



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

PETITION NO. 11 OF 2014 (formerly NRB. H.C. PET. NO. 90 OF 2014)

NICK GITHINJI NDICHUPETITIONER

-VERSUS-

CLERK, KIAMBU COUNTY ASSEMBLY1ST RESPONDENT

KIAMBU COUNTY ASSEMBLY2ND RESPONDENT

Mr. Mtange for the Petitioner / Applicant.

Mr. Kibe Mungai & Mr. Ngaywa and Ngige for the 1st and 2nd respondent.

Mr. Mbeya for 1st interested party.

Snr Counsel Paul Muite and M/s Kamar for 2nd interested party.

RULING

1. The Petitioner, Nick Githinji Ndichu, is the speaker of the Kiambu County Assembly elected pursuant to Article 178 of the Constitution. He is also an Advocate of the High Court of Kenya in active practice prior to his election.
2. The Petitioner was removed from the position of speaker pursuant to a motion of impeachment moved by a member of the County Assembly **Hon. Mbuiyu Nelson Munga**, on 25th February, 2014. The motion was passed by the requisite numbers hence the removal of the Petitioner from office of speaker.
3. The Petitioner is alleged to have misconducted himself in the following respects;
 - i. The Petitioner authorized the Finance Department to pay Ksh. 530,000/= to be used by himself on a private errand, to attend the Annual Law Society of Kenya Retreat in Brazil. That this amounted to theft of public resources.
 - ii. That the payment was not sanctioned by the interim clerk of the Assembly, and thus the payment

was irregular.

- iii. That the Petitioner irregularly appointed the 1st interested party to provide legal services to the Kiambu County which firm was not one in the pre-qualified list of providers of goods and services in the county.
 - iv. That the Petitioner has been using derogatory language to members of the 2nd Respondent who have raised concern over his leadership style and he employed political persecution to instil fear.
4. The Petitioner denies these allegations and has provided an extensive defence in his supporting affidavit sworn on 27th February, 2014. The Petitioner therefore prays;
 - a. **a declaration be issued to declare the Petitioner's removal from office by the Respondent as illegal, unlawful and unconstitutional and contravenes the Petitioner's rights guaranteed under the Constitution;**
 - b. **a conservatory order do issue reinstating the Petitioner to office as existing ante 25th February 2014;**
 - c. **an order reinstating the degazettement of the Petitioner and/or in the alternative if gazetted, the said gazette Notice be brought before the Court for the purpose of quashing the same.**
 - d. **an order of Certiorari do issue quashing the 2nd Respondent's decision to impeach the Petitioner;**
 - e. **a permanent injunction restraining the Respondents by themselves, their agents, servants and / or employees or any person acting under them from advertising, recruiting, interviewing or in any other manner in filling the alleged vacancy in the office of the Petitioner;**
 - f. **costs of the suit;**
 - g. **any other order that the Honourable Court may deem fit to grant.**
 5. The law firm of George Mugoye Mbeya T/A Mugoye and Associates Advocates has joined this suit as the 1st interested party, whereas, the Law Society of Kenya has joined the suit as the 2nd interested party.

6. The petition was filed at the High Court and was transferred to this Court by Hon. Majanja J. pursuant to a consent dated 4th March, 2014.

On the face of the record therefore, the parties had submitted themselves to the jurisdiction of the Industrial Court.

7. That notwithstanding, the Respondents in addition to the Replying affidavits in the matter on 4th March, 2014, noted a preliminary objection on the same date to wit;
 1. The Industrial Court has no jurisdiction to adjudicate over the question of removal of the Petitioner as the speaker of the County Assembly of Kiambu.
 2. the Petitioner has no justiciable cause of action against the first and second Respondent.
 3. under *Section 12* of the *Industrial Court Act 2011* this Honourable Court has no jurisdiction to grant the reliefs sought by the Petitioner.
 8. Meanwhile a notice of motion on a Certificate of Urgency was simultaneously filed with the

Petition on 27th February 2014 seeking various interim reliefs.

When the matter came before me for directions, the Court entertained brief arguments from the parties and a temporary injunction was granted restraining the Respondents from recruiting, interviewing or in any other manner filling the position of speaker of the Kiambu County Assembly pending the hearing and determination of the application.

The preliminary objection and the Notice of Motion were then set for hearing interparties on the 6th March, 2014, at 2.30 p.m.

The interested parties have duly filed their responses mainly in support of the Petitioner's case.

9. It is important that the issue of jurisdiction be determined at the outset in recognition of the decision in the case of Owner of the **Motor Vessel lillian "S" V Caltex oil Kenya Ltd. (1989) KLR** where the Court of Appeal stated thus:

"without jurisdiction 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 before it. 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."

Jurisdiction is challenged by counsel for the Respondents Mr. Kibe Mungai on two fronts;

- i. that there is no employment relationship between the speaker of County Assembly and the County Assembly of Kiambu, the speaker being an elected official and therefore not an employee;
- ii. that impeachment of a speaker being a political process is not justiciable and thus the Court cannot provide any remedy to the Petitioner.

10. (i) Employment Relationship

Competing arguments on this point were heard from Advocate Kibe Mungai for the Respondents and Snr Counsel Paul Muite who led the case for the interested party and the Petitioner.

11. The jurisdiction of the Court under *Articles 162(2)* as read with *Section 12* of the *Industrial Court Act, 2011* is very clear and was well elaborated by **Hon. Majanja J.** in the matter of **United States International University (USIU) V. Attorney General (2013) e KLR**.

In the matter, counsel Kibe Mungai persuaded the Court to find;

- a. The Industrial Court has jurisdiction to determine applications for enforcement of rights and fundamental freedoms under Article 22 and 23 in relation to all matters within their jurisdiction under the Act;
- b. for purposes of all matters falling within the Industrial Court, reference to the "High Court" in the Constitution shall be deemed to refer to the "Industrial Court"; and
- c. in order to avoid apparent conflict, the court having the status of the High Court should have all the powers of the High Court in determination of disputes.

12. The Honourable Judge relying on *Kenyan and South African* jurisprudence and statutory law found; at page 14:

"In light of what I have stated, I find and hold the Industrial Court as constituted under the Industrial Court Act, 2011 as a court with the status of the High Court is competent to interpret the Constitution and enforce matters relating to breach of

fundamental rights and freedoms in matters arising from disputes falling within the provision of Section 12 of the Industrial Court Act, 2011.”

This decision was cited with approval by the Court of Appeal, at Nairobi in **Civil Appeal No. 6 of 2012 Professor Daniel N. Mugendi Vs. Kenyatta University and 3 others.**

Section 12(1) of this Act provides that the Court has jurisdiction to hear and determine disputes **relating to employment and labour relations including:**

- a. disputes relating to or arising out of employment between an employer and an employee

Under Section 2 of the employment Act, 2007 a ‘contract of service’ is defined to mean;

“an agreement, whether oral or in writing, and whether expressed or implied to employ or to serve as an employee for a period of time.”

Whereas an “employee” is defined as “a person employed for wages or a salary.”

13. It is clear from the foregoing that the law is not concerned with the method of acquiring an employee. The law does not concern itself with whether the person was appointed or elected. Rather, the person must;

- (i) be having an oral or written contract of service;
- (ii) be providing a service to a real or legal person;
- (iii) be receiving a wage / salary for the services rendered.

If such a person has a dispute with the person with whom he/she has a contract of service and to whom he / she provides services for a wage or salary, the court has jurisdiction over such dispute and has available remedies for that purpose.

14. It is the Court’s finding that the Petitioner has a relationship with all the above attributes with the 2nd Respondent.

This Court has therefore got jurisdiction over this matter.

15. (ii) **Whether the impeachment of a speaker is justiciable.**

On this point, I will go no further than the recent decision of a three (3) Judge bench of the High Court of Kenya at Kerugoya in **Petition No. 3 of 2014, Hon. Martin Nyaga Wambora Vs. Speaker, County Assembly of Embu and 5 others.**

The Court upon review of the case of **Nixon V. USA, 506 US 224 (1993)**, and **The decision of The Supreme Court of Kenya in the case of The speaker of the Senate and another and Attorney General and others (Advisory opinion No. 2 of 2013)** found:

“It is our view that under Article 165(3)(d) (i – iii) of the Constitution, this Court has jurisdiction to hear any matter relating to any question with respect to the interpretation of the Constitution including the determination of;

- i. *the question whether any law is inconsistent with or in contravention of this Constitution;*
- ii. *the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with or in contravention of the Constitution;*

iii. any matter relating to constitutional power of state organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government.”

16. Similarly Article 159(1) of the Constitution provides as follows:

“Judicial authority is derived from the people and vests in and shall be exercised by the Courts and tribunals established by or under this Constitution.”

There is no doubt in my mind that the Court cannot sit aside and watch while disputes clearly delineated under the Constitution to be within its purview continue to eat into the very fabric of the Republic of Kenya.

17. The Supreme Court Stated thus in the Senate case supra;

“we are persuaded by the reasoning in the cases we have referred to from other jurisdictions to the effect that Parliament must operate under the Constitution which is the supreme law of the land If parliament violates the procedural requirements of the supreme law of the land it is for the Courts of law, not least the Supreme Court to assert the authority and supremacy of the Constitution.”

The Court was referred to the definition of ‘justiciable’ in the Blacks law dictionary as follows;

“The Quality or state of being appropriate or suitable for adjudication by a Court.”

18. As the Judges in Wambora case observed:

“It is clear from the above definition that whether a matter before a Court is justiciable or not depends on the facts and circumstances of each particular case but the Court must first satisfy itself that it has jurisdiction to entertain the matter before it can resolve the issue of justiciability.’

19. In this case, having regard to the competing issues outlined in the Petition and the replying affidavits of the Respondents and interested parties, it is clear that the question as to whether or not the speaker of the Kiambu County was lawfully removed from office is justiciable and this Court has jurisdiction to hear and determine the matter.

20. The question whether the County Assembly violated its own procedure and acted in excess of jurisdiction therefore in removing the speaker is one this Court is presently seized of.

21. **Injunction**

Whether or not the Court is to extend the temporary injunction issued on 4th March, 2014 to stop the filling of the position of the speaker pending the hearing and determination of the Petition depends on the requirements for grant of interim orders well set out in the case of **Mary Aliviza & Okoth Mondol V. Attorney General of Kenya and Secretary General of East African Community. Application No. 3 of 210, EALS, Law Digest 2005 – 2011 P.1** which is cited with approval in the Industrial Court of Kenya at **Nairobi, Petition No. 39 of 2013, Gladys Boss Shollei Vs. Judicial Service Commission** as follows, page 17;

*“The Judges relying on the authority in **Sergeant V. Paul (1949) 16 E.A.C.A. 63** stated;*

“One, the grant or refusal of a temporary injunction which is an interlocutory order, is an exercise of Judicial discretion which must be exercised judiciously.

*Two, the purpose of a temporary injunction is to preserve the status quo (see: **Noor Mohamed, Hanmohamed V. Kassamali Virji Madhani (1953) 20 E.A.C.A. 8 and Garden Cottage Food Limited V. Milk Marketing Board (1984) A.C. 130.***

Three, the conditions for the grant of an Interlocutory Injunction are now well settled in East Africa;

- a. *an applicant must show a prima facie case with a probability of success;*
- b. *an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages; and*
- c. *if the Court is in doubt, it will decide an application on the balance of convenience.”*

22. On the issue whether the applicant has established a prima facie case with probability of success, I have carefully considered the competing arguments by counsel and in particular the following;

Whether the Respondent violated the procedural requirements under the County Governments Act, No. 17 of 2012 especially Section 11 titled “Removal of speaker from office” which provides:

“(1) a speaker of a County Assembly may be removed from office by the County Assembly through a resolution supported by not less than seventy five percent of all the members of the County Assembly.

(2) a notice of the intention to move a motion for a resolution to remove the speaker shall be given in writing to the clerk of the County Assembly, signed by at least one third of all the members of the County Assembly stating the grounds for removal;

(3) a motion for a resolution to remove the speaker shall be presided over by a member of the County Assembly elected under Section 9(4);

(4) Before the debate and voting on a motion under Sub-section (3), the speaker shall be accorded an opportunity to respond to the allegations on the floor of the County Assembly.”

The Court has also considered the standing order applicable to the matter in particular *standing order No. 58* titled “procedure for removal of the speaker” which cites the provisions of *Section 11* of the County government Act verbatim.

The Court is mindful that at this stage of the case, it is not supposed to go to the merits of the case but it is important for the Court to satisfy itself as was stated by the Court of Appeal **in Mrao V. First American Limited and 2 others (2003) KLR** that there is,

“a case which on the material presented to court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter”

and as was stated in *Mary Aliviza* case (supra).

23. *“At this stage we must of course refrain from making any determination on the merits of the application or any defence on it. A decision on the merits or demerits of the case must await the substantive consideration of the facts and applicable law after full hearing of the Reference.”*

24. Having also, considered standing order No. 63 – titled Right to be heard and the Hansard report of the proceedings by the Kiambu County Assembly on the material day, the Court at this stage is of the view that there exists a right which has apparently been infringed by the Respondents as to call for an

explanation or rebuttal.

25. The Court is also of the view that if the Petitioner is eventually successful on the merits of the petition, he is not likely to suffer irreparable harm since he is at liberty to pursue payment of damages if the Court finds that his removal was unlawful and in contravention of his constitutional rights as per prayer 25(a) in this petition.

26. The matter also largely turns on the balance of convenience. Unlike in the case of Wambora (*supra*) where there is a constitutional provision for the Deputy Governor to assume the office of the Governor in his absence or upon his removal, this is not the case with respect to the position of the speaker of the County Assembly.

27. The provisions of the *County Governments Act No. 17 of 2012* and the standing orders of the Respondent do not provide for the automatic filling of the position of the speaker upon his removal other than by an election for substantive replacement.

28. Furthermore, it is apparent from the provisions of this Act, and the standing orders that, the Assembly may not be convened at all in the absence of the speaker other than for the purpose of electing a speaker on the first sitting.

29. Under Article 178(2)(b) of the Constitution and Section 9(4) of the Act, an acting speaker may only be elected during a specific sitting convened by the substantive speaker if the substantive speaker is absent from the house.

30. In fact, *standing order 4(2)* reads:

“If the office of speaker falls vacant at any time before the expiry of the term of County Assembly, no business shall be transacted by the County Assembly until the election of a new speaker.”

31. It is clear that granting an interim order in the terms sought by the Petitioner would ground the operations of the Kiambu County Assembly to a halt. The balance of convenience is therefore not in favour of granting the interim order sought.

Accordingly the application is dismissed and costs will be in the cause.

Dated and delivered at Nairobi this 14th day of March, 2014.

MATHEWS N. NDUMA

PRINCIPAL JUDGE