



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION NO. 172 OF 2019

IN THE MATTER OF: THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: ALLEGED CONTRAVENTION AND VIOLATION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF INDIVIDUALS AS ENSHRINED UNDER ARTICLES 179 (2), (5) & (6) OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

IN THE MATTER OF: THE DOCTRINE OF LEGITIMATE EXPECTATION, REASONABLENESS AND DOCTRINE OF PROPORTIONALITY

AND

IN THE MATTER OF: CONTRAVENTION OF SECTION 32 (4), (5), 46 (1) OF THE COUNTY GOVERNMENT ACT

BETWEEN

MARION NJERI NJOROGE.....PETITIONER

-VERSUS-

JAMES KARANJA NYORO.....1ST RESPONDENT

COUNTY GOVERNMENT OF KIAMBU.....2ND RESPONDENT

RULING

1. The 1st Respondent filed a Notice of Motion on 2nd October 2019 seeking the following reliefs:

1. THAT pending the hearing and determination of this application the Honourable Court be pleased to stay and/or discharge the conservatory order made on 25th September, 2019.

2. THAT the Honourable Court be pleased to set aside the conservatory order made on 25th September, 2019.

3. THAT the Honourable Court be pleased to grant an order if stay of these proceedings pending the hearing and determination of the following cases pending before the High Court on the same subject matter.

i. Nairobi High Court Petition No. 373 of 2019 James Gacheru Kariuki vs. Hon. Attorney General & Others.

ii. Nairobi High court Petition No. 361 of 2019 Bernard Chege Mburu vs. James Karanja Nyoro & Others.

4. That the costs of this application be costs in the cause.

2. The application is premised on the following grounds:

1. Pending determination of the question of whether this Court has jurisdiction over this matter, the orders sought could not be lawfully and justifiably granted.
2. There were no grounds whatsoever to grant conservatory orders before *inter-partes* hearing given that no evidence of proximate or imminent illegal action or harm was /has been tendered by the Petitioner/Applicant. That public interest is being prejudiced by those orders.
3. The Conservatory Orders made on 25th September, 2019 should be set aside *ex debito justitiae* in view of the above and to ensure objective and fair *inter-partes* hearing.
4. The questions on the constitutionality and interpretation of Section 32 (4) and (5) of the County Governments Act, 2012 *vis-a-vis* Article 179 (5) of the Constitution is pending before the High Court in Nairobi in Petition 373 of 2019 and Petition 361 of 2019 hence there are no justifiable reasons to tie the hands of the Acting Governor and prejudice public interest given that efficacy of the Applicant as acting Chief Executive is crucial for proper service delivery in Kiambu and effective public administration.
5. By virtue of Section 7 of the Civil Procedure Act, Cap 21, there is need to avoid two courts of co-equal jurisdiction making conflicting decisions and it only fair and just that the proceedings be stayed pending the determination of Petition No. 373 of 2019 and Petition No. 361 of 2019.

3. The Application is supported by the Affidavit of James Karanja Nyoro, the Applicant, sworn on 1st October 2019. He deposes that after the Governor was charged with various criminal and economic crimes committed in the course of his duties as Governor of Kiambu County, an Order was issued in the Chief Magistrate's Court Milimani Anti-Corruption Case No. 22 of 2019 Republic v Ferdinard Ndungu Waititu Babayao & 12 others barring the Governor from setting foot in Kiambu County offices pending his trial thereby occasioning his absence as governor of Kiambu County.

4. He further deposes that by dint of Article 179 (5) of the Constitution, he became the Acting Governor of Kiambu County and he had been diligently discharging his duties in order to ensure smooth operations of the County Government.

5. He deposes that the issues in the Petition are similar to the 2 Petitions mentioned herein before the High Court and that the conservatory orders should be stayed or set aside as he requires sufficient legal capacity and scope to discharge his functions.

6. In response to the application, the Respondent, Petitioner herein, filed her grounds of opposition on 7th October 2019 contending that there are no grounds in law or in fact entitling the Applicant to the orders sought. She further contended that the impugned interim orders, were granted *inter-partes* after parties made their representations. She also contended that if the Applicant is aggrieved by the impugned orders, he should file an appeal or apply for review of the same. Finally, she contended the Applicant has no control over the way the Petitioners in the said Petitions in the High Court may wish to proceed since he is just an Interested Party and Respondent therein.

7. The application was argued orally in the open court.

Applicant's submissions

8. Mr. Kibe Mungai, learned counsel for the Applicant argued that when this Court granted the Order there was a Preliminary Objection questioning the jurisdiction of this Court. He submitted that the Court must always determine the issue of jurisdiction before any substantive order has been issued. According to the Counsel, before the Petitioner comes before this Court, matters to do with Article 41 of the Constitution must be in issue.

9. He submitted that the Petitioner has not pleaded anything under Article 41 of the Constitution. He submitted that the Respondent is not an employee and she is not purporting to be acting in representative capacity. He therefore, contended that the Petitioner is not entitled to conservatory orders as a matter of justice so as to enable fair hearing of the suit, and as such he urged the court set aside order.

10. Counsel further submitted that at the time of granting the Order, this Court was informed that the Gazette Notice annexed to the Petition is the same subject matter in Petition 361 of 2019 and Petition 373 of 2019. He argued that Korir J declined to grant Conservatory Order in the said matters but when the instant Petition was filed, Conservatory Orders were granted.

11. As regards the order of stay of the proceedings herein, he submitted that as judicial policy, where a matter is pending before two courts, the first matter that was filed ought to proceed and the second one ought to be stayed to avoid conflicting decisions. He further submitted that a reading of the Petition before this Court, the Applicant's action will either be right or wrong depending on the interpretation of Section 32 of the County Governments Act and the relevant Article of the Constitution, by the High Court.

12. In the Counsel's view, the Constitution is clear that should a person hold an office, he should be able to exercise all the powers of that office unless there is a clear illegality. He argued that the Deputy Governor acts as a Governor to fill the vacuum created by the absence of the Governor. He urged the court to allow the Applicant's application.

Petitioners submissions.

13. Mr. Masaviru, learned counsel for the Respondent / Petitioner submitted that the Applicant is committing an illegality in nominating,

appointing and dismissing CEMs. He contended that Section 32 (4) (g) of the County Government Act provides that while acting in office of Governor, the Deputy Governor shall not exercise a Governor's powers to nominate, appoint and dismiss, as these powers are the preserve of the substantive governor. He argued that the Deputy Governor herein is acting *ultra vires*.

14. As regards the issue of jurisdiction and standing, he submitted that any person can move the court under Article 22 (1) of the Constitution and that the proper forum will depend on the reliefs sought. He argued that in this case, the petitioner is challenging the dismissal of members of County Executive Committee (CEC) and interference with the composition of CEC which relates to employment. He submitted that under Article 165 (5) of the Constitution provides that this Court has exclusive jurisdiction to determine all the matters reserved to it under Article 162 (2) (a) of the Constitution. He therefore contended that this court is the correct one to determine whether the contract of service for the affected member of CEC were interfered with.

15. As regards setting aside of the Interim Order, Counsel submitted that the Court issued the Conservatory Orders based on the material presented and the submission by counsel for the two sides. He argued that the instant application has not brought any new issues or material before the Court opined that the Applicant should either have appealed against the order, or sought review of the same.

16. He further argued that the two Petitions in the High Court seek different orders and the parties involved are different. He contended that Petition 361 of 2019 does not seek interpretation of section 32 (4) of the County Governments Act while Petition 373 of 2019 which is seeking interpretation of that section seems to have been abandoned since it has no date and nothing is happening in the file.

17. Counsel submitted that the applicant is asking the Court to fold its hands and watch as an illegality continues wilfully in full glare of the Court. He further argued that the case is grounded on Article 41 of the Constitution. He wondered why the Applicant is only seeking stay of execution and not seeking transfer of the instant Petition to the High Court.

Applicant's rejoinder

18. In his rejoinder Mr Kibe Mungai acknowledged that Section 32 (4) of the County Government Act bars a Deputy Governor from exercising the governor's power to nominate, appoint or dismiss. He however submitted that what the applicant did was to reassign roles. He urged the Court to determine whether the reassignment which does not require referral of the names to the County Assembly is prohibited by section 32 of the County Government Act.

19. In respect to *locus standi* Counsel submitted that it all depends on whether the Court or tribunal has jurisdiction. He submitted that in this case the issues are matters in rem which should go to the High Court and not matters in persona which should fall under this court's jurisdiction. He maintained that the Court must first interpret the Constitution before deciding whether the Deputy Governor has violated the law or acted illegally. He submitted that the High Court is the correct Court to interpret the Constitution.

20. He submitted that under the Constitution of Kenya (Protection of Fundamental Rights and Freedoms) Practice Procedure Rules, 2013 (Mutunga Rules) orders can be set aside at the instance of the Respondent.

21. Counsel urged the Court to respect judicial policy by not entertaining the same matters pending before other Courts. He relied on **Hon. Benjamin Koech v Baringo county Government 7 2 Others, Petition 3 of 2019** and **Joseph C. Koech v Baringo County Assembly & 2 Others, Petition 12 of 2019** which were both stayed by the Courts.

Analysis and determination

22. The main issues for determination herein are:

- a. Whether the Court should set aside the interim Conservatory Order issued on 25th September 2019.
- b. Whether the Court should stay the proceedings in this suit

a. Whether the interim conservatory order should be set aside.

23. Under Rule 25 of the **The Constitution of Kenya (Protection Of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013**, (otherwise known as Mutunga Rules) the court has the power to set aside, vary or discharge a Conservatory Order. However, the setting aside is dependent on the Court's discretion upon considering the circumstances of each case and the injury which would be occasioned to a party seeking such order.

24. The foregoing is fortified by **Bloggers Association of Kenya (Bake) v Attorney General & 5 others [2018]eKLR** where the Court held:

“Even though Rule 25 of the Mutunga Rules provides that courts may vary, set aside or discharge orders issued under Rule 23 of the said Rules, courts have held that this power must be exercised with great caution and is ordinarily only exercised to correct an error or oversight or to effect a review of the proposed order so that the orders may be able to deal more appropriately with the issues as litigated by the parties. See Benjoh Amalgamated case (supra)... In any event, it is trite law that before granting orders to set aside or disturb conservatory orders, the court must be satisfied that the applicant will be irreparably injured if the orders are not set aside.”

25. On 25th September 2019, this Court issued interim conservatory orders restraining the 1st Respondent/Applicant from violating the

provisions of Section 32 (4) & (5) of the County Governments Act pending the *inter-partes* hearing of the interlocutory application by the petitioner. The 1st Respondent/Applicant was more specifically restrained from appointing, reshuffling, reassigning, dismissing or interfering with the 2nd Respondent's executive, secretaries, chief officers, enforcement officers and or any other senior officers of the 2nd Respondent or the composition of the 2nd Respondent's executive committee. The order was granted after hearing brief submissions by counsel before filing of substantive responses by the respondents due to the urgency of the matter.

26. Counsel for the Applicant submitted that the Court should set aside the conservatory Orders granted on 25th September 2019 in accordance with the Mutunga Rules. The main reasons put forth by Counsel for the Applicant is that it is in public interest that the Conservatory Orders be set aside as the same were never issued in the other two Petitions before the High Court; that the court's jurisdiction is in question; that the petitioner lacks standing; and that the order has muzzled the applicant from exercising his lawful mandate and therefore cannot discharge his functions.

27. However, Counsel for the petitioner has objected to the application and submitted that if the Applicant is aggrieved by the impugned order, he ought to have either appealed or sought a review of the same. In addition, the petitioner's counsel contended that the applicant is committing an illegality and he is acting *ultra vires* by appointing and dismissing members of CEC and other Senior Officers contrary to section 32(4) of the County Governments Act which bars a Deputy Governor from doing so. According to him, the court cannot sit and watch an illegality being committed. Finally, he contended that this court is the right court to hear and determine the dispute because it involves rights of employees and the petitioner has the standing to agitate for the rights of the said employees by dint of Article 22 of the constitution.

28. In **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR**, the Supreme Court of Kenya held that:

“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 adjudicatory 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 applicant’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 values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.”

29. After hearing the brief oral submissions by all the parties on 25.9.2019, this court agreed with the petitioner, that under section 32 (4) of the Act, the 1st respondent was barred from exercising the power of a substantive Governor to nominate, appoint, or dismiss a member of CEC or other officers under the Act. Accordingly, the court was persuaded that it was in the public interest to issue conservatory order on interim basis to restrain the 1st respondent from exercising or threatening to exercise powers of a substantive Governor contrary to section 32(4) of the Act. Without the said orders the substratum of the petition would have been destroyed and thereby render the suit moot. The petition herein being one seeking to protect the rights of employees would therefore lose value if by the time trial is done the said rights will have been taken away in breach of an express statutory provision.

30. In view of the foregoing justification, I decline to set aside the interim conservatory order as prayed until I hear the interlocutory application dated 23.9.2019 *inter-partes*, after all the parties have filed their responses to show how the said interim order has prevented the 1st respondent from exercising the lawful powers as acting Governor under section 32 of the Act and Article 179 (5) of the Constitution.

31. However, the court has considered the proposal by the petitioner's counsel that the impugned order can be varied to exclude the junior employee of the county and let the conservatory order remain applicable to the senior officers only. The counsel did not give any indication as to which cadre of staff would be deemed junior or senior. I will therefore accept the invitation to vary the interim order issued on 25.9.2019 to the extent that it will apply only to the employees who under the Constitution and the County Governments Act are supposed to be nominated, appointed and dismissed only by the Governor.

32. In view of the foregoing, the order is hereby varied to the extent that the 1st respondent is restrained from appointing, reshuffling, reassigning, dismissing the 2nd respondent's Members of the CEC, County Secretary, Chief officers and Accounting officers of County Departments, entity or decentralized unit of the county government or in any manner interfering with the composition of the 2nd respondent's Executive Committee pending the *inter-partes* hearing of the petitioner's Notice of Motion dated 23.9.2019 on a day to be agreed by the parties.

(b) Whether the proceedings herein should be stayed.

33. The Applicant further seeks stay of the proceedings pending the hearing of Petition 373 of 2019 and Petition 361 of 2019. Counsel for the Applicant submitted that it is good judicial policy that there should be no two conflicting judgments where a matter is pending before two courts. However, Counsel for the Respondent submitted that the two Petitions are distinct and that Petition 373 of 2019 is inactive.

34. The Petitioner in Petition 361 of 2019 seeks a declaration that the 1st Respondent's Gazette Notice No. 8401 of 6th September 2019 is unconstitutional as the Deputy Governor's decision, the Applicant herein and the Respondent therein, is *ultra vires* by virtue of Section 32 (4) & (5) of the County Governments Act.

35. On the other hand, the Petitioner in Petition 373 of 2019 seeks *inter alia* a declaration that section 32 (4) of the County Governments Act is inconsistent with provisions of Article 179 (5) of the Constitution.

36. In the instant Petition, the Petitioner/ Respondent seeks *inter alia* a declaration that the actions of the 1st Respondent/Applicant in

appointing, reshuffling and reassigning and dismissing the composition of the Cabinet of the 2nd Respondent were unlawful, illegal, unprocedural, unjustified and a gross violation of Chapter 6 of the constitution, article 73 (1), (2) of the Constitution. It further seeks declaration that the 1st Respondent/Applicant is unfit to hold the office of Deputy Governor, Kiambu County.

37. The court's view however is that save for the issue of suitability to hold the office, the petition herein and petition 361 of 2019 raises a more or less similar question for determination of by the court namely, whether a Deputy Governor can nominate, appoint, dismiss, reassign, reshuffle or in any other manner interfere with the appointment, status or designation of employees appointed by a Governor, including members of CEC, during the absence of the Governor from office within the meaning of section 32 of the County Governments Act and Article 179(5) of the Constitution.

38. The two petitions were provoked the 1st respondent's decision to re-assign two members of the Kiambu County Executive Committee through a Gazette Notice No. 8401 published on 4th September 2019 and his further alleged actions of dismissing persons holding various positions in Kiambu County and appointing others.

39. I have no doubt from the material so far presented to me that the dispute herein relates to employment and in a context of public service and this Court has exclusive jurisdiction to hear and determine it by dint of Article 162 (2) (a) and 165 (5) of the Constitution. However, in view of the judicial policy cited by the applicant, I believe that it just and fair that I do not proceed with the petition herein while Korir J is busy in the High Court answering a related question. I know that the petitioner herein is not a party to the High Court proceedings and may be prejudiced if stay of proceedings herein is ordered. I will therefore not order stay of proceedings herein but rather adjourn the hearing for 30 days to see the outcome of the petition 361 of 2019 before Korir J.

40. I seek support from *Lucy Waithera Kimanga & 2 others v John Waiganjo Gichuri [2015] eKLR* where the court held that:

“Are the reasons given sufficient for this court to impose a stay of proceedings? As a general rule, stay of proceedings should not be imposed unless the proceeding beyond all reasonable doubt ought not to be allowed to continue.”

Conclusion and disposition

41. I have found that there is public interest in retaining the interim conservatory order issued on 25.9.2019 and consequently declined to set the same aside. I have however varied the order to the extent that it will only apply to the officers who under the constitution and the County Governments Act are supposed to be nominated, appointed and dismissed only by the governor. I have found that this court has jurisdiction to hear and determine the petition herein but in order to avoid conflicting decision, I will adjourn the hearing of the petition for 30 days to await the decision of Korir J in Petition 361 of 2019. In the upshot, the 1st respondent's application dated 1.10.2019 is dismissed. Costs shall abide the outcome of the petition. This case will be mentioned on 18.11.2019.

Dated, Signed and Delivered in Open Court at Nairobi this 18th day of October, 2019

ONESMUS N. MAKAU

JUDGE