear the Petitioner, on 19th November 2019, at 2.30 p.m.

35. There was an Application filed by the Petitioner on 18th November 2019, asking the Court to cite the 2nd Respondent for contempt, for having facilitated debate and tabling of the select committee report.

36. This Application does not appear to have been argued, and there is no finding, that the Respondents acted in contempt of the Orders made on 7th November 2019.

37. The record indicates, that on 27th August 2020, pending Applications were marked as withdrawn, with no order on the costs. This would include the Application by the Petitioner asking the Court to deliberate on the issue of contempt, dated 18th November 2019.

38. The Court cannot therefore make a finding on contempt, through the main Petition, the relevant Application where such finding could have been made, having been withdrawn.

39. Furthermore, the **Supreme Court of Kenya, in Justus Kariuki Mate & Another v. Martin Nyaga Wambora & Another [2017] e-KLR**, held-

§ Each arm of Government has an obligation to recognize the independence of the other arms of Government.

§ Each arm of Government is under duty to refrain from directing another Organ on how to exercise its mandate.

§ The Courts of law are the proper judge of compliance with constitutional edict, for all public agencies; but this is attended with the duty of objectivity and specificity, in the exercise of judgment.

§ For due functioning of constitutional governance, the Courts be guided by restraint, limiting themselves to intervention in requisite instances, upon appreciating the prevailing circumstances and the objective need and public interests attending each case.

§ In the performance of respective functions, every arm of Government is subject to the law.

40. The Supreme Court in the decision above, declined to uphold Orders of contempt of Court, which had issued at the High Court and been endorsed by the Court of Appeal. The explanation was that the County Assembly against whom the contempt Orders had issued, was ‘‘*operating quite properly within the constitutional scheme of devolution, and running its legislative processes within the ordinary safeguards of the separation of powers- consequently, quite legitimately outside the path of the ordinary motions of the judicial arm of the State. On that basis, there would have been hardly any scope for the deployment of the Court’s conservatory orders- more particularly, without first hearing the Petitioners [County Assembly].*’’

41. The Petitioner herein did not prosecute his Application for contempt. It was withdrawn about a year from the date the conservatory orders issued. The Application for conservatory orders itself, does not appear to have ever been heard and determined *inter partes*. The Assembly process subject of those orders was legally time-bound. It is inconceivable that the 3rd Respondent would keep on hold the process indefinitely. In the view of the Court, the Assembly was operating quite properly within the constitutional scheme of devolution. The Court does not think that the removal process can be faulted on the ground that the Respondents were in contempt of Court. There was never a trial and findings on contempt.

42. The motion against the Petitioner was received by the 3rd Respondent on 22nd October 2019. It was placed before the 3rd Respondent on 29th October 2019. Section 40 [2] of the County Governments Act, allows an MCA, supported by at least 1/3 of all MCAs, to propose a motion requiring the Governor to dismiss a member of the Executive Committee, on grounds set out in Section 40[1].

43. The County Assembly did not make any final and binding decision on 29th October 2019, to have the Petitioner removed. The Assembly only voted to establish, that the motion by the Hon. Member, had the requisite support of at least 1/3 of all the Members.

44. The motion having satisfied the endorsement of at least 1/3 of all the Members, the next step in accordance with Section 40[3] was for appointment of a select committee to investigate the matter.

45. This was done on 4th November 2019 before this Petition was filed.

46. The appointment of the committee was not done outside the County Governments Act, contrary to the view of the Petitioner. He complains that the 3rd Respondent appointed a select committee, despite already having passed a resolution to remove him. In his submission, investigation should have preceded the resolution. This is not the order of events, prescribed by Section 40 of the Act.

47. Section 40[2] of the Act requires that the motion is supported by at least 1/3 of all the Members. What happened on 29th October 2019 was an exercise in establishing such support, followed by appointment of a select committee under Section 40[3] of the Act.

48. Section 40 [3] does not bar Members of the Assembly, who may have supported the motion, from being Members of the select committee. The law states that, ‘‘*the County Assembly shall appoint a select committee comprising five of its members, to investigate the matter.*’’ There is no bar to members who were supportive of the removal motion, from serving in the select committee. It is even likely, that a motion is supported by all Members of the Assembly, which would not obviate the need for a select committee.

49. Once the select committee is in place, it is mandated to investigate and report its findings to the County Assembly, within 10 days of its appointment.
50. There is no provision for extension of the timelines, and no room exists for intermittent interruptions associated with applications for adjournment within the Judiciary. The process must begin and complete within the given period.
51. The County Executive Member has a right under Section 40[4] of the Act, to appear before the select committee.
52. The Petitioner was invited to state his case before the select committee on 4th November 2019. He demanded to be supplied details of the charges. He was correctly advised that the details were as contained in the motion, which had already been availed to the Petitioner.
53. He applied for proceedings and walked out, and sought the assistance of the Court. That was his last participation in the proceedings for his removal at the 3rd Respondent.
54. Section 40[5] of the Act provides that if the select committee finds no substantiation in the charges, no further proceedings shall be taken. The Petitioner had not been advised on the findings of the committee when he filed the Petition.
55. If substantiated, the County Assembly shall vote whether to approve the resolution requiring the County Executive Member to be removed.
56. The County Assembly had not voted to approve removal of the Petitioner, after investigations of the select committee.
57. The Petitioner was invited to give his position to the County Assembly before the final vote, on 19th November 2019. The County Governments Act does not require hearing of the County Executive Members before the final vote. The Petitioner submits however, that Standing Order 87 [16], required the County Assembly to hear him. He was invited to appear before the County Assembly. He declined appearance.
58. The Petitioner did not take up the opportunity. Section 40 [6] of the Act requires that if the resolution is supported by a majority of the Members of the County Assembly, the Speaker shall promptly deliver the resolution to the Governor; and the Governor shall dismiss the County Executive Member.
59. The Speaker did not communicate the resolution of 29th October 2019 to the Governor, requiring that the Petitioner is dismissed. The law does not require the Governor to remove a County Executive Member, merely upon endorsement of a Member's Motion by 1/3 of the Members. There must be a select committee, investigations, and a final vote by the Assembly, to call in the engagement of the Governor.
60. The Court is not convinced by the Petitioner, in light of the law and facts above, that he was denied the various statutory rights and fundamental rights pleaded under the Constitution. He walked out of the process. He cannot turn around and say fair hearing was denied to him. 1/3 of Members had endorsed the proposed motion at the outset, but 2/3 of the Assembly Members, had not yet expressed their view in the matter, and the vote in the end could go either way.
61. The Court does not find merit in this Petition. There were strict timelines to conduct and conclude the Assembly business pertaining to removal of the Petitioner. There was no room for incessant adjournments. The process was well in progress at the time the Petitioner walked out, seeking the protection of the Court. He seems to have misunderstood Section 40 of the County Governments Act, on the initial endorsement of the motion by at least 1/3 of the Members; the role of the select committee; and the final vote of the Assembly before dismissal by the Governor. He was not deprived of any procedural protections in the process of removal. The role of the Court in parliamentary processes, was defined in the **Justus Kariuki Mate** decision cited above.
62. The Court takes judicial notice that County Governments have a shelf-life of 5 years. The County Government of Kiambu's 5-year mandate ends in less than a year. There would be no purpose in granting the orders sought in the Petition. The grant of the orders would be unsettling to a Government already at the end of its electoral term. The docket the Petitioner seeks to be restored to, must have been filled, and he must have moved on. The Parties should set their sights on the next electoral opportunities.

IT IS ORDERED: -

- a. The Petition is declined.*
- b. No order on the costs.*

DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY, AT NAIROBI, UNDER THE MINISTRY OF HEALTH AND JUDICIARY COVID-19 GUIDELINES, THIS 28TH DAY OF JANUARY 2022.

JAMES RIKA

JUDGE