



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS**

**COURT OF KENYA AT NYERI**

**JUDICIAL REVIEW NO. 8 OF 2019**

**IN THE MATTER OF: AN APPLICATION FOR JUDICIAL  
REVIEW ORDERS OF PROHIBITION AND CERTIORARI**

**AND**

**IN THE MATTER OF: THE CONSTITUTION OF KENYA ARTICLES  
10, 19(2), 20(1), (2), (3) & (4), 21(1), 23(3), 35(1), 40, 41, 47(1) & (2), 50(1), 258(1) AND 259(1)**

**AND**

**IN THE MATTER OF: THE COUNTY GOVERNMENT ACTS 2012**

**AND**

**IN THE MATTER OF: COUNTY ASSEMBLY SERVICE ACT, 2017**

**AND**

**IN THE MATTER OF: THE CONSTITUTION OF KENYA (PROTECTION OF  
RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013**

**AND**

**IN THE MATTER OF: THE COUNTY ASSEMBLY OF LAIKIPIA STANDING ORDERS**

**AND**

**IN THE MATTER OF: PUBLIC FINANCE MANAGEMENT ACT, 2012**

**AND**

**IN THE MATTER OF: THE FAIR ADMINISTRATIVE ACTION ACT, 2015**

**BETWEEN**

**BONIFACE NDAI.....APPLICANT**

**VERSUS**

**COUNTY ASSEMBLY OF LAIKIPIA.....1<sup>ST</sup> RESPONDENT**

**THE SELECT COMMITTEE OF THE COUNTY**

ASSEMBLY OF LAIKIPIA.....2<sup>ND</sup> RESPONDENT

THE SPEAKER COUNTY ASSEMBLY

OF LAIKIPIA.....3<sup>RD</sup> RESPONDENT

CLERK, COUNTY ASSEMBLY OF LAIKIPIA.....4<sup>TH</sup> RESPONDENT

### JUDGMENT

1. The Applicant after being granted leave to commence Judicial Review proceedings filed a Notice of Motion dated 24<sup>th</sup> July 2019 and premised upon grounds on the face of the motion, annexed statement dated and filed in Court on 10<sup>th</sup> July 2019 and the verifying affidavit sworn on the same date by Boniface Murungi, the Applicant herein, seeking for Orders as follows:-

i. An order of certiorari to call, remove, deliver up to this honourable court and quash the decision by the 2<sup>nd</sup> Respondent dated 5<sup>th</sup> July 2019, and the decision of the 1<sup>st</sup> Respondent dated 8<sup>th</sup> July 2019 requiring the Governor, Laikipia County to remove the Applicant from office and any other decision taken and orders issued pursuant and in furtherance of the said decision.

ii. An order of prohibition to prohibit and/or restrain the Respondents whether by themselves and/or through their agents from undertaking any further steps or actions or issuing orders or commands and prohibiting any further proceedings in furtherance of the decision of the 2<sup>nd</sup> Respondent dated 5<sup>th</sup> July 2019 and that of the 1<sup>st</sup> Respondent dated 8<sup>th</sup> July 2019 requiring the Governor, Laikipia County to remove the Applicant from office plus costs of the suit.

2. In response to the Judicial Review Application, the Respondents filed a Replying Affidavit sworn the 4<sup>th</sup> Respondent Jasper Mutuiro on behalf of the 2<sup>nd</sup> to 4<sup>th</sup> Respondent. He deponed that the Applicant did not come to court with clean hands as he failed to disclose essential material facts that led to the decision for his removal. He deponed that the application does not meet the legal threshold of judicial review proceedings in that it challenges the merits of the decision in question rather than the decision making process which is the proper scope of judicial review proceedings. He deponed that the Applicant was removed through a resolution for violating the Constitution and all due process was followed as he was given an opportunity to be heard. The Resolution for removal was passed on 8<sup>th</sup> July 2019 and the 4<sup>th</sup> Respondent delivered a letter to the Governor notifying him of the said decision, thus the court order served on 17<sup>th</sup> July 2019 has been overtaken by events and there is nothing to restrain as the Assembly became *functus officio*. He deponed that the prayers sought should not be granted as the application is aimed at benefiting the Applicant for his own wrongdoing and to keep him in office for no valid reasons. He deponed that the application is incompetent, a non-starter, frivolous, scandalous and an abuse of the court process and should be struck out or dismissed with costs to the Respondents.

3. Parties filed submissions in support and in opposition of the application. The Applicant in making his submissions aimed to answer three questions:

i. If judicial review is the most efficacious remedy in this matter

ii. Were the Applicant's rights under Art. 47(1) and 50(1) of the Constitution as read with the Fair Administrative Action violated?

iii. Whether the Applicant should be granted the orders as prayed for.

On the issue as to whether judicial review is the most efficacious remedy in this matter, the Applicant submitted that the remedy of judicial review and the prerogative orders of *mandamus*, *certiorari* and prohibition are available against public bodies which elect to operate in contravention of the rules of natural justice and in breach of the fair administrative actions like the respondent's did. The availability of an alternative remedy is not a bar to the commencement of judicial review proceedings. The court must always exercise its discretion judiciously in deciding whether or not to grant judicial review remedies. The main issue to be considered by the court is whether the alternative remedy adequately protects the rights and interests of the applicant. The applicant relied on the case of **R. v City Council of Nairobi Ex parte Rajin Velji Shah [2014] eKLR** where it was stated that "... *The remedy of judicial review is available, in appropriate cases, even where there is an alternative legal or equitable remedy.*" Accordingly, the Applicant submitted that the orders for judicial review are meant to assist in the enforcement of the rule of law. He submitted that in the instant case, the court exercised its discretion in favour of the Applicant based on fact that the judicial review orders sought for were not for an ulterior purpose. Moreover, the matter dealt with issues of breach of the rules of natural justice and unreasonableness by a public body thereby making judicial review remedies the most appropriate as was held in the case of **R. v City Council of Nairobi Ex parte Rajin Velji Shah (supra)**. The Applicant submitted that the court in this matter exercised its discretion justly and in accordance with the law in granting leave to the Applicant to file a motion for judicial review orders. On the issue as to whether the Applicant's rights under Art. 47 (1) and 50(1) of the Constitution as read with the Fair Administrative Action were violated, the Applicant submitted that the procedure of removal of a Member of the County Executive Committee is stipulated by Orders 65 to 67 of the County Assembly of Laikipia Standing Orders which duly elaborate the procedure to be followed. The Applicant submitted that the Respondents failed to adhere to those requirements and particularly the rules of natural justice. The Applicant submitted that the Respondents did not supply the Applicant with sufficient particulars of the complaints against him or even the accompanying documents. He relied on the case of **Byrne v Kinematograph Renters Society Ltd [1985] 2 ALL ER 579** at 599 the Applicant submitted that where there is a procedure laid it ought to be followed. He submitted that it is also sound law that a person accused should know the nature of the accusation made, and should be given an opportunity to state his case and the tribunal should act in good faith. The Applicant submitted that the Respondents failed to give him sufficient notice to respond to the amended motion which contained new charges as required by Standing Order No. 65(2). He cited the decision of Lord Denning in **Kanda v Government of Malaya [1962] AC 322** where it was held "*if the right to be heard is to be a real right which is worthy anything, it must carry with it a right in the accused man to know the*

case which is made against him. He must know what evidence has been given and what statements have been made affecting him, then he must be given an opportunity to correct or contradict them.” The Applicant submitted that he was clearly not given the opportunity to examine and respond to several allegations brought by the amendment of the Motion and such was the procedural impropriety that he underwent. The Applicant submitted that he was not allowed to fully participate in the hearings hence leading to breach of natural justice. The Applicant submitted that the Respondents proceeded with the hearing of two witnesses in the absence of the Applicant on 3<sup>rd</sup> July 2019 and despite the fact that they had his contacts and that of his advocates, they did not bother to notify the Applicant of the commencement of the hearing and this was a clear indication of a predetermined outcome. The Applicant argued that he was also denied the right to rebut substantially as he was not provided with particulars of the allegations levelled against him. The Applicant submitted that there was no evidence that credible investigations were carried out, there was no report shown on the investigations, if any, carried out. The Applicant submitted that he had produced evidence to prove that he carried out public participation on the Laikipia County Public Finance Bill contrary to his accusers’ allegations. However, the Respondents did not call the names of the people in the list with a bid to finding out the truth and none of them was also called as a witness to prove otherwise. He submitted that had the Respondents carried out investigations crucial facts would have been unearthed which would have enabled them to reach a well informed decision and this therefore was more evidence of the procedural impropriety. The Applicant further submitted that contrary to Section 4(2) of the Fair Administrative Actions Act he was not given reasons to justify the Respondents’ findings. He submitted that a decision, especially a *quasi* judicial, one ought to be self-explanatory. However, it was not the case in the removal procedure of the Applicant. He argued that it was just a mass of findings thrown in without any explanations or basis whatsoever and such a decision without reasons cannot be allowed and ought to be quashed. The Applicant denied the allegations raised against him, gave his explanation but the Respondents failed to adequately or at all address his submissions. The Applicant submitted that this failure of the Respondents to consider relevant facts is so evident from the process and the outcome of the Applicant’s hearing. The Applicant submitted that in carrying out the process, the Respondents must weigh the pros of the Member against the cons if any and also ensure that public interest is considered and taken care of. He relied on the case of **Suchan Investments Ltd v Ministry of National Heritage and Culture & 3 Others [2016] eKLR**, the Applicant submitted that the decision to remove him from office was not proportionate for the reason that it did not weigh the allegation and the sentence/determination given. He argued that without the balancing act, the Respondents committed a procedural impropriety and their decision is amenable to be quashed for violating the provisions of Section 7(2)(1) of the Fair Administrative Actions Act. He submitted that looking at the parameters of judicial review set out in the case of **R v Kenya National Examinations Council ex parte Geoffrey Gathenji Njoroge & 9 Others [1997] eKLR** and **Stanley Olonana Ntutu & 12 others v District Land Registrar Narok & 3 Others [2013] eKLR** where Lady Justice Waithaka observed that “*an order of judicial review would issue if a public body acted in excess of its jurisdiction or contrary to the laws of the land or contrary to the rules of natural justice.*” The Applicant submitted that having established that the Respondents acted in excess of their powers, unreasonably and in breach of the rules of natural justice, the orders of prohibition and *certiorari* should issue against them. The Applicant submitted further that it is against public policy and the Constitution of Kenya that public institutions should be allowed to act in such unfair and unreasonable manner without any regard to the Constitution and the rule of law. The Applicant submitted that the Respondents had engaged in illegal actions and abused the powers granted to them by the law. He submitted that the Respondent’s actions would continue not unless an order of *certiorari* and prohibition is issued against them.

4. The Respondents submitted that the Applicant introduced new arguments and grounds in his submissions not set in the notice of motion and statement of facts as required by Order 53 of the Civil Procedure Rules. The Respondents submitted that the new arguments included alleged breaches of Art. 47(1) and Art. 50(1), reliance on Articles 10(2)(b), 20 and 21 of the Constitution, reliance on Section 4 of the Fair Administrative Actions Act, alleged abdication of duty to investigate, and failure to give reasons. The Respondents argued that the effect of the new arguments is that they fundamentally change the nature of the proceedings yet the pleadings have not been duly amended. It was submitted that it is trite law that a party is bound by their own pleadings. Submissions are not pleadings and the court should ignore the new grounds since considering them will prejudice the Respondents who did not have a chance to rebut the new grounds as introduced in the submissions. The Respondents relied in the case of **DEN v PNN [2015] eKLR** where the Court of Appeal stated that it is a principle of law that parties are generally confined to their pleadings unless pleadings were amended during the hearing of a case. The Respondents submitted that in view of the foregoing, the court should only consider the grounds as set out in the Notice of Motion, and the statement of facts. The Respondents submitted that the Applicant did not raise the issue of exhaustion of alternative remedies and he seemed to have misunderstood the issues raised by the Respondents. The Respondents submitted that issue is that the Applicant’s case substantially falls outside the mandate and scope of judicial review proceedings as it challenges the merits of the recommendations in questions as opposed to the decision making process. The Respondents submitted that the Applicant’s submissions at pages 6 and 7 are therefore misplaced. Reliance was placed on the case of **Gilbert Tuwei v County Assembly of Kericho & 2 Others [2016] eKLR** and the Respondents submitted that this court cannot interrogate the merits of the decision on the basis of the availed evidence and is restricted to considering whether the applicant was given fair treatment by the respondents and whether due process was followed. The Respondents submitted that Applicant’s supporting affidavit and the statement of facts although couched as constituting “lack of sufficient reasons to justify decision”, “irrationality of the decision and factual errors”, “illegality”, “bias and malice”, “legitimate expectation”, “proportionality of the decision”, and “ failure to consider relevant facts” all in effect question and challenge the merits of the decision arriving at finding the allegations of breach of the Constitution as substantiated. The Respondents submitted that the Applicant has in effect invited the court to step into the functions of the County Assembly and substitute the impugned decision which found that the particulars were substantiated. The Respondents submitted that the fact that the Applicant believes that the particulars ought to have all been unsubstantiated does not render the process unlawful and it is not within the province of this court to question the merits of the decision. The Respondents submitted further that the Applicant did not establish the ground for the grant of judicial review orders. It submitted that the contention that the select committee had no jurisdiction because it was not duly constituted has no basis as the number of the Committee members (5), was in accordance with Section 40(3) of the County Governments Act and that the provisions of Section 40(3) of the County Governments Act being a substantive law, supersedes the provisions of the Laikipia Standing Orders. The Respondent argued that the select Committee was thus duly constituted and had jurisdiction to handle the matter. The Respondents submitted that the Applicant’s allegation that he was not accorded a right to be heard in accordance to Standing Order 66(2) is unfounded. All due process was followed as laid down in the standing orders and the motion in question was moved under Section 40(2) of the County Assembly Act. The motion was presented to the Clerk by a Member of the County Assembly of the Laikipia County Assembly and approved by the Speaker. The Applicant was notified of the date of the hearing and all particulars sought by him were availed by the 4<sup>th</sup> Respondent, the hearing commenced as earlier communicated in the absence of the Applicant because he had not sent any apology or requested for an extension of time. The Respondents submitted that the Applicant and his counsel arrived later but they did not request or a deferment of the hearing and the assertion by the Applicant that he was never given a hearing is therefore baseless and should be dismissed. The Respondents submitted that the entire proceedings met the requirements of a fair process as every opportunity was given to the Applicant to defend himself within the timelines set out in the standing orders. They relied on the case of **Francis Maliti v County Assembly of Machakos & 2 others; Governor Machakos County (Interested Party) [2019] eKLR** where the court was not persuaded to find that the petitioner, in that case, was not accorded a fair hearing since he did not ask for any deferment or adjournment of the proceedings. The Respondents submitted that they did not violate the rules of natural justice as alleged by the Applicant. The

Respondents assert that the Applicant was afforded an opportunity to be heard and he attended the deliberations of the Committee and the County Assembly as per the Standing Orders and the County Government's Act but he failed to utilize that opportunity and having failed to take that opportunity to convincingly defend himself and having failed to seek for more time to present his case, the Applicant cannot turn around and claim that he was condemned unheard. The Respondents submitted that the decision to remove the Applicant was not contrary to the Constitution or at all as the Governor has the ultimate power to fire a County Executive and none of the Respondents has usurped that power. It was submitted that in fact, the Select Committee and subsequently the 1<sup>st</sup> Respondent only made recommendations for the Applicant's removal which did not amount to a decision with the effect of adversely affecting his rights of interests at that stage and even if such recommendation would have amounted to a decision, it would still not amount to a final decision since for it to take effect, it had to be implemented by the County Governor. The Respondents submitted that the Constitutional basis for the actions taken by the Select Committee and the County Assembly included Art. 185 as read with Articles 174 and 195, which provides for oversight functions as well as checks and balances by the County Assembly over the County Executive. In addition, holding a member of the County Executive accountable is an exercise of sovereignty by the people as per articles 1 and 10(2) of the Constitution and as such there was no violation of the Constitution as alleged since the Committee simply conducted their statutory and constitutional duties. The Respondents' submitted that since the Applicant has not established the grounds for the grant of judicial review orders, the application should be dismissed in its entirety. It submitted that from the holding in the case of **Kenya National Examinations Council** (*supra*) it is clear that an order of *certiorari* targets to quash an unlawful or illegal decision and the Select Committee and subsequently the 1<sup>st</sup> Respondent having only made recommendations for the applicant's removal which did not amount to a decision, the final decision rests with the governor who was not sued as a party herein. The Respondents argued that the Applicant also directed the order of prohibition as against the Governor to whom a report was issued for his removal from office yet the Governor is not a party in this suit. The Respondents argued that the order for prohibition cannot therefore issue. The Respondents relied on the case of **R v Principal secretary, Ministry of Defence ex parte George Kariuki Waithaka [2018] eKLR** and stated that it is trite law that the court should not issue orders in vain. The Respondents submitted that they cannot be prohibited from undertaking their statutory powers and duties and in view of the above submissions it is clear that the application for judicial review has no merit and it should be dismissed with costs to the Respondents.

5. The decision that is impugned is what should be the target of any judicial review. Judicial Review concerns itself not with the merits of the decision but in respect of the decision making process. The substance of the Applicant's judicial review motion attacks the decision made and the merits thereof. That cannot be the purview of the court's remit in judicial review matters. From the narration by the Applicant, his removal went step by step according to the law and therefore the process was unimpeachable. The Applicant was afforded an opportunity to be heard by the Select Committee and he attended the deliberations of the Committee and the hearings at the County Assembly as per the Standing Orders and the County Government's Act but he failed to utilize that opportunity. He cannot now accuse the Respondents of failing to follow the law yet it was meticulously followed and it matters not the outcome was not favourable to him but the orders of *certiorari* and prohibition cannot issue as there is no merit in the motion before me. As it was not proper to seek a Judicial Review in such a case as this where it was clear there was adherence to the law, the Applicant will meet the costs of the motion. Judicial review not merited, costs to the 2<sup>nd</sup> to 4<sup>th</sup> Respondents.

It is so ordered.

**Dated and delivered at Nyeri this 26<sup>th</sup> day of November 2019**

**Nzioki wa Makau**

**JUDGE**

I certify that this is a true copy of the Original

**Deputy Registrar**