REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

PETITION NO. 92 OF 2018

IN THE MATTER OF AN APPLICATION UNDER ARTICLE 165(3)(a), (b), (4)

AND

IN THE MATTER OF THE CONTRAVENTION AND THREATENED CONTRAVENTION OF ARTICLES 2, 3, 10(2)(a),(c), 27(1),(3),28, 41(1), 47, 50,73 and 232 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA IN SO FAR AS THE CONSTITUTION HAS BEEN AND STANDS TO BE VIOLATED

AND

IN THE MATTER OF THE CHALLENGE OF THE UNLAWFUL DISMISSAL OF THE PETITIONER FROM EMPLOYMENT OF THE RESPONDENT

AND

IN THE MATTER OF A CONSTITUTIONAL PETITION BY

HON. BEATRICE KEDEVERESIA ELACHI.....PETITIONER

VERSUS

NAIROBI CITY COUNTY ASSEMBLY SERVICE BOARD....1st RESPONDENT

NAIROBI CITY COUNTY ASSEMBLY.....2nd RESPONDENT

RULING

1. On 6 September 2018, Beatrice Kedeveresia Elachi (Petitioner) moved the Court under the High Court Practice and Procedure Rules, the Judicature Act and inherent powers of Court seeking that a motion of even date be admitted for hearing during the current vacation.

2. Onyango PJ before whom the application was placed allowed an array of orders and it would be prudent to set them out

1. **THAT** the application be and is hereby certified urgent.

2. **THAT** the motion is admitted as an originating process under Article 22(3)(b) of the Constitution owing to the demonstrated urgency.

3. **THAT** pending the *inter partes* hearing of the motion, a conservatory order is hereby issued prohibiting the Respondents, their members or any person acting on their behalf or direction from removing the Petitioner as Nairobi City County Speaker, appointing a new nominee for approval by the Nairobi City County Assembly of appointment to the office of Speaker of the Nairobi City County Assembly pending *inter partes* hearing of the application.

4. **THAT** the Respondents, their agents and/or persons acting under their directions are hereby restrained for (sic) interfering with the Petitioner's execution of the duties of her office as speaker pending the *inter partes* hearing of this application.

5. **THAT** any decision to impeach the Petitioner as Speaker of the Nairobi City County by the 2nd Respondent on 6th September 2018 is hereby stayed pending *inter partes* hearing of this application.

6. **THAT** the Petitioner is directed to file her Petition on or before close of day on 7th September 2018.

7. **THAT** the application is fixed for *inter partes* hearing on 11 September 2018 before the Duty Judge at 12.00pm.

3. In compliance with the Court order, the Petitioner filed a Petition on 7 September 2018.

4. Upon service of the motion and orders, the 2nd Respondent filed a notice of preliminary objection on 10 September 2018 in the following terms

1. The application is incompetent, bad in law and fundamentally defective and is one for striking out with costs to the 2nd Respondent as:-

a) It fails to appreciate the Article 1(1) and (2) of the Constitution.

b) The motion being under Article 22(3)(b) failed to appreciate the bare minimums of procedural requirements under the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013.

c) The same is not founded on any Petition. d) The supporting affidavit is neither sworn by the Petitioner nor her advocate.

2. The Honourable Court has no jurisdiction to hear the Petition under Article 163(3)(a),(b) and (4).

3. The Honourable Court has no jurisdiction to quash the outcome of the 2nd Respondents process at interlocutory stage.

4. The conservatory orders issued are unlawful, abuse of court process and bad in law as the same:-

i. Is in conflict with a binding Supreme Court decision in Petition Number 32 of 2014 between Justus Kariuki Mate & Another vs. Hon. Martin Nyaga Wambora & Ar (2017) eKLR which conclusively settled the issue of conservatory orders against legitimate constitutional processes undertaken by a County Assembly.

ii Does not take into consideration the principle of separation of powers and endangers institutional comity between the arms of government.

iii. Has effect of hamstringing the due performance of the constitutional mandate of the Nairobi County Assembly.

iv. Have been issued in the face of defective and incurably irregular application.

4. The application is incompetent, bad in law and a mockery of constitutional and legislative imperatives under Article 178(3), Section 11 of the County Governments Act, No. 17 of 2012 and Nairobi City County's Standing Order Number 65.

5. The 1st Respondent also filed a notice of preliminary objection on 11 September 2018 in the following terms

1. The Honourable Court has no jurisdiction to grant the reliefs sought in the application at the interlocutory stage of the proceedings in view of the decisions in:

(a) *Justus Kariuki Mate & Ar v Martin Nyaga Wambora & Ar*, Supreme Court Petition No. 32 of 2014, decision of 15th December 2017; and

(b) *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others*, Supreme Court Application No. 5 of 2014, decision of 2nd April 2014.

2. The matters raised in the application (and the Petition) are inherently unjusticiable for offending the political question doctrine, having been constitutionally entrusted to a political organ of government (see *Patrick Ouma Onyango & 12 Others v Attorney General & 2 Others* (2005) eKLR.

3. The Honourable Court has no jurisdiction to grant reliefs that effectively amount to reinstatement, final orders at the interlocutory stage of the proceedings.

4. The proceedings herein have been commenced by a person who:

(a) Has no appreciable locus, stake and/or interest in the matters in controversy;

(b) Is statutorily precluded from meddling into political matters relating to the affairs of the Respondents; and

(c) Purports to act for a person who is not under any form of disability.

6. When the parties appeared for the *inter partes* hearing of the motion on 11 September 2018, they proposed and the Court agreed that the two Preliminary Objections be taken first.

Submissions by 1st Respondent

7. The 1st Respondent challenge to the motion and orders issued on 6 September 2018 were broadly three-pronged, though four grounds were listed.

8. On the question of jurisdiction, the 1st Respondent advanced the argument that the Court lacked jurisdiction on the basis that the constitutional design had reserved the question of impeachment of a county assembly Speaker to a different organ, the county assembly at the first instance, and not the Courts (separation of powers).

9. In the view of the 1st Respondent, the impeachment of a county assembly speaker was primarily a political question and hence unjusticiable and that the Court should if at all, tread with caution.

10. And if a Court decided to enter the fray, it should be circumspect with the orders to issue to ensure

that there is no hindrance to the orderly conduct of the constitutional and statutory functions of the other organs of government.

11. Closely linked to the separation of powers and the desire not to interfere with the constitutionally ordained functions of the other organs, the 1st Respondent submitted that the Court should be averse to issuing orders at an interlocutory stage before the facts in issue have been interrogated.

12. To the 1st Respondent, the orders which were issued on 6 September 2018 therefore amounted to reinstating the Petitioner to her office of speaker before a hearing of the substance of her case on the merits in disregard of the legal position that reinstatement is ordinarily a final remedy.

13. Lastly, the 1st Respondent further took the position that the affidavit in support of the motion was deposed by a person who did not meet the test of *standi* set out by Article 22(3)(b) of the Constitution. It was asserted that it was not demonstrated that there was any form of disability on the part of the Petitioner, and that the person who swore the affidavit was a public officer who should not have entered the political disputation arena.

14. The 1st Respondent also cautioned that the Court should be alert otherwise it would be used as a shield by public officers when they are called to account.

Submissions by the 2nd Respondent

15. The 2nd Respondent advanced four broad objections to the Court proceedings and orders of 6 September 2018 but in the view of the Court the objections fall under jurisdictional concerns (grounds 2, 3 and 4) and the propriety and procedure used to approach the Court (ground 1).

16. In the first instance, it was urged that the application upon which the Court granted *ex parte* orders on 6 September 2018 was incompetent, bad in law and fundamentally defective because there was no Petition on record (it is not disputed that the Petition was filed on 7 September 2018 while the application was filed on 6 September 2018).

17. Counsel for the 2nd Respondent suggested that it was unprecedented for a court of law in this jurisdiction to grant conservatory orders on the strength of a motion without a Petition in contravention of the formalities envisaged under Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013.

18. Counsel stated that he had not come across such a procedure in his long years of practice and drew parallels with circumstances where an indigent litigant were to approach the Court without the benefit of an advocate.

19. According to the 2nd Respondent, it was not open to the Court to invoke a form of the *epistolary jurisdiction* when explicit rules were in place (Mutunga Rules).

20. The 2nd Respondent also challenged the validity and/or propriety of the proceedings and orders on the ground that the supporting affidavit to the application was not sworn by the Petitioner but by a third party, thus not meeting the criteria outlined in Article 22(3)(b).

21. On the jurisdictional questions, the 2nd Respondent was of the view that the Court lacked jurisdiction on the basis that it was not open to the Court to interfere or intervene in an incomplete parliamentary process/proceedings.

22. In this regard, the decision of the Supreme Court in *Justus Kariuki Mate & Ar v Hon. Martin Nyaga Wambora & Ar* (2017) (the *Mate* case) and the provisions of the National Assembly (Powers and Privileges) Act were invoked.

23. It was also asserted that the Court had failed to take into consideration the principle of separation of powers.

24. Still on jurisdiction, the 2nd Respondent invoked the provisions of Article 163(3)(a), (b) and (4) and went further to postulate that the Court could not grant at the interlocutory stage, a conservatory order restraining a legislative Assembly from carrying out its mandate in view of the that they were exercising their mandate as part of the sovereign will of the people (impeachment proceedings) who elected them.

25. Both Respondents urged the Court to either strike out or dismiss the proceedings.

Petitioner's arguments

26. Mr. Kinyanjui for the Petitioner opposed the preliminary objections by first directing the Court's attention to the principles set out in the celebrated case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA 696 as to the true nature of a preliminary objection.

27. In the view of counsel, the objections raised did not meet the test set out in the *Mukisa* case because the Respondents had in their submissions attempted to convince the Court to look at the facts which were not yet fully before it.

28. On the apparent procedural defects or improprieties, the Petitioner drew the Court's attention to the deposition in the affidavit in support of the motion to the effect that the Petitioner was attending an official function in Malindi and could not have been in a position to swear the affidavit. It was stated that the Petitioner had been notified at about 1.00pm to attend the impeachment proceedings at 3.00pm.

29. According to the Petitioner, the mere fact that the affidavit was deposed to by her Personal Assistant did not turn the Assistant into the Petitioner.

30. In the view of the Petitioner, the test in Article 22(3)(b) of the Constitution had been met and that the Court ought not to close its eyes the right to access justice as enshrined in Article 48 and the need to administer justice without undue regard to technicalities.

31. In respect to the failure to file a Petition, the Petitioner took the position that in constitutional litigation, it was open to a party to move a Court informally if the circumstances warranted (*epistolary jurisdiction*).

32. It was urged that there was hardship in that the Petitioner was out of town and that in case, the Court had given directions as to the filing of the Petition and the Court's order in that respect was complied with.

33. Responding to the submissions on jurisdiction and separation of powers, the Petitioner maintained that the impeachment of a Speaker was not merely a political process but a legal question because the Constitution had ordained in Article 178 that appropriate legislation be put in place by Parliament to guide the impeachment process.

34. The Petitioner therefore urged that the Court should not shut its eyes where the process adopted in removing a speaker from office was tainted with illegality. She contended that the proceedings in the County Assembly had been marred by constitutional and statutory violations which were publicised to the public.

35. On the appropriate order arising from the objections, the Petitioner advanced the position that striking out or dismissal would not meet the ends of justice as the Court had not been moved accordingly to vacate or vary the orders of 6 September 2018 and that in any case striking out pleadings was a draconian step which should not be lightly taken.

Rejoinder by the Respondents

36. In brief replies, the Respondents maintained that the objections raised purely legal questions as there was no Petition on record when the orders were granted; that in constitutional litigation, the court can only be approached informally in the absence of rules (in the instant case there were Rules (the Mutunga Rules) and where a party was indigent and not represented by an advocate and that the *Mate* case was binding on this Court.

Evaluation

Orders on motion not anchored on a Petition

37. When the Petitioner approached the Court on 6 September 2018, she filed a motion which was not accompanied with a Petition.

38. In terms of Article 22(3)(b) of the Constitution as read with the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 the filing of a Petition is contemplated where a party alleges violation or threatened violation of a constitutional right.

39. The Petitioner was alive to that requirement and as part of her address to the Duty Judge requested to be allowed to file a Petition by close of the next day.

40. The Court was satisfied with the factual scenario obtaining and the explanations tendered by the Petitioner and explicitly issued two orders to wit: *that the motion is admitted as an originating process under Article 22(3)(b) of the Constitution owing to the demonstrated urgency* and *that the Petitioner is directed to file her Petition on or before close of day on 7th September 2018.*

41. It is therefore apparent that the Court issued the conservatory orders under objection herein only after appreciating the circumstances obtaining on 6 September 2018.

42. In my humble view, in so far as a concurrent Court had granted conservatory orders in the absence of a Petition but after admitting a motion as an *originating process*, the exercise of that judicial discretion cannot appropriately be challenged through a Notice of Preliminary Objection.

43. The proper course, in the view of this Court would be for the Respondents to move the Court which admitted the proceedings and granted the orders on 6 September 2018 for a review and/or go on appeal so that this Court is not seen as sitting on appeal or review of an order of a Judge who is just a door away. As it is, the factual scenario upon which the Court acted remain unchallenged when the route of a preliminary objection is taken.

44. And without appearing to hamstring the handling of such application if one is made, the parties may wish to consider the divergent positions taken by Ringera J (as he then was) in *Kihara v Barclays Bank Kenya Ltd* (2001) 2 EA 420; Harris J (as he was then in *Njoroge Kironyo and others v Kironyo Njoroge* (1976) KLR 109 and Odunga J in *Alfred Mwai Kariuki v Kenya Commercial Bank Ltd & Another* (2012) eKLR where injunctive reliefs were sought in instances where substantive statements of claim had not been filed or the injunctive orders pleaded (under the Civil Procedure Rules).

Jurisdiction and separation of powers

45. The Supreme Court in the *Mate* opinion extensively dealt with the twin issues of jurisdiction and separation of powers in proceedings such as now confront this Court and because of the hierarchical scheme of the Court system that decision binds this Court.

46. One of the jurisdictional concerns raised was that the Court ought to allow a parliamentary (used to include a county assembly) proceedings to run its course before judicial intervention.

47. This Court has perused the *Mate* decision keenly and has not been able to discern an express prohibition of the Court's intervention with parliamentary proceedings and processes.

48. The text and spirit of the *Mate* decision appears to project *reluctance, restraint and deference* on the part of the judicial arm where the principle of separation of powers is implicated, and that each proceeding alleging violation of constitutional rights be examined on a case by case basis.

49. In this respect, it would be appropriate to quote extensively certain paragraphs the Court considers apt.

50. At paragraph 59 to 60 , the Court opined thus

> {59} Also quite relevant is this Court's decision in Speaker of the Senate & Another v. Attorney General & 4 Others, Reference No. 2 of 2013; (2013) eKLR. The Court, in that case signalled that it would be reluctant to question parliamentary procedures, *as long as they did not breach the Constitution.* In reference to Article 109 of the Constitution, which recognises that Parliament is guided by both the Constitution and the Standing Orders in its legislative process, the Court thus held (paragraph 49 and 55):
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> > Upon considering certain discrepancies in the cases cited, as regards the respective claims to legitimacy by the judicial power and the legislative policy – each of these claims harping on the separation-of-powers concept – we came to the conclusion that it is a debate with no answer; and this Court in addressing actual disputes of urgency, must begin from the terms and intent of the Constitution. Our perception of the separation-of-powers concept must take into account the *context, design and purpose of the Constitution; the values and principles enshrined in the Constitution; the vision and ideals reflected in the Constitution.…*
>
> It is clear to us that it would be illogical to contend that as the Standing Orders are recognized by the Constitution, this Court, which has the mandate to authoritatively interpret the Constitution itself, is precluded from considering their constitutionality merely because the Standing Orders are an element in the "internal procedures" of Parliament. We would state, as a legal and constitutional principle, that Courts have the competence to pronounce on the compliance of a legislative body, with the processes prescribed for the passing of legislation.
>
> {60) It makes practical sense that the scope for the Court's intervention in the course of a running legislative process, should be left to the discretion of the Court, exercised on the basis of *the exigency of each case*. The relevant considerations may be factors such as: the likelihood of the resulting statute being valid or invalid; the harm that may be occasioned by an invalid statute; the prospects of securing remedy, where invalidity is the outcome; the risk that may attend a possible violation of the Constitution.

51. And on the question of legislative privileges and immunities, paragraph 84 is instructive. The Court asserted that

> {84) From the facts of this case, it is clear to us that the integrity of Court Orders stands to be evaluated in terms of their inner restraint, where the express terms of the Constitution allocate specific mandates and functions to designated agencies of the State. Such restraint, in the context of express mandate-allocation under the Constitution, is essential, as a scheme for circumventing conflict and crisis, in the discharge of governmental responsibility. No governmental agency should encumber another to stall the constitutional motions of the other. The best practices from the comparative lesson, signal that the judicial organ must practice the greatest care, in determining the merits of each case.

52. And finally, paragraph 94 where the Supreme Court concluded that

> {94} The effect is that, a methodical and conscientious inquiry would show the County Assembly to have been operating quite properly, within the constitutional scheme of devolution, and running its legislative processes within the ordinary safeguards of the separation of powers – and consequently, quite legitimately *outside the path of the ordinary motions of the judicial arm of*

State. On that basis, there would have been hardly any scope for the deployment of the Court's *conservatory Orders* – more particularly without first hearing the petitioners.

53. My understanding is that the Court should conduct a methodical and conscientious inquiry to satisfy itself that the assembly was being faithful to the constitutional design and scheme before issuing any conservatory orders.

54. That inquiry can only be conducted after giving all the concerned parties an opportunity to bring forth all the attendant facts and law, a scenario which the objections raised herein are attempting to suppress.

55. On 6 September 2018, the Court must have weighed the constitutional scheme and design and the *prospects of securing an remedy* before issuing the conservatory orders now sought to be challenged through preliminary objections by the Respondents. For when a Court is satisfied that there has been an infringement or threatened infringement of a fundamental right, it is obligated to grant an appropriate remedy and an appropriate remedy must be one which is effective to vindicate or protect the right even on a temporary basis.

56. The Respondents have raised powerful arguments but in my view those arguments should be addressed on the hearing of the application filed by the Petitioner on the merits and not through the avenue of preliminary objection.

57.But just two observations in passing before concluding.

58. A study of the *Mate* decision shows that the Supreme Court's attention was not drawn the interplay between the doctrine of separation of powers and the political question doctrine and the right to equal protection of the law and access to justice as enshrined rights and fundamental freedoms.

59. Therefore, the question would remain at large whether a certain category of persons (speakers) right to equal protection of the law (Article 27) and to initiate proceedings where violations are threatened can be limited until after the alleged violation or threatened violation of constitutional rights have been perfected when Article 22 contemplates a party approaching the Court on assertion of threats of violation or infringement of fundamental rights.

60. It is also open to debate whether the National Assembly (Privileges and Immunities) Act (read to include the County Assemblies Powers and Privileges Act) meets the test of Article 24 of the Constitution in so far as it was urged that the Court ought not to intervene in parliamentary processes before conclusion of such processes.

61. Secondly, it is the humble view of this Court that challenging interlocutory proceedings where orders have been issued *ex parte* through notices of preliminary objection(s) should be the exception rather than the norm.

62. The Court is of that view because there is a real likelihood that the legal questions posed through such objections may be directly implicated in the substantive proceedings and the danger of the Court hearing the substantive dispute coming to a different conclusion is real.

63. The possibility of causing judicial embarrassment or tying the hands of the trial Court therefore arises.

64. Further, it is open to debate whether a litigant who has raised a preliminary objection as was done here could raise the same legal points in consideration of the plea of *res judicata*. Both the parties and the Court would be placed in a predicament.

65. Lastly, such objections may compromise the optimal use of scarce judicial time as the nature of constitutional petitions and attendant motions thereon presuppose similarity of legal questions to be addressed.

66. For the record, the Court observes that it has not considered the submissions filed by the 2nd Respondent on 13 September 2018 because they were filed after oral arguments without leave and because the other parties did not have an opportunity to respond thereto. The submissions may be considered at the *inter partes* hearing of the motion.

67. The Petitioner and the Respondents eloquently and with much circumspection presented their respective arguments and the Court is grateful to them.

Conclusion

68. The Court therefore declines to uphold the objections and orders that the same be dismissed.

69. The Court further directs that the parties appear before Onyango PJ on 17 September 2018 with a view to taking directions on the accelerated hearing of the pending motion and Petition.

70. The *ex parte* interim orders issued on 6 September 2018 are extended until the appearance before Onyango PJ.

71.Costs in the cause.

Delivered, dated and signed in Nairobi on this 14th day of September 2018.

Radido Stephen

Judge

Appearances

For Petitioner Mr. Kinyanjui instructed by J. Harrison Kinyanjui & Co. Advocates

For 1st Respondent Mr. Muthomi & Mr. Karanja instructed by Muthomi & Karanja Advocates

For 2nd Respondent Prof Ojienda, SC; Mr. Kabuta & Mr. Odongo instructed by Prof. Tom Ojienda & Associates Advocates

Court Assistant Lindsey