



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

PETITION NO. 58 OF 2018

(Before Hon. Justice Mathews N. Nduma)

HON. OMOTI DUKE MAOSA.....PETITIONER

VERSUS

THE SPEAKER OF THE NYAMIRA COUNTY ASSEMBLY...1ST RESPONDENT

THE NYAMIRA COUNTY ASSEMBLY.....2ND RESPONDENT

MOSE ABEL MOKAYA.....3RD RESPONDENT

ROBINSON BUSENI MOCHECHE....INTERESTED PARTY/4TH RESPONDENT

RULING

1. Application serving before court for determination is dated 3rd August 2018. Interim orders were not granted when the application was placed before Radido J. on 11th September 2018 in the first instance. Interim orders were granted on 4th October 2018 when Advocates for both parties appeared before me. Application seeking to discharge the interim orders dated 15th October 2018 was filed. This application was deemed as a response to the Application dated 3rd August 2018 and directions were given on filing of written submissions. Application to join the interested party was not opposed and was granted.

2. The petitioner is a Deputy Speaker of the respondent. The petitioner was removed as a deputy speaker of the Assembly by his peers on 16th August 2018 pursuant to a motion of 15th August 2018. A new deputy speaker was elected since then and has continued to transact business in the Nyamira County Assembly.

3. The petitioner seeks interim orders to restore him to the position of deputy speaker pending the hearing and determination of the petition. Hansard report for Nyamira county Assembly plenary proceedings for 15th and 16th August 2016 were produced by consent of the parties. This is the record of proceedings during the removal of the petitioner as deputy speaker and his replacement.

Response

4. The Supporting Affidavit sworn by Moffat Teya, a resident of Nyamira County to the application to set aside the interim orders in the present application was deemed to be the substantive response to the current application. The interested party Robinson Buseni Mocheche also deposes to an affidavit sworn on 15th October 2018 in which he places the facts of the dispute in perspective.

5. The nub of the response is that on 16th August 2018, the interested party was elected as Deputy Speaker of County Assembly of Nyamira and commenced discharging his mandate under Article 178 of the constitution of Kenya. That the interested party effectively replaced the petitioner/applicant in the position of deputy speaker.

6. That a motion tabled on 14th August 2018 was prosecuted and passed on the floor of the house on 15th August 2018 pursuant to the motion- the Petitioner/Applicant was voted out.

7. That the Hansard proceedings of 15 and 16th August 2018 produced in court vide supplementary Affidavit by the respondent filed on 2nd November 2018 demonstrates the fact.

8. That the interested party was sworn and assumed office on 16th August 2018. That the present application was filed on 15th August 2018 and interim orders issued on 4th October 2018 without material disclosure to the court of the status quo.

9. That the petition and application filed on 15th August 2018 and interim orders issued on 4th October 2018 came too late in the hour.

10. That the application lacks merit and it be dismissed.

Determination

11. The issues for determination are whether the Petitioner/Applicant has satisfied the requirements for grant of interim orders pending the hearing and determination of the petition.

12. The court has carefully considered the submissions by the parties and finds that the Petitioner/Applicant has failed to satisfy the requirements for grant of interim orders set out in ***Giella vs Cassman Brown Ltd and the Supreme Court in Gitirau Munya Case*** in the following respects:

13. The applicant has not made out a prima facie case that at the time he approached court he was still the Deputy Speaker of the County Assembly of Nyamira and was therefore entitled to an interim injunction to retain him in that position. Furthermore, the position of Deputy Speaker is an elected, non-substantive position by members of the County Assembly of one of their own to stand in place of the speaker in his absence.

14. The applicant has not demonstrated that he stands to suffer any irreparable harm that cannot be remedied by way of damages if the injunction is not granted and he is eventually successful in the petition.

15. Furthermore public interest dictates that constitutional organs whilst checking each other respect the specific mandates of each organ. There are extra ordinary circumstances to dictate otherwise. The Applicant has not disclosed such extra ordinary circumstance in this case. He is a member of the County Assembly of Nyamira who has been removed from a non-substantive position of deputy speaker by his peers.

16. The court does not wish to delve into the merits or otherwise of the disputed facts at this stage and reserves them for determination upon hearing of the petition.

17. Accordingly, the application for conservatory orders lack merit and is dismissed. Costs in the cause.

Ruling Dated, Signed and delivered this 9th day of July, 2019

Mathews N. Nduma

Judge

Appearances

Mr. Munwango for Applicant.

Mose Nyambega for Respondent and interested party

Chrispo – Court Clerk