



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

PETITION NO. 23 OF 2020

IN THE MATTER OF ENFORCEMENT & INTERPRETATION OF THE CONSTITUTION

AND

IN THE MATTER OF THE COUNTY GOVERNMENTS ACT AND OTHER ENABLING PROVISIONS

AND

IN THE MATTER OF ARTICLES 1, 3, 6, 10, 19, 21, 22, 23, 27, 28, 32, 35, 41, 43, 45, 47, 65, 165, 176, 179, 180, 183, 185(3), 195, 230(5), 232, 235, 236, 258 AND 259 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE CONTRAVENTION AND/OR APPREHENDED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS

BETWEEN

DR ANTONY WALELA.....1ST PETITIONER

MR RICHARD SABWAMI KEYA.....2ND PETITIONER

MATHEWS CHIRASHA MAKANDA3RD PETITIONER

VERSUS

HON EMMANUEL SITUMA MUKHEBI.....1ST RESPONDENT

JOHN ONGWAE MUSONGO.....2ND RESPONDENT

COUNTY ASSEMBLY OF BUNGOMA.....3RD RESPONDENT

HON WYCLIFFE WANGAMATI.....4TH RESPONDENT

COUNTY GOVERNMENT OF BUNGOMA.....5TH RESPONDENT

JUDGMENT

1. Dr Antony Walela (1st Petitioner) was appointed as the County Executive Committee member for Health & Sanitation, Mr Richard Sabwami Keya (2nd Petitioner), County Executive Committee member for Public Service Management and Administration and Mr Mathews Chirasha Makanda (3rd Petitioner), County Executive Committee member for Agriculture, Livestock and Co-operatives Development.

2. On 22 June 2020, the Petitioners lodged a Petition with the Court alleging that an attempt to impeach them was unlawful and against the Standing Orders of the County Assembly of Bungoma.

Background

3. Sometime in March 2020, the Deputy Minority leader of the County Assembly requested the Speaker to recall the County Assembly Sectoral Committee on Health to investigate allegations of misuse of funds meant to address the COVID19 public health pandemic.
4. The Speaker recalled the Committee, and it carried out investigations. The 1st and 2nd Petitioners appeared before the Committee on 6 May 2020.
5. The Committee published its report the same month, and the report implicated the 1st and 2nd Petitioners. The report recommended their removal from office, and it was submitted to the County Assembly on 8 June 2020, after which the House Business Committee scheduled it for debate.
6. On 16 June 2020, a member of the County Assembly of Bungoma notified the Speaker of a notice of Motion to impeach and remove from office the 1st Petitioner.
7. The next day, 17 June 2020, a Motion was placed before the County Assembly of Bungoma for the impeachment and removal of the 2nd Petitioner.
8. The County Assembly debated and approved the motions on 17 June 2020. Two Select Committees were also appointed to conduct investigations in respect of the 1st and 2nd Petitioners.
9. The Clerk of the County Assembly wrote to the 1st and 2nd Petitioners on the same day, inviting them to appear before the Select Committee (s) on 19 June 2020. The hearings were rescheduled to 22 June 2020 at the request of the Petitioners. The Petitioners appeared before the Committees.
10. In respect of the 3rd Petitioner, a member of the County Assembly gave notice of removal to the Speaker on 16 June 2020, and the Motion was slotted for debate on 23 June 2020.
11. On the same day, the Petitioners moved the Court seeking interim interdicts, and the Court granted conservatory orders restraining the Respondents from proceeding with the impeachment process pending the hearing and determination of the Petition.
12. The Court also directed the Petitioners to serve the Motion. The parties were further directed to file and exchange affidavits and submissions ahead of Ruling on notice.
13. The Clerk of the County Assembly filed a replying affidavit sworn on 6 July 2020 on behalf 1st to 3rd Respondents. The 2nd Petitioner filed a supplementary affidavit on 21 July 2020.
14. The Petitioners filed their submissions on the Motion on 4 September 2020 and the 1st to 3rd Respondents on 12 August 2020.
15. The parties next appeared before the Court on 4 November 2020, when the parties suggested that the Motion be abandoned in lieu of expediting the Petition and that the interim orders be extended.
16. The Court directed that the Motion and Petition be taken together.

Evaluation

17. The Court has considered the Motion, Petition, affidavits and submissions on record.

Jurisdiction

18. The Respondents contended that the Court did not have jurisdiction over the Petition's subject matter, and the doctrine of separation of powers was invoked.
19. When carrying out the task of removal proceedings against a county government minister, a County Assembly is conducting a quasi-judicial function.
20. In the view of the Court, and there are plenty of authorities from the Court of Appeal and the Supreme Court, such a function is amenable to judicial interrogation.
21. The Court, therefore, finds that it has jurisdiction.

Competency of the Petition

22. It is trite law that pleadings should be drafted with precision. But precision should not be substituted with exactitude.

23. A perusal of the body of the Petition would leave no doubt in the mind of a concerned party that the challenge presented before the Court was the attempt to remove the Petitioners from their offices as county government Ministers.

24. The Petitioners set out in detail the provisions of the Constitution, Statute and Standing Orders which they felt were not complied with by the Respondents.

25. The Court finds that the Petition put the Respondents on sufficient notice of the case to meet.

Illegal or unlawful removal process?

26. The Petitioners challenged the impeachment process (ess) on the ground that they were conducted in a hurry and in violation of Standing Order no. 62(3).

27. Standing Order no. 62 provides as follows:

Procedure for removal of Member of County Executive Committee

62. (1) Before giving notice of Motion under section 40 of the County Governments Act, 2012, the Member shall deliver to the Clerk a copy of the proposed Motion in writing stating the grounds and particulars upon which the proposal is made, for requiring the Governor to dismiss a Member of County Executive Committee on the ground of a gross violation of a provision of the Constitution or of any other law; where there are serious reasons for believing that the Member of county executive has committed a crime under national or international law; or for gross misconduct. The notice of Motion shall be signed by the Member, and the Clerk shall submit the proposed Motion to the Speaker for approval.

(2) A member who has obtained the approval of the Speaker to move a motion under paragraph (1) shall give a three (3) days' notice calling for the dismissal of a Member of County Executive Committee by the Governor.

(3) Upon the expiry of three (3) days, after notice given, the Motion shall be placed on the Order Paper and shall be disposed of within three days;

(4) When the Order for the Motion is read, the Speaker shall refuse to allow the Member to move the Motion unless the Speaker is satisfied that the Member is supported by at least one-quarter of all Members of the County Assembly to move the Motion. Provided that within the seven days' notice, the Clerk shall cause to be prepared and deposited in his office a list of all Members of the County Assembly with an open space against each name for purposes of appending signatures, which list shall be entitled "SIGNATURES IN SUPPORT OF A MOTION FOR REMOVAL OF Mr./Mrs./Ms----- MEMBER OF COUNTY EXECUTIVE COMMITTEE"

Provided further that the Mover shall provide to the Speaker, at least on one hour before the sitting of the Assembly, a list signed by members in support of the Motion.

(5) Any signature appended to the list as provided under paragraph (4) shall not be withdrawn.

(6) When the Motion has been passed by at least one-third of all members of the County Assembly, the Assembly shall, within seven (7) days, appoint a special committee comprising of a third of the Members to investigate the matter; and shall, within ten days, report to the Assembly whether it finds the allegations against the Member of county executive to be substantiated.

(7) The Member of County Executive has the right to appear and be represented before the select Committee during its investigations.

(8) No further proceedings shall be taken on the matter if the select Committee finds the allegations unsubstantiated.

(9) If the select Committee reports that it finds the allegations substantiated, the County Assembly shall afford the Member of County Executive an opportunity to be heard and vote whether to approve the resolution requiring the Member of County Executive to be dismissed.

(10) If a resolution requiring the Governor to dismiss a Member of County Executive is supported by a majority of the members of the County Assembly, the Speaker shall promptly deliver the resolution to the Governor, and the Member shall be considered dismissed.

28. The first step in the impeachment process under the aforesaid Standing Order is the giving of a motion to the Clerk of the County Assembly.

29. There is evidence in the form of order papers and the Hansard that notice of Motion for the impeachment of the 1st Petitioner was given by Hon Tony Khaoya Barasa on 16 June 2020.

30. However, none of the parties disclosed when the Motion was approved by the Speaker as required by Standing Order no. 62(2).

31. In terms of Standing Order no. 62(2), there should have been 3 clear days after obtaining the Speaker's approval for the mover to move the notice of motion in the County Assembly. The 3-day rule was not complied with.

32. In respect of the 2nd Petitioner, a copy of the notice of motion was not filed. There was no disclosure on when the Speaker approved it. The Speaker's approval was necessary before the House Business Committee could schedule it for tabling/moving in the County Assembly.

33. The Respondents did not produce any records to show whether the motion for the impeachment of the 2nd Petitioner was supported by at least a third of the members of the County Assembly.

3rd Petitioner

34. A member of the County Assembly issued a notice of motion for the impeachment of the 3rd Petitioner to the Speaker on 16 June 2020.

35. The Respondents did not disclose when the Speaker approved the Motion. The approval, again, was necessary before the House Business Committee could slot the motion for moving before the County Assembly.

36. From the foregoing, the Court finds that the attempts to impeach the Petitioners started off on the wrong footing as the processes contemplated by the Standing Orders were not strictly complied with.

Conclusion and Orders

37. The Petitioners sought 3 substantive prayers and these were:

- i. A declaration that the 1st, 2nd and 3rd Respondents have violated the Constitution and the County Governments Act.
- ii. A declaration that attempts at impeachment or impeachment are illegal, discriminatory against the Petitioners and an order of nullification of any such action.
- iii. A declaration that the 1st, 2nd and 3rd Respondents failed to observe the national values and principles of governance as set out in Article 10 and Article 185(3) of the Constitution in the manner they handled the Petitioners issues by denying them fair hearing and acting maliciously.
- iv. The 1st, 2nd and 3rd Respondents to pay the Petitioners costs of the Petition in any event.

38. Considering the above and the fact that it is the process which has been found wanting, the Court orders that:

- i. A declaration be and is hereby issued that decision of the Respondents to impeach the Petitioners did not comply with Standing Order no. 62(1), (2) and (3) of the Standing Orders of the County Assembly of Bungoma.

39. Each party to bear its own costs.

DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN NAIROBI ON THIS 7TH DAY OF APRIL 2021.

RADIDO STEPHEN, MCIARB

JUDGE

Appearances

For Petitioners Mwamu & Co. Advocates

For 1st to 3rd Respondents Mr. Makhoha instructed by Prof Tom Ojienda & Associates

For 4th and 5th Respondents Mr Wangila instructed by A.S. Kuloba Advocates

Court Assistant Chrispo Aura