



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

ELRC CAUSE NO. E007 OF 2021

CONSOLIDATED WITH ELRC CAUSE NOS. E010 OF 2021 & E011 OF 2021

NYANDARUA COUNTY ASSEMBLY

SERVICE BOARD.....1ST CLAIMANT

MUKIRI MUCHIRI.....2ND CLAIMANT

-VERSUS-

NYANDARUA COUNTY ASSEMBLY.....1ST RESPONDENT

ZACHARIA MWANGI NJERU.....2ND RESPONDENT

SAMUEL RIMUI KAIYANI.....3RD RESPONDENT

REUBEN GITAU KARANJA.....4TH RESPONDENT

ELIZABETH WANJIKU MUTHUI.....5TH RESPONDENT

THE GOVERNMENT PRINTER.....6TH RESPONDENT

THE INSPECTOR GENERAL OF POLICE.....7TH RESPONDENT

THE HON. ATTORNEY GENERAL.....8TH RESPONDENT

AND

JOHN KIERU WAMBUI.....1ST INTERESTED PARTY

KARIUKI MUCHIRI.....2ND INTERESTED PARTY

RULING

1. Before me for determination is the 2nd-5th Respondents/Applicants' Notice Motion dated 13th October, 2021 and filed on 15th October, 2021 pursuant to Rule 17(1) and 19(1)(2)(3) &(4) of the Employment and Labour Relations Court(Procedure) Rules, 2016, Articles 48 and 159(2)(c) of the Constitution of Kenya and all other enabling provisions of law seeking interalia for Orders;-

1) That the Honourable Court be pleased to stay further proceedings in this matter and submit the dispute herein for mediation by the inter-Governmental Relations Technical Committee established under section 11 of the Intergovernmental Relations Act,2021.

2) The inter-Governmental Technical Relations Committee be ordered to conduct the mediation and submit a report to Court within 60 days of Submissions of the dispute.

3) In conducting the mediation, the inter-Governmental technical relations Committee be at liberty to invite officers from the

controller of budget, the Central Bank of Kenya, the Council of County Governors, the National County and Government Coordinating summit and the Ministry responsible for devolution to assist in Mediation.

4) During the mediation period, the proceedings of the county assembly be presided over by any member of the Speaker Panel.

5) Costs of this Application be Provided for.

2. The application is supported by the grounds on the face of the application and the affidavit deposed upon on 13th October, 2021 by **Elizabeth Wanjiku Muthui**, the acting clerk Nyandarua County Assembly and based on the following grounds; -

a) That there are series of cases that have been filed arising from the impeachment of the Speaker of Nyandarua County Assembly, one Hon, Ndegwa Wahome for alleged misappropriation of funds and that this suit is one of the schemes used to by the embattled speaker to reinstate Mukiri Muchiri, the 2nd Claimant herein, as the county Assembly clerk in order to appropriate some public funds to finance the upcoming general elections, which he intends to vie for gubernatorial seat

b) That the several suits and counter suits have affected the operation of Nyandarua County whose funds are under threat of further misappropriation.

c) That there is a dispute as to who is the legally appointed acting clerk of the county assembly, despite the gazette notice number 10399 of 2021 appointing the 5th Respondent in the said position which Gazette Notice has not been vacated or stayed. Also that the claimants have stayed Gazette Notice number 10281 of 2021 which is unknown to the Respondents.

d) That as much as the court in **Nakuru Constitutional Petition Number E001 OF 2021 Hon James Wahome V Hon Zachary Mwangi Njeru & 8 others**, reinstated the impeached speaker to office, the said speaker lacks the majority members of the MCAs, therefore all County government executive Order are not passed, coupled with the fact that the said speaker has openly declared his interest to run for gubernatorial seat in the year 2022, further stalling the business of the said County assembly.

e) The Applicants stated that the impeached speaker wants to use Mukiri Muchiri to make preferential payment in aid of his gubernatorial campaigns in 2022 general elections.

f) That because of the nature of issue at hand its only proper that this Court direct parties to mediation and a report filed in Court to enable court give an appropriate remedy.

3. In response to the Application, the claimants filed a replying affidavit sworn on the 19th October, 2021, by the vice chairperson of the 1st Claimant, **John Kieru Wambui**, who is also the 1st Interested party herein, on its behalf and on behalf of the 2nd Claimant. The claimants opposed the said application on the following basis; -

a) The claimants averred that the 2nd claimant is the duly appointed acting county assembly clerk, having been appointed and gazzeted by the 1st Claimant and has been performing all his duties pertaining to the office of the county assembly clerk.

b) It is stated that the application is misconceived and incompetent for the reason that the deponent of the Supporting affidavit described himself as the acting county clerk when this Court had ruled on 20th May, 2021 that the 2nd Claimant is the legitimate acting county Clerk.

c) They then stated that any actions taken by the 2nd Respondent are illegal and of no consequences, further that the 5th Respondent was appointed by Reuben G Karanja an imposter who purported to be the vice chairperson of Nyandarua County assembly service board who had no authority to appoint or issue any gazette notices on behalf of the 1st Claimant.

d) That the attempt by jubilee party to remove the 2nd claimant together with Kariuki Muchiri was stayed by the Political Parties Dispute Tribunal through PPDT case No. E005 OF 2021 and the resolution passed by some members of Nyandarua County to replace them was stayed by the court vide Orders issued on 3rd June, 2021 leaving them as the legitimate occupiers of the said offices. Subsequently PPDT no. E005 OF 2021 was dismissed on basis that internal dispute resolution mechanism had not been exhausted leading to filing of PPDT Case No. E013 of 2021 which also granted the stay of the resolution to replace the 2nd claimant and a final judgment delivered on the 6th August, 2021 holding that the removal of the Kariuki Muchiri and the 2nd Claimant was unprocedural and illegal void and inconsequential, which decision was appeal at Nairobi High Court Appeal NO. E527 of 2021 however orders of status quo was maintained by Justice C. Meoli.

e) In addition, this Court in ELRC Cause no. E012 OF 2021, dismissed a suit by Reuben Rimui Karanja seeking to restrain the 2nd Claimant and his co-board member from interfering with their duties as purported members of the 1st Claimant.

f) Accordingly, that the actions of 4th Respondent appointing the 5th Respondent as the county clerk were done without authority and in violation of the various Court Orders. Further that appointment of a county clerk can only be done by at least Three (3) members of the 1st Respondent which was not the case here as the 4th Respondent unilaterally appointed the 5th Respondent.

g) They then stated that the application before court is not capable of being granted for the reason that the Applicant are not members

of the 1st Respondent therefore do not have locus to seek any of the orders sought. further that the signatory of the county assembly, who is the 5th Respondent herein is no longer an employee of the 1st Respondent having been dismissed on 3rd May, 2021, which decision has not been challenged in any form.

h) The appointment of the 5th Respondent as the acting clerk gazetted vide special gazette Notice No. 4749 and another Gazette Notice no. 10399 both done on 23rd September, 2021 by the 2nd and 4th Respondent Respectively all purportedly acting on behalf of the 1st Respondent, when none of them had no authority to act.

i) It is alleged that the only reason why the 1st Respondent has not resumed its normal operation is that the 2nd Respondent, 5th Respondent and Majority Leader Edinald Wambugu Kingori have refused to hand over the keys to the assembly electronic doors despite numerous court Orders. That the above persons were held in contempt of Courts in Nakuru High Court Petition Number E002 of 2021 and fined Kshs 200,000/- each and in default two months' imprisonment.

j) It is the claimants case that the Applicants are attempting through this application to prolong the issue by submitting it to a mediator instead of complying with the Court orders issued that would settle the matter.

k) That if the Orders of the Courts are obeyed there will be no issue to submit to the mediator therefore the Application is without merit and the same ought to be dismissed with costs.in any case that the Applicants are seeking for orders from this Court when they have failed to obey other orders granted by this Court thus to allow their application would insult the dignity and integrity of this Court.

4. The interested parties also filed a replying Affidavit in opposition of the Respondents application deposed upon on the 20th October, 2021 by **James Wahome Ndegwa** the speaker of the Nyandarua County Assembly and the 2nd Interested party in ELRC 10 of 2021 and the 1st Interested party in ELRC Cause No.11 of 2021.his affidavit was based in the following grounds; -

a) That the application before Court has been brought in bad faith, an attempt to defeat the various Court Orders issued by the Court. Further that the Applicant alleged to be the acting clerk of Nyandarua County Government when this Court had restrained her from assuming office and also having been terminated from the county assembly on the 3rd May, 2021, she ceased to be an employee of the county Government of Nyandarua therefore lacks authority to institute this suit on behalf of the County Government or carry out any function on behalf of the count.

b) It is stated that in defiance of the said Court Order the Applicant carried out appraisal, promoted 28 employees and backdated their wages and directorates were increased from 4 to 10 at the county assembly leading to public loss of funds.

c) That the Applicant, despite being in contempt of Court Orders are now submitting themselves before this Court seeking to be heard.

d) That the Applicants do not have authority to seek for order from this Court seeking for the matter to be taken for mediation for the reason that she is a stranger to the county government of Nyandarua having ceased from being an employee and for the reason that they have failed to obey this Court Orders.

e) It is contended that if the Applicant complied with the various court Orders issued across various court then there will be no issue left that will need to be mediated upon. In addition, that this application is a decoy by the Applicant to avoid purging the contempt of Court Orders issued in Nakuru Petition no. E002 of 2021 latest being on 4th October, 2021.

f) It was stated that the allegation of misappropriation of funds is not supported by any evidence. He also stated that he has never been subjected to any investigations on the alleged misappropriation of funds rather that it is the Applicants and his group that have been propped by EACC for suspected looting and misappropriation of public funds for the few months they illegally occupied the said offices.

g) that it is not in dispute as to who is the acting clerk of the Court assembly, therefore the purported government Notices were issued by persons who were not properly in office which Notice have the effect of being null and Void ab initio.

h) It was started that the mandate of the speaker is properly provided in law separate from the functions of the MCAs, therefore the issue of securing majority MCAs in carrying out the 1st Respondent's business is without any basis in law *vis a vis* the mandate of the speaker.

i) The Interested party then stated that the Application is without basis and the same ought to be dismissed.

5. This Application was disposed of by way of written submission.

Applicants Submissions.

6. The Applicants submitted on two issue; whether this is a dispute under the inter-governmental relations framework and whether this dispute can be referred for mediation by the inter-governmental Relations Technical Committee.

7. On the first issue, the Applicant cited the case of **Council of County Governors V Lake Basin Development Authority & 6 others**

[2017] eklr where the Court held that;-

“What constitutes a dispute within the context of the Intergovernmental Relations Act has received judicial construction by the High Court. In *Isiolo County Assembly Service Board & another vs Principal Secretary (Devolution) Ministry of Devolution and Planning & another* [31] Onguto J stated:-

‘The dispute must be between the two levels of government. It must not be between one or the other on the other hand and an individual or person on the other hand. A dispute between a person or State officer in his individual capacity seeking to achieve his own interest or rights would not equate an intergovernmental dispute. A dispute between two or more county governments would however equate an intergovernmental dispute: see section 30(2)(b) of the Act. By the better reason, it would also follow that where a state officer seeks through any means to advance the interest of a government, whether county or national, against another government whether county or national, then such a dispute would rank as an intergovernmental dispute.

What precisely amounts to an intergovernmental dispute is not expressly detailed either under the Constitution or the Act. Guidance may however be retrieved from both Articles 6 and 189 of the Constitution as well as from Section 32 of the Act. Articles 6 and 189 provide for respect, cooperation and consultation in the conduct of the two governments’ mutual relations and functions. The focus appears to be performance of functions and exercise of powers of each respective level of government. Section 32 of the Act however appears to precipitate even a commercial dispute as an intergovernmental dispute when the Section expressly refers to “any agreement” between the two levels of government or between county governments. The agreement, in other words, is not limited to that of performing functions or powers or that of guiding relations.”

8. Accordingly, it was submitted that the issue in this case revolves around impeachment of the Speaker and the running of the business of the county Assembly making it a perfect case to be resolved by a mediator under Intergovernmental Relations Framework.

9. It was further argued that the issue as who is the legitimate acting clerk remain unresolved as the 5th Respondent was appointed as the acting speaker on the 23rd September, 2021 vide gazette Notice number 10399 of 2021.

10. The Applicants insisted that the 2nd Claimant is rooted for to be the acting clerk to give the speaker a soft landing in looting public funds to support his bid of vying for gubernatorial seat in the year 2022. Also that their main interest is to look out for best interest of people of Nyandarua County.

11. On the second issue it was submitted that sections, 30,31 and 33 of the Intergovernmental Relations Act , provides for resolutions of dispute between governments by themselves or through an intermediary. It was argued that the constitution under Article 159(2)(c) and Article 189(3) emphasizes on the need to exhaust all alternative dispute Resolution mechanism and in this they cited the case of **Council Of Governors V Attorney General & 7 others [2019] eklr.**

12. The Applicant then prayed that the claim herein be submitted for mediation to resolved the issue in Nyandarua County Government once and for all.

1st Respondent submissions

13. The 1st Respondent in opposition of the Application submitted that the issue in dispute is between individuals in Nyandarua County and not between National and county Government or between County Governments as envisaged under section 30 of the Intergovernmental Relations Act. Therefore, that the intergovernmental Technical Relations Committee cited by the Applicant to mediate the issue herein lacks the requisite jurisdiction to mediate over the issue between the parties herein.

14. Accordingly, it was submitted that the issue is outside the jurisdiction of the intergovernmental technical Relations Committee. In addition, that the Applicants are contemnors who should not be granted audience by this Court since the contempt has not been purged. In this they buttressed their argument by citing the case of **Fred Matiangi, the Cabinet secretary ,Ministry of Interior and Coordination of National Government V Miguna Miguna and 4 others in civil Application No. 1 of 2017.**

Claimants Submissions.

15. The claimants submitted on two issues whether the matter should be submitted for mediation and whether this Honourable Court should stay further proceedings.

16. On the first issue, it was submitted that this Court already ruled on the 20th May, 2021 that the 2nd claimant is the legitimate appointed acting clerk of the assembly. Also that the Court stayed degazettment of County Speaker one Hon James Wahome Ndegwa, therefore any actions taken by any other person pending hearing and determination of Nakuru Petition No. E002 of 2021 was illegal, null and Void.

17. The claimant submitted that the application herein has been brought by the Applicants to enforce an illegality since the 2nd to 5th Respondent are in contempt of this Court and only raise this application to have this matter taken out for mediation to avoid purging the contempt. It was then argued that the illegality perpetuated by the Applicants ought to be quashed in this Court and not taken for mediation.in this they cited the case of **of County Government of Isiolo & 10 others V Cabinet secretary, Ministry of interior and coordination of National Government & 3 others [2017] eklr.**

18. It was further submitted that as much as Section 31 of the Intergovernmental Relations Act, provides for alternative dispute resolution mechanism which ought to be exhausted before a suit is filed in Court, the said Act only come in play when the dispute is between National

and County Government or between County Governments, which is not the case herein.

19. It was argued that the dispute in this case is among people in county government. They supported their argument by citing the case of **County Government of Mombasa V National Treasury & Another inter-Governmental Relations and technical Committee (Interested party) [2020] eKLR**.

20. On the second issue, it was submitted that stay of proceedings is at the discretion of this Court which ought to be exercised rationally and in the interest of justice.

21. They argued that the stay orders are sought by the Applicants who are in contempt of this Court which ordinarily should not be given any audience unless they purge the contempt or give reason for the failure to obey the said Order. In this they cited the court of Appeal case of **National Hospital Insurance Fund Board of Management V Boya Rural Nursing Home Limited[2007] eKLR** where the Court held that:-

“It is apparent from the ruling of the learned Judge that he understood the law to be that a contemnor who has made an application to set aside the order alleged to have been disobeyed cannot be heard on such application unless and until he has obeyed the order first and then question it later. If that is so, then the learned Judge with respect misapprehended the law for a court has an absolute discretion whether or not to hear a contemnor who has not purged the contempt. In *Hadkinson v Hadkinson* [1952] 2 All ER 567 Denning L.J. said at page 575:

“I am of the opinion that the fact that a party to a cause has disobeyed an order of the court is not of itself a bar to his being heard, but if his disobedience is such that, so long as it continues it impedes the cause of justice by making it more difficult for the court to ascertain the truth or to enforce orders which it may make, then, the court may in its discretion refuse to hear him until the impediment is removed or good reason is shown why it should not be removed”.

22. It was then submitted that the stay of proceedings would further delay the case herein and offend the realization of the overriding objective of this court facilitating just, proportionate and expeditious determination of civil dispute. Also that to allow a member of speaker panel to chair sitting in the county Government is a fraudulent prayer made to review Orders Granted by Justice Chemitei in Nakuru High Court Petition no. E002 OF 2021.

23. The claimant therefore urged this Court to dismiss the Application for lacking merit.

24. I have considered the averments and submissions of the parties herein. The issues for this court’s determination are two fold:-

1. Whether the issues raised by the applicants herein fall under the inter-governmental relations framework.

2. Whether the orders sought should be granted.

INTER GOVERNMENTAL RELATIONS FRAMEWORK

25. **“The Inter Governmental Relations Act No. 2 of 2012 is an Act of Parliament to establish a framework for consultation and co-operation between the national and County Governments and amongst County Governments, to establish mechanisms for the resolution of intergovernmental disputes pursuant to Acts 6 and 189 of the constitution and for connected purposes”.**

26. From this long title of the Act, the Act also provides mechanism for resolution of inter governmental disputes pursuant to the constitution.

27. Section 31 of the IGRA also provides that the National and County Governments shall take all reasonable measures to resolve disputes amicably and apply and exhaust the mechanism for alternative dispute resolution provided under the Act and any other legislation before resorting to Judicial proceedings as contemplated by Act 189 (3) 2(4) of the constitution.

28. In opposing this application the respondents submitted that the issues in court fall outside the ambit of this court’s jurisdiction because the dispute is between individuals and not between counties.

29. The claimant also submitted that the issues herein have already been determined by this court vide its ruling on 20th May, 2021 that the 2nd claimant is the legitimate appointed Acting Clerk of the assembly and also staying the de-gazettement of the County Speaker James Wahome Ndegwa.

30. They also argue that the dispute herein is not between National and County Government. My consideration of the dispute before me shows that the dispute in the 3 files before me relate to the office of the County Speaker of Nyandarua County Assembly one Wahome Ndegwa. The said speaker had been impeached by the Assembly but was reinstated by the court.

31. It has been argued that the suits have paralyzed the operations of Nyandarua County where funds are under threat. The applicant argued that the speaker though reinstated lacks the majority members of the MCAs who have shot down all county Government executive orders.

32. The issue then is whether the issue herein relates to individual persons or the county operations and therefore falling under disputes amongst County Governments.

33. The envisaged disputes under the IGRA referred to as disputes between County Governments in my view refer to disputes between 2 different counties. The dispute herein however revolves around one county where different factions have disagreements.

34. The issue of what constitutes a dispute within the context of the IGRA was discussed in **Isiolo County Assembly Service Board and Another VS PS (Devolution) (Supra)** where the learned Judge aptly found that the dispute must be between the two levels of government. It must not be between one level of government on one hand and an individual or person on the other hand.

35. The same position was enunciated in **County Government of Mombasa vs National Treasury and another VS IGRA and Technical Committee (Supra)** where the court emphasized the fact that a dispute under the IGRA is not a dispute amongst people but between the National and County Governments or amongst County Governments.

36. The dispute herein being between different individuals and the Nyandarua County Assembly does not in my view fall under the IGRA.

37. The 7th & 8th respondents submitted that the matter should be placed before the Inter Governmental Relations Technical Committee for mediation in relation to Section 189 of the constitution. Indeed Article 189 of the Constitution emphasizes its corporation between the national and county governments but not the resolution of disputes between warring factions in the county.

38. Article 159 (2) (d) of the constitution however empowers courts to administer justice without undue regard to procedural technicalities. Article 159 (2)(c) also advocates for alternative form of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanism whereas the dispute before me may not fall directly under the Intergovernmental Relations Act, this is not a bar to the parties attempting to resolve this issue through any other means other than through the court process.

39. In the circumstances and in order to avoid greater miscarriage of justice to the inhabitants of Nyandarua County I will allow parties to attempt ADR as prayed by the applicants herein.

40. The mediation process will be undertaken by the Inter Governmental Technical Relations Committee within a period of 30 days.

41. Costs in the cause.

RULING DELIVERED VIRTUALLY THIS 17TH DAY OF NOVEMBER, 2021.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:-

Sitati holding brief for Peter Wanyama for 2nd to 5th Respondent/Applicants - present

Mwaniki holding brief for Githinji for 1st respondent and holding brief for Kipkoech for claimant – present

Court Assistant - Fred