



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

PETITION NO. 35 OF 2020

IN THE MATTER OF THE CONTRAVENTION & THREATENED CONTRAVENTION OF

ARTICLES 1,2, 3,6,10,27(1), 28,35(1) (b), 41(1), 47, 165 (3) (a), (b), (4), 175, 176, 181,

195, 232, 236 & 258 OF THE CONSTITUTION OF KENYA

IN THE MATTER OF THE CONSTITUTION OF KENYA IN SO FAR AS THE

CONSTITUTION HAS BEEN, AND STANDS TO BE VIOLATED

IN THE MATTER OF SECTION 33 OF THE COUNTY GOVERNMENT ACT

IN THE MATTER OF STANDING ORDERS 67 AND 72 OF THE

NAIROBI CITY COUNTY STANDING ORDERS

IN THE MATTER OF THE CHALLENGE OF THE ULTRA VIRES,

UNCONSTITUTIONAL, UNLAWFUL AND THREATENED

IMPEACHMENT OF THE PETITIONER & UNLAWFUL REMOVAL

FROM THE OFFICE OF GOVERNOR, NAIROBI CITY COUNTY

AND

IN THE MATTER OF A CONSTITUTIONAL PETITION

BETWEEN

HON. MIKE SONKO MBUVI GIDION KIOKO.....PETITIONER

VERSUS

THE CLERK, NAIROBI CITY COUNTY ASSEMBLY.....1ST RESPONDENT

THE SPEAKER, NAIROBI CITY COUNTY ASSEMBLY.....2ND RESPONDENT

THE NAIROBI CITY COUNTY ASSEMBLY.....3RD RESPONDENT

HON. PETER ANYULE IMWATOK.....4TH RESPONDENT

THE SPEAKER, SENATE OF KENYA.....5TH RESPONDENT

RULING

The petitioner filed the petition and an urgent application on 28.02.2020 through J. Harrison Kinyanjui & Company Advocates. The petitioner is challenging the impeachment proceedings that have been initiated against him with the aim of his being removed from the office of Governor for the Nairobi City County Government. Upon listening to counsel for the parties present on 02.03.2020 the Court ordered:

- 1) That the respondents to file and serve their respective replying affidavit by close of 04.03.2020 and petitioner and 1st respondent may file further supporting affidavits by close of 06.03.2020.
- 2) That pending the interpartes hearing of the application or further orders by the court the proposed motion by the 4th respondent herein for the proposed impeachment of the petitioner herein as scheduled in Notice Paper 1 on Tentative Business of the 3rd respondent on Tuesday 3rd March 2020 or as may be adjourned to another date and time shall not proceed except in strict compliance with the provisions of standing order Nos. 67 and 72 of the 3rd respondent.
- 3) That mention on 09.03.2020 at 9.00am or soon thereafter as will be called out in court.
- 4) That today's costs in the cause.

The 2nd respondent filed on 04.03.2020 a notice of preliminary objection through Diro Advocates LLP. The preliminary objection states that at the hearing of the petition and motion dated 27.02.2020 the 2nd respondent will raise a preliminary objection and shall pray that the same be struck out with costs on the grounds that:

- 1) The jurisdiction of the Court is strictly limited to the jurisdiction conferred to it through the Constitution and the Employment and Labour Relations Court Act together with the Employment and Labour Relations Court (Procedure) Rules.
- 2) The petitioner has not established an employer-employee relationship to invoke the jurisdiction of the Honourable Court.
- 3) The application contravenes a fundamental principle of law that maintains that all three organs of government remain separate and should not encroach upon each other.
- 4) The application is totally misconceived, bad in law and an abuse of Court process.

Parties consented and the Court directed that the preliminary objection be heard in priority to the petitioner's application. The interim orders have continued to be extended in that regard. This ruling is on the preliminary objection.

The 2nd respondent filed the submissions on the preliminary objection on 10.03.2020. It was submitted as follows:

1) The jurisdiction of the Court is as provided for in Article 162(2) of the Constitution and section 12 of the Employment and Labour Relations Court Act, 2011. The Court's jurisdiction relates to employment and labour relations- disputes relating to or arising out of employment between an employer and an employee. Under section 12 of the Act the dispute must be between an employer and employee. The Act defines employee as a person employed for wage or salary and employer as a person, public body, firm, corporation or company which has entered into a contract of service to employ an individual. Further rule 7 (1) of the Employment and Labour Relations Court (Procedure) Rules 2016 provides that a petition may be filed in the Court but it must be predicated on a contract of service. There exists no employer-employee relationship between the petitioner and the respondents and the Court's jurisdiction cannot be invoked in that regard. The 2nd respondent relies on **Re The Matter of Interim Independent Electoral and Boundaries Commission [2011] eKLR** where the Supreme Court stated thus, "Assumption of jurisdiction by Courts in Kenya is a subject regulated by the Constitution, by statute law, and by principles laid out in judicial precedent...jurisdiction flows from the law, and the recipient court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours...." Again in **Samuel Kamau Macharia-Versus- Kenya Commercial Bank Limited & 2 Others[2012]eKLR**, the Supreme Court stated, "A Court's jurisdiction flows from either the constitution, or legislation or both. Thus a Court of law can only exercise jurisdiction as conferred on it by law. It cannot arrogate to itself jurisdiction exceeding that, which is conferred upon it by law...where the constitution exhaustively provides for jurisdiction of a Court of law, it must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation...."

2) It is submitted that the Court must preserve the delicate balance on institutional comity between the three arms of government and the Court should not supervise the workings of Parliament or even the County Assembly. The institutional comity between the three arms of government must not be endangered by the unwarranted intrusions into the workings of one arm by another and should there arise a necessity to warrant the intrusion, then the same should be a preserve of the Apex Court as was held by the Supreme Court in **In the Matter of the Speaker of the Senate & Another [2013]eKLR** citing the South African case, **The President of the Republic of South Africa & Others –Versus- South African Rugby Football Union & Others (CCT16/98) 1998 ZACC 21**. It was submitted that the Court should preserve the delicate balance and not to be seen to be intruding into political sphere by downing its tools for there exists no cause of action of which the Court can be called upon to invoke its exclusive jurisdiction. The petition being misconceived it should be struck out.

The 3rd respondent filed the submissions dated 14.07.2020 through Ngira Advocates LLP. The 3rd respondent's submissions are that there

exists no employer-employee relationship between the 3rd respondent and the petitioner within the definition of employee and employer under section 2 of the Employment Act, 2007. The 3rd respondent referred to section 12 of the Employment and Labour Relations Court Act, 2011 and like the 2nd respondent submitted that there being no employer-employee relationship, the Court lacked jurisdiction. It was further submitted that a Governor like the petitioner was a state officer and not a person in public service (which under Article 260 definition excludes a state officer) and therefore, the petitioner could not claim employer-employee relationship. The 3rd respondent therefore supported the preliminary objection.

The petitioner filed the submissions on 21.07.2020. it is submitted for the petitioner as follows:

1) It is clear from the pleadings in the petition and the application that the jurisdiction of the Honourable Court is properly invoked because the petitioner's complaints implicating labour relations as between the petitioner and the constitutional persons mandated to interfere with the said labour relations are subject of adjudication in the suit. The petitioner's labour rights are under threat and the proper place to vindicate his concerns in in the Court as moved. The petitioner relies on **Council of County Governors –Versus- Lake Basin Development Authority & 6 Others [2017]eKLR** (Mativo J) thus, **“26. On principle it seems to me that in general a Court is bound to entertain proceedings that fall within its jurisdiction. Put differently, a court has no inherent jurisdiction to decline to entertain a matter within its jurisdiction. Jurisdiction is determined on the basis of pleadings and not the substantive merits of the case.”** Thus to determine if the Court has jurisdiction, the pleadings have to be looked at.

2) The issue in the petition is impeachment of the petitioner in a process purportedly invoking Article 181(1) (a), (b) and (c) of the Constitution as read with section 33 of the County Government Act, 2012 and standing order No. 67 of the Nairobi City County Assembly Standing Orders, implicating the cited respondents. The provisions deal with removal of the Governor from office by way of impeachment. The removal from office is invariably cessation from employment and which implicates the petitioner's labour rights.

3) The Court enjoys jurisdiction per Article 165(2) (b) of the Constitution to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened as read with Articles 165(5) (b) and 162(2) (a) on the jurisdiction of the Court over employment and labour relations disputes and to grant the reliefs as per Articles 22 and 258 of the Constitution of Kenya 2010.

4) Accordingly, the 2nd respondent has failed to raise a preliminary objection on the standards established in **Mukisa Biscuits Manufacturing Co. Ltd –Versus- West End Distributors [1969] EA 696** which held that a preliminary objection raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct and, it cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion. The declarations prayed for in the petition fall within the Court's discretion to grant and the preliminary objection must fail.

5) The 2nd respondent concedes and submits that section 12 of the Employment and Labour Relations Court Act, 2011 does not state what kind of dispute it must be as long as it is a dispute between an employer and an employee relating to employment. The petitioner has invoked Article 41 of the Constitution in seeking to vindicate his labour rights as envisaged under Article 27(1) of the Constitution of Kenya.

6) The petitioner relies on **Richard Bwogo Birir –Versus- Narok County Government & 2 others [2014]eKLR** thus, **“The engagement of public and state officers in the new Republic does not rest and revolve upon the private consent of persons who are involved to conclude the employment contract. The Court holds that the persons involved conclude the contract for and on behalf of the people of Kenya within the stipulated constitutional and statutory safe-guards and the persons have no private consents that override the safe-guards. The conclusion of the arrangements that constitute the contract of public service is a public rather than a private action. Thus, if only for the dichotomy of private right and public law, the court has arrived at the compelling finding that in the new Republic, public and state officers are employed upon a framework beyond the private consents but predetermined and regulated by constitutional and statutory prescriptions; essentially, largely public and remotely private realms.”** And further, in the same case, thus, **“The Court holds that the subjective judgments of individual government persons should not be allowed to override the objective criteria set in the Constitution and relevant statutes for the good delivery of our public and state service. Where such subjective judgments of individual government persons infringe on others constitutional and statutory rights and protections like in the present case, it is the opinion of the Court that a proper remedy would be available to vanquish the offensive decision.”**

7) The petitioner further relies on **Shadrack Wangómbe Mubea –Versus- County Government of Nyeri & Another [2015]eKLR** thus, **“Needless to state, provisions in Article 41 of the Constitution conferring the fundamental right to fair labour practices are universal as they apply to all employees including public and state officers as employees of the people and the Article applies to public and state officers subject only to such qualifications or limitations that may be enacted as provided for in Article 24 and 25 of the Constitution. To the extent that the Employment Act, 2007 implements the right to fair labour practices as enshrined in Article 41 of the Constitution, in absence of an express relevant constitutional or legislative provision or qualification, in the opinion of this court, there would be no justification to bar public and state officers from enjoying the minimum terms and conditions of employment as provided for in the Act.”** The petitioner is the Governor of the Nairobi City County and is a state officer under Article 260(h) of the Constitution of Kenya. As a state officer and service thereof he receives remuneration as set by the Salaries and Remuneration Commission and now seeks the protection of the Court as per Articles 41 (1) and 27(1) of the Constitution. The petitioner meets the definition of an employee and the *forums conveniens* for the dispute is the Court which has the relevant jurisdiction.

8) The Court is entitled to intervene whenever standing orders of a county assembly such as the 3rd respondent is violated or disobeyed. The Court's jurisdiction cannot be ousted from investing the legality and constitutionality of the process of impeachment of the petitioner. The petitioner relies on **Beatrice Kedeveresia Elachi –versus- Nairobi City County Assembly Service Board & Another [2018]eKLR** where Radido J held that an inquiry can only be conducted after giving all the concerned parties an

opportunity to bring forth all attendant facts and law, a scenario which the objections raised in that case attempted to suppress.

9) As per the opinion in Justus Kariuki Mate & Another –Versus- Martin Nyaga Wambora & Another, Supreme Court Petition No. 32 of 2014, the Court will be reluctant to question parliamentary procedures as long as they did not breach the Constitution. In the instant case, the petitioner has clearly pointed out that there was no compliance with standing orders of the Nairobi City County Assembly in processing the impeachment motion seeking the ouster of the petitioner and the Court is entitled to entertain the claim.

The Court has considered the submissions and the preliminary objection and makes findings as follows.

First, there is no doubt that a state officer like the petitioner who is a Governor is in employment of the state. He is clearly an employee within the definition of an employee under the Employment Act, 2007 because he is paid a salary. As submitted for the petitioner his employment is governed by the relevant constitutional and statutory provisions and where necessary, the provisions of the Employment Act, 2007. The Court upholds its holding in Richard Bwogo Birir –Versus- Narok County Government & 2 others [2014]eKLR and Shadrack Wangombe Mubea –Versus- County Government of Nyeri & Another [2015]eKLR respectively.

Further, the Court follows its opinion in Okiya Omtatah Okoiti -versus- The Hon. Attorney General; and Ambassador Francis Muthaura and Others (interested parties) [2019]eKLR thus, “**The Court has held that public officers are servants of the people and are engaged or employed within a framework of constitutional and statutory provisions as well as lawful policies and practices. The Court finds that the dispute relates to employment of public officers as defined in the Constitution and further relates to applicable constitutional and statutory provisions or lawful policies and practices in that regard and the dispute is clearly within the Court’s jurisdiction.**” In the instant case the matter relates to impeachment process with respect to the petitioner’s service as a Governor. The Court finds that the impeachment is clearly a disciplinary process for removal of the petitioner from office. Disciplinary process is obviously a human resource function being undertaken within the relevant constitutional and statutory provisions and the Court returns that the dispute is within its constitutional and statutory jurisdiction to decide disputes about employment and labour relations.

Second, the Court follows its opinion in in Abdikadir Suleiman –Versus-County Government of Isiolo and Another [2015]eKLR thus:

“As stated by the court earlier in this judgment, the original and unlimited jurisdiction to make a finding on legitimacy or lawfulness of decisions in disputes between employers and employees rests with this court as vested with the appropriate jurisdiction under Articles 159(1), 162 (2) (a) as read with Article 165(5) and (6) of the Constitution; Articles 22(1) and 258(1) of the Constitution, and the provisions of the Employment and Labour Relations Act, 2011. The court holds that the jurisdiction spreads to all issues in the employment relationship and related matters including the enforcement of the fundamental rights and freedoms under Article 22 of the Constitution and enforcement of the Constitution under Article 258 as far as the issues in dispute are, evolve, revolve or relate to employment and labour relations. The court holds that the compass or golden test for the court’s jurisdiction is the subject matter in the dispute namely disputes relating to employment and labour relations as provided for Article 162 (a) of the Constitution and as amplified in the Employment and Labour Relations Court Act, 2011 and not the remedies sought or the procedure of moving the court or the situ of the applicable law or any other extraneous considerations as may be advanced by or for a litigant.”

Again the Court follows the opinion in its recent ruling delivered on 12.04.2019 in Okiya Omtatah Okoiti –Versus- The National Executive of the Republic and 6 Others [2019]eKLR, thus,

“The Court has also held that in the public service under the Constitution of Kenya 2010, there are no masters and servants so that in public service in the new Republic, the test of master – servant does not obtain towards establishing existence of employment. In Paul Nyadewo Onyango –Versus- Parliamentary Service Commission and Another [2018]eKLR the Court stated, “In the present case, the Court will not therefore place emphasis on the relationships between individual public or state officers. None was a servant or master of the other. What is paramount, in the opinion of the Court, is that the officers interrelate and work together within the lawful prescription of the standards of a good public service delivery. They have no private treaties binding one officer to the other but only the constitutional, statutory and lawful policies or practices that are applicable to the public service and incorporated in the individual officer’s contract of service.”

Again in Richard Bwogo Birir –Versus- Narok County Government and 2 Others [2014] eKLR the Court stated **“The court has carefully considered the enumerated constitutional provisions and holds that all persons holding public or state office in Kenya in the executive, the legislature, the judiciary or any other public body and in national or county government are servants of the people of Kenya. The court holds that despite the level of rank of state or public office as may be held, no public or state officer is a servant of the other but all are servants of the people. Thus, the court holds that the idea of servants of the crown is substituted with the doctrine of servants of the people under the new Republic as nurtured in the Constitution of Kenya, 2010. The hierarchy of state and public officers can be complex, detailed and conceivably very long vertically and horizontally but despite the rank or position held, the court holds that they are each a servant of the people and not of each other as state or public officers. They are all the servants of the people. The court holds that there are no masters and servants within the hierarchies of the ranks of state and public officers in our new Republic.”**

Thus to answer the preliminary issue the Court returns that it has jurisdiction to entertain the present petition. The Court adds that whether it is about employment law or policy or about individual public officer’s grievances, the jurisdiction of the Court would properly be available in that regard.

Third, parties are in agreement that the Court’s jurisdiction flows from Article 162(2) (a), Article 165 (5) (b) and the provisions of the Employment and Labour Relations Court Act, 2011. There is no doubt that the dispute is about whether the initiated impeachment proceedings are continuing in accordance with the relevant provisions of the standing orders and the Constitution. The Court has already found that impeachment is in the nature of a disciplinary process that may lead to the petitioner’s removal from office as is clearly a human

resource function that squarely falls under the jurisdiction of the Court and the Court enjoys the relevant jurisdiction. Section 12(1) of the Employment and Labour Relations Court Act, 2011 is clear that the Court has exclusive original and appellate jurisdiction to hear and determine disputes referred to it in accordance with Article 162(2) of the Constitution and the provisions of the Act or any other written law. Section 12 (2) of the Act (which the parties appear to have failed to refer to) further provides that an application, claim or complaint may be lodged with the Court by or against an employee, an employer, a trade union, an employer's organisation, a federation, the Registrar of Trade Unions, the Cabinet Secretary or any office established under any written law for such purpose – and by that provision, it is clear that in the instant petition the petitioner (as an employee) has by way of the petition lodged a complaint against the respondents. The Court further holds that by reason of section 12(2) of the Act the proceedings are not limited to parties listed in section 12(1) of the Act but the jurisdiction spreads to disputes about employment even by and against persons not being employees or employers or parties to the contract of service. The Court finds that to be the case especially in view of Article 162(2) as read with Article 165 (5) (b) of the Constitution.

Third, the Court finds that by entertaining the petition it is not undermining the delicate balance on institutional comity between the three arms of government and the supervising the workings of Parliament or even the County Assembly. The Court further finds that by entertaining the petition it is not thereby intruding in the political realm of things. As submitted for the petitioner, the Court enjoys the jurisdiction and it is justiciable for the Court to intervene where it is shown that the impeachment proceedings are going on in contravention of the relevant constitutional and statutory provisions or standing orders. Article 260 of the Constitution states that “**public office**” means an office in the national government, a county government or the public service, if the remuneration and benefits of the office are payable directly from the Consolidated Fund or directly out of money provided by Parliament. Thus whereas under the Article, “**public service**” means the collectively of all individuals, other than state officers, performing a function in a state organ, by definition of public office, state officers equally hold a public office and qualify as public officers. Accordingly, the Court finds that the justiciability of the present petition alleging unconstitutional and illegal impeachment process is properly anchored on Article 236 of the Constitution on protection of public officers. The Article provides that a public officer shall not be:

- a) victimised or discriminated against for having performed the functions of office in accordance with the Constitution or any other law; or
- b) dismissed, removed from office, demoted in rank or otherwise subjected to disciplinary action without due process of law.

The Court considers that the petitioner's case is based on Article 236 (b) thereof and he was entitled to invoke the Court's jurisdiction. The Court further returns that as submitted for the petitioner, issues of constitutionality and legality of the impeachment process are justiciable and fall within the determination by the Court. While making that finding the Court considers that it should be obvious that where it is alleged that in the process of impeachment as prescribed in the Constitution, statutes and standing orders is proceeding unlawfully or unconstitutionally in any particular case, it should be possible for the aggrieved person to move the Court for appropriate remedies such as declarations and judicial review remedies. Thus the Court upholds and follows its opinion in the ruling in Abdikadir Suleiman –Versus-County Government of Isiolo [2015]eKLR thus, “**The court says it in other words as follows. The Constitution or legislation may provide that a person or public body or authority shall not be subject to the direction or control of any other person or authority in the exercise of any functions or powers as vested in the person or authority or public body by the Constitution or legislation. The Constitution or legislation may also vest in a person or authority or public body the power or function to consider or entertain given disputes or matters as of first instance or on appeal and to render decisions in that regard in accordance with the prescribed procedures. In the opinion of this court, such constitutional and legislative provisions shall not be construed as precluding a court from exercising the relevant jurisdiction in relation to any question whether that person or authority or public body has exercised the powers or functions in accordance with the Constitution or any other law. The court holds that such provisions do not oust or extinguish or adjourn the court's jurisdiction to hear and determine a dispute about the legality or the manner of the exercise of the constitutional or statutory powers and functions by the relevant person, public body or authority as may have been vested in the person, public body or authority under the Constitution or statute.**”

The court is alert that under Article 159(2) (b) justice shall not be delayed and under Article 159 (2) (e) the court is guided that in exercise of judicial authority, the purpose and principles of the Constitution shall be protected and promoted. Under Article 159 (1) judicial authority is vested in the judiciary and it is the opinion of the court that issues of legality of actions or omissions is the immediate and proper primary or original province and jurisdiction of the court and is not the penultimate or initially ceded jurisdiction of persons, public bodies and authorities outside the judiciary. In the opinion of the court, it would amount to delayed justice to tell the claimant thus, “**The court knows your alleged case is that an illegality has taken place; you challenge the alleged illegality; on merits of the challenged decision you ought to appeal to the Commission; the Commission has no jurisdiction to consider issues of illegality as you have alleged in your case but it might consider it and may rule in your favour; and therefore, though this court has the primary jurisdiction to consider the issue of illegality as you have alleged, you ought to have gone to the Commission in the first instance just to see if the Commission might have considered the issue of illegality before you moved this court and your case is dismissed accordingly for failure to give the Commission chance to exercise the speculative and hopeful jurisdiction on that issue of alleged illegality. While....**” Thus, the Court finds that as submitted for the petitioner, he needs not wait for his rights and fundamental freedoms to be violated and thereafter move the Court but he is entitled to arrest the alleged threatened violation as is purportedly done in the instant petition and application accompanying the petition.

In conclusion the preliminary objection dated and filed on 04.03.2020 for the 2nd respondent is hereby dismissed with orders:

- 1) The 2nd respondent to pay the petitioner's costs of the preliminary objection.
- 2) The interim orders herein given on 02.03.2020 as extended are hereby extended until further orders by the Court or until the next mention date.
- 3) Parties to take steps for the expeditious hearing and determination of the petitioner's application dated 27.02.2020 as well as the petition and for that purpose mention on 27.10.2020 as will be listed and called out for relevant and further directions.

Signed, dated and delivered by the court at Nairobi by video-link this Friday 23rd October, 2020.

BYRAM ONGAYA

JUDGE