



**County Assembly of Mandera County v Governor, Mandera County & another  
(Reference 1 of 2018) [2021] KESC 59 (KLR) (Civ) (17 March 2021) (Ruling)**

*County Assembly of Mandera County v Governor, Mandera County & another [2021] eKLR*

Neutral citation: [2021] KESC 59 (KLR)

**REPUBLIC OF KENYA  
IN THE SUPREME COURT OF KENYA**

**CIVIL**

**REFERENCE 1 OF 2018**

**PM MWILU, AG.CJ & AG. P, MK IBRAHIM, SC  
WANJALA, NS NDUNGU & I LENAOLA, SCJJ**

**MARCH 17, 2021**

**BETWEEN**

**COUNTY ASSEMBLY OF MANDERA COUNTY ..... APPLICANT**

**AND**

**THE GOVERNOR, MANDERA COUNTY ..... 1<sup>ST</sup> INTERESTED PARTY**

**GOVERNOR, MANDERA COUNTY ..... 2<sup>ND</sup> INTERESTED PARTY**

*(Being an application by the interested parties/applicants seeking to strike out the Reference filed by the County Assembly of Mandera for an Advisory Opinion under Article 163(6) of the Constitution)*

**A County Assembly had the locus standi to move the Supreme Court for an advisory opinion**

*The main issue for determination was whether a reference seeking Supreme Court's advisory opinion on the legality of the continued stay in office, after a general election, of a serving County Executive Committee (CEC) whose re-appointment had been rejected by a county assembly was res judicata in light of a High Court decision on the constitution of a new CEC and the transition from the outgoing to the incoming CEC. The Supreme Court held that any party aggrieved by the decision in Simba Hasbeem Gedow .v. Governor Mandera County & 2 others, Constitutional Petition No. 7 of 2018 (Simba case) could only challenge the same by way of an appeal to the Court of Appeal and if still dissatisfied, such party could appeal to the Supreme Court. Thus, the instant reference was incompetent and an abuse of the process of court. The same could not, therefore, escape an order for dismissal.*

Reported by Chelimo Eunice

**Jurisdiction** – jurisdiction of the Supreme Court - jurisdiction of the Supreme Court to issue advisory opinions – principles guiding applications invoking the Supreme Court's advisory opinion jurisdiction – who had the locus standi to move the Supreme Court for an advisory opinion - where a county assembly sought an advisory opinion



from the Supreme Court - whether a county assembly had the *locus standi* to move the Supreme Court for an advisory opinion – Constitution of Kenya, 2010 articles 163 (6), 176(1) & 177.

**Civil Practice & Procedure** – *res judicata* – *res judicata* in Supreme Court’s advisory opinion jurisdiction - whether the Supreme Court could entertain issues previously determined by the High Court - where the High Court had determined the issue about the constitution of a new executive committee within 21 days after the members of the county assembly were sworn in and the transition from the outgoing to the incoming County Executive Committee (CEC) - whether in the circumstances, a reference seeking Supreme Court’s advisory opinion on the legality of the continued stay in office after a general election of a serving CEC or of CEC members whose re-appointment had been rejected by a county assembly was *res judicata*.

### **Brief facts**

The County Assembly of Mandera (applicant) filed a reference on March 15, 2018 seeking the Supreme Court’s advisory opinion as to whether the continued stay in office after a general election, of a serving County Executive Committee (CEC) or of CEC members whose re-appointment had been rejected by a County Assembly was legal *in lieu* of section 47 of the County Governments Act, and whether such a CEC could hold office indefinitely or until a new committee was constituted.

The interested parties filed an application dated March 5, 2020 seeking orders to strike out the reference on grounds that the applicant lacked the competence to make a request for an advisory opinion. They also submitted that the questions raised in the reference had been previously litigated and that the application was brought in bad faith and without merit as there was no *lacuna* in law.

The applicant on its part submitted that the questions raised in the reference were substantively different from those raised in *Simba Hasbeem Gedow .v. Governor Mandera County & 2 others*, Constitutional Petition No. 7 of 2018 (*Simba case*) and that there was a *lacuna* in law, concerning the nomination and appointment to the CEC, where a county assembly failed to approve nominees forwarded by a governor within 21 days as provided by the County Governments Act. The applicant contended that the law did not envisage a situation where those offices remained vacant after the expiry of 21 days.

### **Issues**

- i. What principles guided applications invoking the Supreme Court’s advisory opinion jurisdiction
- ii. Who had the *locus standi* to move the Supreme Court for an advisory opinion?
- iii. Whether a County Assembly had the *locus standi* to move the Supreme Court for an advisory opinion.
- iv. Whether a reference seeking Supreme Court’s advisory opinion on the legality of the continued stay in office after a general election of a serving County Executive Committee (CEC) whose re-appointment had been rejected by a county assembly was *res judicata* in light of a High Court decision on the constitution of a new CEC and the transition from the outgoing to the incoming CEC.

### **Held**

1. Article 163(6) of the Constitution provided that the Supreme Court could issue an advisory opinion at the request of the national government, any state organ or any county government with respect to any matter concerning county government. There were various principles guiding those intending to invoke the Supreme Court’s advisory opinion’s jurisdiction, including;
  - a. It had to fall within the four corners of article 163(6) of the Constitution. It had to be a matter concerning county government. The question as to whether a matter was one concerning county government was to be determined by the court on a case-by-case basis.
  - b. The only parties that could make a request for an advisory opinion were the national government, a state organ or county government. Any other person or institution would only be enjoined in the proceedings with leave of the court, either as an intervener (interested party) or as *amicus curiae*.
2. Article 176 (1) of the Constitution provided for establishment of a county government for each county, which county government consisted of a county assembly and a county executive. Article 177 of the



Constitution on the other hand, provided for the membership of a county assembly. Such membership comprised of elected and nominated members. From the foregoing provisions, it was clear that a county assembly was one of the two critical organs that constituted a county government. There could be no county government without a county assembly. It was, therefore, erroneous for the interested parties to suggest that the applicant had no *locus standi*. Secondly, the subject matter of the reference revolved around the issue of transition of CECs after a general election, which matter concerned county government within the meaning of article 163 (6) of the Constitution.

3. The main issue for consideration in the *Simba case* was whether the appointment to the Mandera CEC was in violation of the law. In determining the issue, the trial court addressed itself to the provisions of section 42 (2) of the County Government Act regarding the constitution of a new executive committee within 21 days after the members of the county assembly were sworn in, and the transition from the outgoing to the incoming CEC. It also interrogated the provisions of section 10 of the Public Appointments (County Assemblies) Approval Act, concerning the re-submission of names of nominees for consideration by the county assembly after an initial rejection by the latter. The trial court had to finally make a decision regarding the constitutionality or otherwise of the appointments to the Mandera CEC.

4. The instant reference raised three issues which included whether the continued stay in office of serving CEC members when their re-election had been rejected by the county assembly was legal *in lieu* of the provisions of section 47 of the County Governments Act, whether the CEC members not re-nominated by an incoming governor could continue to hold office and whether persons serving as CEC members before a general election could continue to hold office indefinitely or until a new committee was constituted. Those issues were substantially similar to the issues in the *Simba case*. Having been so determined, those issues could not be resuscitated at the Supreme Court under the guise of an advisory opinion.

5. Any party aggrieved by the decision in *Simba case* could only challenge the same by way of an appeal to the Court of Appeal and if still dissatisfied, such party could appeal to the Supreme Court. Thus, the instant reference was incompetent and an abuse of the process of court. The same could not, therefore, escape an order for dismissal.

*Application dated March 5, 2020 allowed, reference for an advisory opinion dated April 15, 2018 dismissed, with costs of the application and the reference being borne by the applicant.*

#### **Citations**

#### **Statutes**

None referred to

#### **Advocates**

None mentioned

## **RULING**

### **A. Introduction**

- (1) The Reference before the Court is dated 15th March 2018, and lodged on 19<sup>th</sup> March, 2018. It seeks this Court's Advisory Opinion, as to whether, the continued stay in office after a general election, of a serving County Executive Committee ("CEC") or of CEC Members whose re-appointment has been rejected by a County Assembly, is legal in lieu of Section 47 of the County Governments Act, and whether, such a CEC can hold office indefinitely or until a new Committee is constituted.



## **B. The Application**

- (2) The interested parties, pursuant to their admission as such, in a Ruling delivered on 23rd January 2020, have filed an application dated 5th March, 2020 and supported by the Affidavit of Adan Kullow. They seek Orders to strike out the Reference on grounds that the County Assembly of Mandera, lacks the competence to make a request for an Advisory Opinion. They also submit that the questions raised in the Reference, have been previously litigated. It is their case that, this application is brought in bad faith and without merit as there is no lacuna in law.

## **C. The Interested Parties' Case**

- (3) In their written submissions dated 5th March 2020, the interested parties submit that the applicant lacks the locus standi to move the Court for an Advisory Opinion under Article 163 (6) of the Constitution as it is neither a National Government, County Government, nor a State Organ (in terms of Article 260), established under the Constitution. They add that the County Assembly is established and governed by the County Government Act. The mere mention of the Constitution, argue the interested parties, does not make the County Assembly, a constitutional entity. In support of their position, the interested parties rely on this Court's Decision in *The Council of Governors and the Attorney General & 7 Others Reference No. 2 of 2017 [2019] eKLR*.
- (4) The interested parties further urge, that the issues concerning the nomination, appointment, and transition of the Mandera County Executive Committee following the general election raised in the Reference have been previously litigated before the High Court. They state that the Governor of Mandera County and the Mandera County Assembly were parties to the High Court Petition No 517 of 2017 *Shillow Abubakar Hassan v. Governor Mandera County & Another*, Petition 502 of 2017 *Hussein Osman Hassan v. Governor Mandera County & Another* and Petition No. 7 of 2018 *Simba Hasheem Gedow v. Governor Mandera County & 2 Others* Petition 17 of 2018, in which all the issues raised in the Reference herein were canvassed.
- (5) They further submit that at the time of filing the Reference, Petition No. 517 of 2017 and Petition No. 502 of 2017 had been withdrawn, while Constitutional Petition No. 17 of 2018 was pending determination. In a Judgment delivered on 17th December 2018, the High Court dismissed Petition No. 17 of 2018, and held that the interested parties herein, had complied with the constitutional and statutory provisions in constituting the Mandera CEC. They argue that if it was dissatisfied with this Judgment, the County Assembly of Mandera ought to have filed an appeal to the Court of Appeal and a subsequent appeal to this Court instead of seeking an Advisory Opinion.
- (6) It is also submitted that that there is no lacuna in law as Section 42 of the County Government Act, unequivocally provides that after a general election, the outgoing CEC remains in office, until a new CEC is constituted. Reference is also made to Section 10 of the Public Appointments (County Assemblies Approval) Act, which sets out the criteria for re-submitting nominees' names previously rejected by the County Assembly, where the circumstances relied on at the time of rejection, did not exist or had ceased to exist.
- (7) In conclusion, the interested parties submit that, the applicant has deliberately chosen not to disclose the fact that, having sought the opinion of the Attorney-General, it was advised by the latter, not to seek an Advisory Opinion from this Court. The Attorney-General counseled that by dint of Article 198 of the Constitution, the CEC as last constituted remains competent to perform administrative functions until a new CEC is constituted. By failing to disclose this fact, submit the interested parties, the applicant has approached this Court in bad faith.



#### **D. The Attorney-general's Case**

- (8) Though not admitted as an interested party, the Attorney-General filed submissions dated 3rd March 2020, in which he, just like the interested parties, discerns bad faith on the part of the applicant. The failure to make such material disclosure by the applicant, that is, that it had sought and obtained his Advice, submits the Attorney-General, can only be assumed to mean that the applicant has no answer to the said advice.

#### **E. The Applicant's Case**

- (9) In its submissions dated 14th July 2020, it is the applicant's case that High Court Petitions No. 502 of 2017 and 517 of 2017, were withdrawn before being heard on merit, while Petition No. 17 of 2018 is pending at the Constitutional Court. The applicant submits that the questions raised in the Reference, are substantively different from those raised in Constitutional Petition No. 17 of 2018.
10. It is the applicant's further submission that there indeed is a lacuna in law, concerning the nomination and appointment to the CEC, where a County Assembly fails to approve nominees forwarded by a Governor within twenty-one days as provided by the County Governments Act. The applicant contends that the law does not envisage a situation where, these offices remain vacant after the expiry of twenty-one days.
- (11) Regarding the advice sought from, and given by the Attorney-General, the applicant submits that, it moved to Court for an Advisory Opinion because it was dissatisfied with the said advice.

#### **F. Issues For Determination**

- (12) On the basis of the pleadings and submissions by the parties herein, we consider that two issues merit our determination; these are:
- (i) Whether the applicant lacks the locus standi to move the Court for an Advisory Opinion under Article 163 (6) of the Constitution; and
  - (ii) Whether the questions raised in the Reference for an Advisory Opinion have been previously litigated before the High Court.

#### **Locus Standi**

- (13) It is the interested parties' contention that the applicant is not a National Government, County Government, or a State Organ in terms of Article 260 of the Constitution. As such, the latter lacks the locus standi to move the Court for an Advisory Opinion under Article 163 (6) of the Constitution. The interested parties submit that the applicant is established and regulated by the County Government Act as opposed to the Constitution.
- (14) Article 163(6) of the Constitution provides that:
- “The Supreme Court may issue an Advisory Opinion at the request of the National Government, any State Organ, or any County Government with respect to any matter concerning County Government”.
- (15) In Re the Matter of the Interim Independent Electoral Commission, Constitutional Application No. 2 of 2011, [2011] eKLR, in line with Article 163(6) of the Constitution, this Court has developed a



number of principles to help guide those intending to invoke its Advisory Opinion Jurisdiction. At paragraph [83], the Court stated: inter alia;

- “(i) For a reference to qualify for the Supreme Court’s Advisory-Opinion discretion, it must fall within the four corners of Article 163(6): it must be “a matter concerning county government.” The question as to whether a matter is one “concerning county government”, will be determined by the Court on a case-by-case basis.
  - (ii) The only parties that can make a request for an Advisory Opinion are the national government, a State organ, or county government. Any other person or institution may only be enjoined in the proceedings with leave of the Court, either as an intervener (interested party) or as amicus curiae.....” (Emphasis added).
- (16) It is against the foregoing Principle Number (ii) that we must determine whether the applicant is a one of those organs contemplated by Article 163 (6) as would qualify to seek an Advisory Opinion. Towards this end, we must direct our attention to Article 176 (1) of the Constitution, which provides that;
- “There shall be a County Government for each County consisting of a County Assembly and a County Executive.”
- (17) Article 177 of the Constitution on the other hand, provides for the membership of a County Assembly. Such membership comprises of elected and nominated members.
- (18) From the foregoing provisions, it is clear that a County Assembly is one of the two critical organs that constitute a County Government. There can be no County Government without a County Assembly. It is therefore erroneous for the interested parties to suggest that the applicant has no locus standi. Secondly, it is not in doubt that the subject matter of this Reference revolves around the issue of transition of County Executive Committees after a general election. This is a matter that squarely concerns County Government, within the meaning of Article 163 (6) of the Constitution.

### **On Res Judicata**

- (19) A second ground on which this Court’s jurisdiction is contested is that the subject-matter of the Reference is similar to the issues raised in High Court Petitions Nos. 517 of 2017, Shillow Abubakar Hassan v. Governor Mandera County & Another, 502 of 2017, Hussein Osman Hassan v. Governor Mandera County & Another (withdrawn) and No. 7 of 2018, Simba Hasheem Gedow v. Governor Mandera County & 2 Others. The interested parties submit that on the basis of the doctrine of res judicata, this Court cannot proceed to render an Advisory Opinion on matters that are either pending before, or have been determined by the High Court.
20. Having perused the pleadings/proceedings in Constitutional Petition No. 17 of 2018, and the resultant Judgment by the High Court (Chitembwe, J.) delivered on 17th December 2018, it is clear to us that the main issue in the petition was whether, the appointment to the Mandera CEC was in violation of the law. In determining this issue, the learned Judge addressed himself to the provisions of Section 42 (2) of the County Government Act regarding the constitution of a new Executive Committee within 21 days after the members of the County Assembly are sworn in, and the transition from the outgoing to the incoming CEC (Section 42(1) thereof). The learned Judge also interrogated the



provisions of Section 10 of the Public Appointments (County Assemblies) Approval Act, concerning the re-submission of names of nominees for consideration by the County Assembly after an initial rejection by the latter. Finally, the learned Judge had to make a decision regarding the constitutionality or otherwise of the appointments to the Mandera CEC.

- (21) The Reference before us raises three issues viz, whether the continued stay in office of serving CEC Members when their re-election had been rejected by the County Assembly was legal in lieu of the provisions of Section 47 of the County Governments Act, whether the CEC Members not re-nominated by an incoming Governor can continue to hold office, and whether persons serving as CEC Members before a general election can continue to hold office indefinitely or until a new committee is constituted.
- (22) We find that the issues raised in the Reference are substantially similar to those determined by the High Court in Constitutional Petition No. 7 of 2018. These issues, having been so determined, cannot be resuscitated at the Supreme Court under the guise of an Advisory Opinion. Any party aggrieved by the decision of the High Court, can only challenge the same, by way of an appeal to the Court of Appeal and if still dissatisfied, such party may appeal to this Court.
- (23) Having so found, we have no hesitation in declaring this Reference for an Advisory Opinion, incompetent and an abuse of the process of Court. The same cannot therefore escape an Order for dismissal.

#### **G. Orders**

24. ....

- (i) The Notice of Motion Application of 5th March 2020, is hereby allowed.
- (ii) The Reference for an Advisory Opinion dated 15th April 2017, is hereby dismissed.
- (iii) The costs of this Application and the Reference shall be borne by the applicant.

Orders accordingly.

**DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF MARCH, 2021.**

.....

**P. M. MWILU**

**Ag. CHIEF JUSTICE & Ag. PRESIDENT OF THE SUPREME COURT**

**M. K. IBRAHIM**

**JUSTICE OF THE SUPREME COURT**

.....

**S. C. WANJALA**

**JUSTICE OF THE SUPREME COURT**

.....

**NJOKI NDUNGU**

**JUSTICE OF THE SUPREME COURT**

.....

**I. LENAOLA**



**JUSTICE OF THE SUPREME COURT**

I certify that this is a true copy of the original

**REGISTRAR**

**SUPREME COURT OF KENYA**

