



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU**

**JUDICIAL REVIEW APPLICATION NO. 1 OF 2015**

**IN THE MATTER OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF THE EMPLOYMENT ACT OF 2007**

**AND**

**IN THE MATTER OF ORDER 53 RULES 1 OF THE CIVIL PROCEDURE RULES**

**AND**

**IN THE MATTER OF SECTION 8 & 9 OF THE LAW REFORM ACT CAP 26 OF THE LAWS OF KENYA**

**AND**

**IN THE MATTER OF THE COUNTY GOVERNMENT ACT**

**AND**

**IN THE MATTER OF THE BARINGO COUNTY ASSEMBLY STANDING ORDERS**

**AND**

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS**

**BETWEEN**

**WILLIAM KASSAIT KAMKET** **APPLICANT**

**AND**

**THE CLERK**

**COUNTY ASSEMBLY OF BARINGO** **RESPONDENT**

**RULING**

1. William Kassait Kamket (applicant) filed a Chamber Summons under certificate of urgency on 19

March 2015 against the Clerk, County Assembly of Baringo (Respondent) seeking

1. THAT this application be certified as urgent and be heard on a priority basis.
  2. THAT the Court be pleased to grant leave to apply for judicial review orders of prohibition and certiorari.
  3. THAT the grant of leave does operate as stay of the decision of the County Assembly of Baringo to adopt the report of ad hoc committee to remove the speaker from office and the decision to declare the seat vacant and the report itself so that the *ex parte* remains the speaker of the County Assembly of Baringo with full salary,priviliges and benefits without any interference,advertising,processing of applications to fill the position of the speaker from the respondent, its agents and or servants.
  4. THAT the costs of this application be provided for.
2. The motion was placed before me on 19 March 2015, and after listening to Mr. Kipkoech for the *ex parte* applicant, I certified it urgent.
  3. Mr. Kipkoech then proceeded to prosecute prayers 2 and 3 of the summons.
  4. Before delving into the application a brief background may be in order.
  5. The applicant was suspended by the County Assembly on 4 November 2014, and he challenged the suspension before the High Court in Eldoret in Eldoret Judicial Review Application No. 8 of 2014. The reason/ground for the suspension was the charging of the applicant before the Magistrate's Criminal Court in Criminal Case No. 7031 of 2014.
  6. The challenge to the suspension before the Eldoret High Court is still pending.
  7. On 11 February 2015, the County Assembly of Baringo debated and voted on a motion to remove the applicant from the position of Speaker. The motion was defeated.
  8. On or about 14 March 2015, the applicant received a notice dated 12 March 2015, through G4S asking him to appear before an Ad Hoc Committee of the County Assembly of Baringo on 16 March 2015 at 10.00 am to answer to a Petition tendered by residents of a community within the County.
  9. On the same day (16 March 2015), the applicant's Advocates wrote to the Respondent informing him that the applicant was not in a position to appear before the Ad Hoc Committee because the notice given was too short and the Petition he was to respond to had not been served (was not enclosed in the notice dated 12 March 2015). Further, the Advocates informed the Respondent that since the Petition was seeking the removal of the applicant from office of speaker, it was contrary to standing order no. 47 and the issue was *sub judice*.
  10. On 18 March 2015, the County Assembly went ahead and debated the report of the Ad Hoc Committee and resolved to remove the applicant from his position as speaker.
  11. As a result of the events of 18 March 2015, the applicant filed the present summons.
  12. The grounds and reasons for the summons briefly are, that there is a pending judicial review application before the High Court in Eldoret; that a motion to remove the applicant from office of speaker was defeated on 11 February 2015, and pursuant to standing order no. 47, another motion for removal could not be brought/be debated until after expiry of 6 months; that the County Assembly's was engaged in an illegal and unlawful act; that the recommendation of the Ad Hoc Committee was illegal and was in breach of section 11 of the County Government Act.
  13. Mr. Kipkoech submitted that the Court should grant leave to the *ex parte* applicant to commence judicial review proceedings against the Respondent, and that the leave should operate as stay of the decision to remove the applicant as the Speaker of the County Assembly of Baringo.
  14. He urged that because a motion to remove the applicant had been defeated on 11 February 2015, a similar motion could not be brought until the lapse of 6 months.
  15. He further submitted that the applicant was not given sufficient notice to appear before the Ad Hoc Committee.
  16. Although Mr. Kipkoech did not cite any authority, the Court looked up one or two authorities.

## **Evaluation**

17. At this stage the Court should not get into the details of the merits of the substantive application but the Court has gone into the background because of the danger posed by the Court intruding into the terrain reserved for other branches of the State (separation of powers concerns) and the limited orders the Court can grant under the judicial review jurisdiction unlike a constitutional petition and the risk of making final determinations at this stage.
18. The purpose and rationale of an application such as the present one was discussed by Waki J (as he then was) in *Republic v County Council of Kwale & Ar ex parte Kondo & 57 Ors* Mombasa HCMCA No. 384 of 1986. Waki J rendered himself thus

The purpose of application for leave to apply for judicial review is firstly to eliminate at an early stage any applications for judicial review which are frivolous, vexatious or hopeless and secondly to ensure that the applicant is only allowed to proceed to substantive hearing if the Court is satisfied that there is a case fit for further consideration. The requirement that leave must be obtained before making an application for judicial review is designed to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints or administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived... Leave may only be granted therefore if on the material available the court is of the view, without going into the matter in depth, that there is an arguable case for granting the relief claimed by the applicant the test being whether there is a case fit for further investigation at a full *inter partes* hearing of the substantive application for judicial review. It is an exercise of the court's discretion but as always it has to be exercised judicially.

19. The Court of Appeal in *Mirugi Kariuki v Attorney General* (1992) KLR 8 laid the threshold test for grant of leave, which I need not set out here.
20. From the background and submissions, the applicant has demonstrated that certain statutory provisions and the County Assembly's Standing Orders may have been breached when the resolution to remove him was passed on 18 March 2015 and grant of leave is therefore not frivolous. There is an arguable case and the grant of leave is merited.
21. The applicant also seeks that grant of leave do operate as a stay. On the papers before Court, the applicant was not furnished with a copy of the Petition to be able to respond to any allegations. It appears that he was not accorded sufficient time to respond. He did not defend himself before the plenary of the Assembly.
22. The County Assembly has started the process of replacing the applicant but that process is still in the initial stages.
23. The grant of stay pursuant to the grant of leave is a discretionary power and the principles are now well settled. The principles were discussed by Maraga J (as he was then) in *Taib A. Taib vs. The Minister for Local Government & Others* Mombasa HCMISCA. No. 158 of 2006. The Judge stated

As injunctions are not available against the Government and public officers, stay is a very important aspect of the judicial review jurisdiction... In judicial review applications the Court should always ensure that the *ex parte* applicant's application is not rendered nugatory by the acts of the Respondent during the pendency of the application and therefore where the order is efficacious the Court should not hesitate to grant it though it must never be forgotten that the stay orders are discretionary and their scope and purpose is limited... The purpose of a stay order in judicial review proceedings is to prevent the decision maker from continuing with the decision making process if the decision has not been made or to suspend the validity and implementation of the decision that has been made and it is not limited to judicial or quasi-judicial proceedings as it encompasses the administrative decision making process being undertaken by a public body such as a local authority or minister and the implementation of the decision of such a body if it has been taken. It is however not appropriate to compel a public body to act... A stay order framed in such a way as to compel the Respondents to reinstate the applicant before hearing the Respondent cannot be granted.

24. The applicant had been suspended in 2014. He challenged the suspension and the proceedings are

still pending. The Court was not informed whether the suspension was temporarily stopped pending determination of the action before the High Court in Eldoret.

25. The applicant has made out a case for an order that the grant of leave do operate as a stay. The proceedings of the County Assembly will not be imperiled in the short term.

### **Disposition**

26. Granting prayer 4 in the form and substance sought by the applicant would have consequences which may preempt or impact the proceedings before the High Court. The Court was not informed of any salary, privileges and benefits the applicant was getting/enjoyed after the suspension but before the resolution of 18 March 2015.
27. The County Assembly has already voted to remove the applicant, and the process to replace him has begun (Court was shown an advertisement in the Star Newspaper of 19 March 2015 from the bar).
28. Considering the foregoing and on the authority mentioned above, it is my view, this is a suitable case to order that grant of leave to operate as a stay but limited to payment of such salaries/benefits as are payable to a speaker on suspension and the advertising and processing of applications to fill the position of the Speaker of the County Assembly of Baringo.
29. The Court would therefore order
- (a) THAT leave be and is hereby granted to the applicant to apply for judicial review orders of prohibition and certiorari
  - (b) THAT the grant of leave does operate as a stay but limited to
    - (i) payment of such salaries/benefits as are payable to a speaker on suspension; and
    - (ii) the advertising and processing of applications to fill the position of the Speaker of the County Assembly of Baringo.
30. Because of the role of the County Assembly in the governance structure established by the Constitution 2010, and with a view to expeditiously determine the substantive application, the applicant should file and serve a substantive application within the next 5 days and such application should be mentioned within 10 days for further directions as may be appropriate considering the action pending before the High Court.
31. Costs in the Cause.

**Delivered, dated and signed in Nakuru on this 20<sup>th</sup> day of March 2015.**

**Radido Stephen**

**Judge**

**Appearances**

For applicant Mr. Kipkoech B. Ngetich