



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

PETITION NO. 24 OF 2019

(Before Hon. Justice Mathews N. Nduma)

NERRY OTIENO ACHAR.....PETITIONER

VERSUS

THE COUNTY ASSEMBLY OF KISUMU.....1ST RESPONDENT

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

JUDGMENT

1. The County Assembly of Kisumu was due to sit on 7th August 2019 to deliberate the report of the select committee appointed to investigate the conduct of the petitioner following a motion of impeachment passed by more than $\frac{1}{3}$ of all the members of the County Assembly.

2. The petitioner was invited by the select committee to appear before it either on 3rd or 4th August 2019 which two days were Saturday and Sunday. This short notice was necessitated by the need to comply with strict timelines under *Section 40 of the County Governments Act 2012* and *standing orders Rule 65* which provides that the select committee must investigate and submit the report to the County Assembly within 10 days which period started running from 30th July 2019 and was due to lapse on 9th August 2019.

3. The petitioner prays for orders for:

a. A declaration that within the intendment of *Article 10 of the Constitution*, the Respondents are bound by the key national values and principles, to wit, the rule of law.

b. A declaration that within the intendment of *Article 50(1) of the Constitution*, a person facing impeachment proceedings under *section 40 of the County government Act 2012* is entitled to be supplied with documents in support of the allegations before the start of the impeachment proceedings.

c. A declaration that within the intendment of *Article 50 (1) of the Constitution*, a person facing impeachment proceedings under *section 40 of the County Government Act 2012* is entitled to be given reasonable time to prepare a defense.

d. A declaration that impeachment proceedings against the petitioner made pursuant to a Motion by Steve Ouma Owiti, MCA and approved by the County Assembly of Kisumu on 30th July 2019 are a nullity because of violations of *Article 50(1) of the Constitution*.

e. An order of Certiorari to remove into this Court and quash the decision of the County Assembly of Kisumu to recommend the removal from office of the Petitioner pursuant to impeachment proceedings made pursuant to a Motion by Steve Ouma Owiti, MCA and approved by the County Assembly of Kisumu on 30th July 2019.

4. The nub of the petition is that the petitioner allege violation of his right to a fair hearing under *Article 50(1) of the constitution* on the conduct of the initiated impeachment proceedings against him. The petitioner seeks the primary relief of an order of certiorari to quash the decision of the County Assembly of Kisumu to recommend the removal from office of the petitioner pursuant to impeachment proceedings made pursuant to a motion by Steve Ouma Owiti, MCA approved by the County Assembly of Kisumu on 30th July 2019.

5. The petition is opposed by the respondents who depose that due process was fully followed in the unfinished impeachment process against the petitioner. That the petitioner has admitted that he was invited to appear before the select committee on 7th August 2019 by a letter dated 4th August 2019.

6. That instead of responding to the letter dated 4th August 2019, the petitioner rushed to court on 5th August 2019 and obtained conservatory orders. That the suit is presumptive and premature in that no decision has been made by the Assembly to impeach the petitioner.

7. That the petitioner has assumed that a vote approving his impeachment shall be carried and that a majority of the members of the Assembly shall support the motion.

8. That the intervention by the court violates the principle of separation of powers. That the court may only interfere with action of legislature upon the making of a final decision by the Assembly which has not happened. That such intervention may rarely occur upon a clear violation of the constitution by the Assembly. That such a case has not been proved by the petitioner.

9. Wherefore, the petition be dismissed with costs.

Determination

10. The issues for determination are:

a. Whether the petitioner has made out a case for issuance of a final conservatory order.

11. This court is guided by the decision of the Supreme Court in *Gatirau Peter Munya vs Dickson Mwenda Kithinji and 2 others (2014) eKLR* that:

“(86) “Conservatory orders” bear a more decided public law connotation for these are orders to facilitate ordered functioning within public agencies as well as to uphold the adjudication of authority of the court in the public interest. Conservatory orders, therefore are not unlike interlocutory injunctions linked to such private party, issues as “the prospects of irreparable harm” occurring during the pendency of a case or “high probability of success” in the supplicant’s case for orders of stay. Conservatory orders consequently should be granted on the inherent merit of a case bearing in mind the public interest, the constitutional value, and the proportionate magnitudes and priority levels attributable to the relevant causes”

12. It is beyond peradventure that the petitioner came to court before the County Assembly gave him a hearing before the select committee in terms of the invitation letter dated 4th August 2019. It was open to the petitioner to respond to the letter dated 4th August 2019 and demand provision of necessary documents and/or extension of time before coming to court. The petitioner pre-empted proceedings of the County Assembly and prematurely approached court before presenting himself before the select committee on 7th August 2019.

13. The presumption by the petitioner that the County Assembly will make a final adverse decision against him is not a foregone conclusion. It is not for the court to second guess the outcome of an otherwise lawful process by an independent organ of County government.

14. Public interest dictates that this process by the County Assembly progress to conclusion to address the various issues raised against the petitioner. Whether or not the issues raised meet the threshold under *Section 40 of the County Governments Act*, is a matter to be addressed once the matter has progressed to conclusion.

15. In the final analysis the court finds that the inherent merit of the case has not been established to warrant issuance of a conservatory order at this stage.

16. The petition is therefore dismissed with costs.

Judgment Dated, Signed and delivered this 10th day of March, 2020

Mathews N. Nduma

Judge

Appearances

Manyonge Wanyama and Associates Advocates for the petitioners.

Okongo Wandago and Company Advocates for the Respondents

Chrispo – Court Clerk