



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**JUDICIAL REVIEW NO. 12 OF 2018**

(Before Hon. Justice Hellen S. Wasilwa on 19<sup>th</sup> June, 2018)

JOHN GITHIGI MUGWE.....APPLICANT

HON. FERDINAND WAITITU BABAYAO.....1<sup>ST</sup> RESPONDENT

KIAMBU COUNTY GOVERNMENT .....2<sup>ND</sup> RESPONDENT

AND

THE SPEAKER

KIAMBU COUNTY ASSEMBLY PARTY.....1<sup>ST</sup> INTERESTED PARTY

THE CLERK,

KIAMBU COUNTY ASSEMBLY.....2<sup>ND</sup> INTERESTED PARTY

KIAMBU COUNTY ASSEMBLY.....3<sup>RD</sup> INTERESTED PARTY

**RULING**

1. The Application before Court is the one dated 11.5.2018 filed by the Applicant/Petitioner under Certificate of Urgency. The Application was filed through a Chamber Summons filed under Order 53 Rules 1(2), (3) & (4) of the Civil Procedure Rules Section 8 & 9 Law Reform Act Cap 26, Article 47(1) (2) of the Constitution and all other enabling provisions of the law.

2. The Applicant seeks the following orders:-

*1. THAT this application be certified as urgent and be heard Ex-parte in the first instance.*

*2. THAT this Honourable Court do grant leave to the Applicant to file proceedings for an Order of Certiorari by way of calling for, into this Court and quashing the 1<sup>st</sup> Respondent's decision to relieve from duties and dismiss the Applicant from Kiambu County as County Executive Committee Member made on 8<sup>th</sup> May 2018.*

*3. THAT this Honourable Court do grant leave to the Applicant to file proceedings for an Order of Mandamus by way of Judicial Review compelling the 1<sup>st</sup> Respondent to restore and/or reinstate the Applicant to his position as County Executive Committee Member.*

*4. THAT this Honourable Court do grant leave to the Applicant to file proceedings for an Order of Prohibition by way of Judicial Review prohibiting 1<sup>st</sup> Respondent from appointing any other person to the post of County Executive Committee Member until this matter is adjudicated.*

*5. THAT this Honourable Court do grant leave to the Applicant to file proceedings for an Order of Prohibition by way of Judicial Review prohibiting the Interested Parties from vetting, approving and/or conducting public participation with the aim of appointing any other person to the post of County Executive Committee Member until this matter is adjudicated.*

**6. THAT the leave so granted in terms of prayers 2, 3, 4 and 5 herein above do operate as a stay of any and all actions or proceedings to enforce, execute, implement or put into effect in any manner whatsoever the said decision of the 1<sup>st</sup> Respondent dismissing the Applicant from his duty as the County Executive Committee Member Kiambu County until the hearing and determination of the Substantive Motion.**

**7. THAT costs of this Application be provided for.**

**8. THAT such further and other reliefs that the Honourable Court may deem just and expedient to grant in the circumstances of this case.**

3. The Application is based on the following grounds:-

**a) The Applicant has a prima facie case as there has been breach of the law and the constitution by the 1<sup>st</sup> Respondent in discharging his duty thus rendering his decision manifestly wrong, illegal, null and invalid.**

**b) The Application is made without inordinate delay.**

**c) The 1<sup>st</sup> Respondent gave unsubstantiated claims for his decision therefore the decision offends the structure, values, principles, objects and purport of the Constitution and rules of natural justice.**

**d) The Respondent acted in bad faith, his actions were arbitrary are contrary to the law.**

**e) The decision is in contravention of the very laws which the 1<sup>st</sup> Respondent purports to enforce.**

**f) The decision by the 1<sup>st</sup> Respondent is regulated by legislation which was not followed.**

**g) The decision was activated by malice, Political whims and perceived competition.**

**h) The decision is contrary to the law as it offends Article 47 (1) and (2) of the Constitution.**

**i) The Applicant contends that the Respondents have a legal duty to act judicially.**

**j) This matter is of general public importance as the values in the preamble, Article 10, 21(1), 73 and 236 of the Constitution are articles of general application.**

**k) The 2<sup>nd</sup> Interested Party has already gazette Mr. Karungo wa Thang'wa for approval to the position of County Executive Committee in the position of Roads, Transport, Public Works and utilities.**

**l) The said decision to re-assign the Applicant to a different docket, send him on leave and then relieve him off his duties with the 2<sup>nd</sup> Respondent was full of malice and only meant to create room for Mr. Karungo wa Thang'wa once the position fell vacant.**

**m) Unless leave is granted, the interested parties may proceed to vet and approve one Mr. Karungo wa Thang'wa whose name has been seconded by the 1<sup>st</sup> Respondent, gazette in the Daily Nation Newspaper of Friday May 11<sup>th</sup> 2018 and as bound to be tabled before the Interested Parties for approval.**

4. The Application is also supported by the Affidavit verifying the facts sworn by the Applicant herein and deponed to on 11.5.2018 and who has deponed to facts stated in the above grounds.

5. The affidavit has annexures which are letters of appointment of the Claimant including letter of re-assignment, and other letters served upon the Applicant by the Respondents and his response in support of the said letters.

6. The main contention by the Applicant is that he was appointed by the 1<sup>st</sup> Respondent as a member of the County Executive Committee of Roads, Transport and Public Works on 2.11.2017.

7. On 12.4.2017 however he was asked to immediately proceed on leave for 30 days with effect from the said date. He was also informed in the letter asking him to proceed on leave that at the expiry of the leave, he was to have a meeting with the 1<sup>st</sup> Respondent and agree on his performance and set targets accordingly.

8. While on leave on 8/5/2018, the Petitioner/Applicant was relieved of his services by the 1<sup>st</sup> Respondent who cited reasons that the Petitioner is not a good team player and this was affecting delivery of services to the people.

9. Following this development, the Respondent proceeded to nominate another County Executive Committee Member for the office previously held by the Petitioner, which is currently pending before the County Assembly of Kiambu.

10. The Applicants now seeks leave to file Judicial Review proceedings to quash the decision made by the 1<sup>st</sup> Respondent relieving him of his duties and to compel his reinstatement to the position he was appointed to as County Executive Committee Member.
11. He also seeks to bring proceedings to prohibit the Interested Parties from vetting and/or conducting public participation with the aim of appointing any other person to the post of County Executive Committee Member until this matter is adjudicated upon.
12. The Applicant also seeks to have leave so granted to operate as a stay.
13. The Respondents and the Interested Parties opposed this application. 1<sup>st</sup> and 2<sup>nd</sup> Respondent filed their Replying Affidavit through the firm of Manasses, Mwangi and Associates. The affidavit was deponed to by the 1<sup>st</sup> Respondent herein who depones that he is the Governor and Chief Executive Officer of the County Government of Kiambu, the 2<sup>nd</sup> Respondent herein. He has deponed that the Applicant should have petitioned the County Assembly under Article 118 and Chapter 6 on Leadership and Integrity and Section 35 of the County Government Act to ventilate his views on why the nominee should not be approved by the County Assembly rather than injuncting a process of the county Assembly.
14. He depones that the action of the Court is a violation of the doctrine of separation of powers to issue orders stopping a process of the County Assembly.
15. He depones that Section 31 of the County Government Act empowers a Governor to dismiss a County Executive Committee Member where the Governor deems it appropriate.
16. He also contends that he acted in an appropriate manner in order to maintain cohesiveness in the executive team by relieving the Applicant of his duties. This, he avers he also discussed with the Applicant who was uncooperative and continued acting as a lone ranger.
17. The Respondents also depones that this Court lacks jurisdiction to entertain this Petition as it is not a labour dispute and there is no employer – employee relationship between the Petitioner and the Respondent.
18. They also urge Court to vacate the Conservatory order granted by Court on 16/5/2018 and dismiss the Application for leave.
19. The Respondents have submitted that this Court lacks jurisdiction to hear a claim for award of damages and compensation as the only relief that can be granted in a Judicial Review action in certiorari, mandamus and prohibition.
20. He also depones that he was not under any duty to communicate the reasons for his decision to the extent he considered appropriate as provided for under Act 47(2) of the Constitution of Kenya 2010.
21. He avers that the decision to constitute a CEC and determine who shall be a member is a political question and this Honourable should exercise restraint under the doctrine of political avoidance. They therefore ask this Court to dismiss this application for leave.
22. The Interested Parties also filed their Replying Affidavit which was filed on 29.5.2018 and deponed to on 28.5.2018 by one Angela Kagunyi the Acting Deputy Clerk of the 3<sup>rd</sup> Interested Party.
23. She deponed that the Applicant was approved and vetted by the 3<sup>rd</sup> Interested Party and subsequently appointed by the 1<sup>st</sup> Respondent to serve in the office of the 2<sup>nd</sup> Respondent as County Executive Committee Member in charge of Roads, Transport and Public Works (Appendix AK.1).
24. She further deones that the 1<sup>st</sup> Respondent nominated one Karungo Wa Thangwa to serve in the Ministry of Roads, Public Works and Utilities and that the said nomination was published.
25. That it was upon this nomination that the Interested Parties were to be seized with the functions of vetting the preferred nominee herein and that the vetting process is a statutory guided process with its strict time lines that must be observed by the 3<sup>rd</sup> Interested Parties herein.
26. That after the name of the nominee was presented to the 1<sup>st</sup> Interested Party, the motion for the vetting was yet to be moved to the floor of the 3<sup>rd</sup> Respondent for taking a decision capable of being challenged by way of this application and as such the Interested Party contends that their application is premature malicious, unlawful as neither the 1<sup>st</sup> nor 3<sup>rd</sup> Interested Parties have taken any decision on the matter that is capable of being quashed by this Honourable Court.
27. The Interested Parties have also deponed that they have a monopoly of exercising the constitutional and statutory powers under Article 183(3) and Section 8(3) of the County Government Act and no other constitutional organ can purport and/or attempt to curtail, clog, restrain another organ while exercising its constitutional mandate.
28. They cited **Supreme Court of Kenya Petition No. 32 of 2014 in Justus Kariuki Mate & Another vs Martin Wambora Nyaga** to buttress their position where the Court relied on the doctrine of dominant principle with respect to Parliamentary Privilege which is that in certain matters which fall within Parliaments' exclusive sphere of jurisdiction and that Courts should exercise restraint to ensure that their proceedings do not stray in that sphere.
29. They therefore submit that this Court has no jurisdiction to entertain this Application and seek that the application should be dismissed.

30. The Applicants submitted that the 1<sup>st</sup> Respondent in relying on Section 31 of County Government Act to dismiss the Applicant should be read with Section 30(2) of County Government Act where Governor takes oath of office under the constitution. They submit that Article 236(b) of the Constitution provides that a public officer shall not be dismissed without due process. They also cited **Seventh Day Adventist Church (East Africa) Limited vs Permanent Secretary, Ministry of Nairobi Metropolitan & Another and Petition No. 32 of 2014 by Supreme Court Justus Mate vs Hon. Wambora.**

31. They submit that in **Samuel Okuro and 7 Others v Kisumu County Public Service Board & Others** the 2<sup>nd</sup> Respondent was personally asked to pay costs of the Petitioner and they pray that the 1<sup>st</sup> Respondent be ordered to pay costs of this Petition.

32. The Applicants submit that the action by the 1<sup>st</sup> Respondent is illegal and cannot be condoned by hiding behind Parliamentary Privilege.

33. The Interested Parties submitted that this Court lacks jurisdiction to entertain this Application under Order 53. They contend that this application is prematurely before Court.

34. The Interested Parties on their part insist on the doctrine of judicial restraint. They submit that the orders sought should not be granted.

35. I have examined all the averments of both parties and the submissions filed herein. The issues for determination by this Court are as follows:-

**1. Whether this Court has jurisdiction to entertain this application.**

**2. Whether this Court can grant the leave sought by the Applicant.**

**3. What orders are apt in the premise.**

36. Starting with issue No. 1 above, the case of Owners of the Motor Vehicle Vessel "Lillian S" v Caltex Oil Kenya Civil Appeal No. 50 of 1989 is clear that:-

***"A question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything without it, a court has no power to make one more step. Where a Court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction".***

37. The question this Court then seeks to answer is whether it has jurisdiction to grant orders in respect of the Application sought and grant leave to the Applicant to file Judicial Review proceedings as prayed.

38. Order 53 Rule 1 (1) of the Civil Procedure Rules provide that **"No application for an order of mandamus, prohibition, or certiorari shall be made unless leave thereof has been granted in accordance with this rule".**

39. In an Application for leave, the Court may proceed to hear the Application ex parte or may as provided under Order 53 rule (4) ask the Applicant to serve the application on the other party so that the Application may be heard inter-partes.

40. The Applicants indeed approached this Court seeking leave to file Judicial Review proceedings and they were directed by court to first serve the Application so that it could be determined inter-partes.

41. The Respondents and the Interested Parties have now contended that this Court has no jurisdiction to handle this matter as it is a political question.

42. In determining whether appointments of County Executive Committee Member is a matter this Court can handle or not, I refer to Judicial Review No. 4 of 2016 – **Republic v Evans Odhiambo Kidero (Governor Nairobi County) and Another Ex Parte Evans Odiaki (2016) eKLR** where Hon. J. Nderi rejected the argument that member so the executive at both levels of Government are political appointees and so their assumption of tenure and removal from office hangs on the political mandate granted to the appointing authorities of the people.

43. Judge Nderi cited **Nyeri Civil Appeal No. 2 of 2015 County Government of Nyeri and Another vs Cecilia Wangechi Ndungu (2015) eKLR** where the Learned JJA opined that though the Governor can dismiss a County Executive Committee Member:

***"A Governor ought to exercise his power to dismiss a member of a County Executive Committee under Section 31 (a) of the County Government Act reasonably and for the public good".***

44. The Learned Judges also went on to find state:-

***"We are of the considered view that the Employment Act does not apply to state offices. A state officer terms and conditions of service are regulated by the Constitution on the relevant stature principles of fair administrative action and rules of natural justice".***

45. Indeed the Application before Court is hinged on the Constitution and fair administrative action and rules of natural justice and therefore this Court has jurisdiction to deal with questions raised therein.

46. In the above case of **Evans Ondieki** (supra) Judge Nderi also opined as follows:-

**“28. The fact of the matter is that the applicant was a state officer within the meaning of the Constitution. It is also clear that a state officer is a public officer within the meaning of Article 236 of the Constitution and therefore an employer of a state office is enjoined by the Constitution not to dismiss, remove from office, demote in rank or otherwise subject to disciplinary action, the officer without due process of law.**

**The provision of Section 31(a) of the County Government Act 2012 is subservient to Article 236(a) and (b) of the Constitution of Kenya 2010. The Section must be read not to exclude application of due process of the law by the Governor in removing a County Executive Member from his office”.**

47. That having been said, it is my finding that I have jurisdiction to consider the application before me in terms of the actions done by the 1<sup>st</sup> Respondent as against the Applicant.

48. The problem however comes in when considering whether this Court has jurisdiction to entertain the Application in relation to injunctioning the Interested Parties from performing its duties.

49. The Respondents and Interested Parties have cited the Supreme Court in **Justus Kariuki Mate & Another vs Martin Nyaga Wambora & Another (2017) eKLR** where the Supreme Court in citing **Guy F. Sinclair’s work of Scholarship (Parliamentary Privileges and the Polarization of Constitutional Discourse in New Zealand)** in Waikato Law Review Vol 14 states as follows:-

**“The dominant principle with respect to Parliamentary Privilege is that certain matters fall within Parliaments exclusive sphere of jurisdiction and that the Courts should exercise restraint to ensure that their proceedings do not stray into that sphere. This principle of “exclusive cognizance” is widely supported. The UK Joint Committee describes freedom of speech as only “one facet of the broader principle that what happens within Parliament is a matter for control by Parliament alone” and states that the Courts have ‘a legal and constitutional duty to protect freedom of speech and Parliament’s recognized rights and immunities’ but no ‘power to regulate and control how Parliament shall conduct its business”.**

50. The leave being sought herein would in my view interfere with the County Assembly Privilege. They County Assembly has not in any way acted and issuing leave to have Judicial Review brought against the Interested parties as against its legitimate prerogative would in my view be meddling in the County Assembly’s duties by this Court. I find that I do not have jurisdiction to go in that direction.

51. Since the effect of the leave sought will go beyond affecting the Respondents into the power and privileges of the Interested Parties, I find that I have no jurisdiction to entertain the Application before me.

52. I will therefore rest this case and not determine any other issues. Each party to bear costs of their case.

**Dated and delivered in open Court this 19<sup>th</sup> day of June, 2018.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Gathii and Masoria for Applicant – Present

Mwangi Ndegwa holding brief for Mwangi for Respondents – Present and also for Interested Parties – Present