



In the Matter of Speakers, County Assemblies of Nandi, Kericho & Meru Counties (Reference 2 of 2019) [2020] KESC 41 (KLR) (4 August 2020) (Advisory Opinion)

Speakers, County Assemblies of Nandi, Kericho & Meru Counties v Attorney General [2020] eKLR

Neutral citation: [2020] KESC 41 (KLR)

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

REFERENCE 2 OF 2019

DK MARAGA, CJ & P, MK IBRAHIM, SC WANJALA, N NDUNGU & I LENAOLA, SCJJ

AUGUST 4, 2020

**IN THE MATTER OF
THE SPEAKERS, COUNTY ASSEMBLIES OF NANDI, KERICHO & MERU
COUNTIES APPLICANT**

AND

ATTORNEY GENERAL INTERESTED PARTY

Circumstances in which the Supreme Court could exercise its advisory opinion jurisdiction.

Reported by John Ribia

***Jurisdiction** – jurisdiction of the Supreme Court – advisory opinion jurisdiction - what were the circumstances in which the Supreme Court would exercise its advisory opinion jurisdiction – Constitution of Kenya, 2010 article 163(6)*

Brief facts

The Speakers of the County Assemblies of Nandi, Kericho and Meru (the applicants) sought the Supreme Court’s advisory opinion on whether the Constitution had the power to limit the possible grounds for removal of the speaker of a County Assembly.

Issues

What were the circumstances in which the Supreme Court would exercise its advisory opinion jurisdiction?

Held

1. A matter for advisory opinion had to be one of great public importance which bore novelty, and ill-fits the conventional dispute-settlement scheme and called for expeditious resolution; or it had to be a matter that raised a variety of structural, management and operational challenges unbeknown to traditional dispute settlement. The matter must therefore be urgent portending a paralysis to the institution concerned unless it was resolved immediately.



2. The Supreme Court had to guard against improper transformation of normal dispute issues for ordinary litigation into advisory opinion causes, as the court had to be disinclined to take a position in discord with the core principles of the Constitution.
3. There was a contested justiciable issue that had been canvassed before the High Court although it was not clear if it had been substantially determined by the court. As such the issue could only come to the Supreme Court through the appellate process if appropriate and necessary. If the High Court could not provide relief, the parties should seek legislative intervention. The instant matter was not only justiciable and fit for trial in the lower courts in the normal way but also *res judicata*. It was incompetent and an abuse of the court process.

Reference dismissed.

Orders

Each party was to bear its own costs.

Citations

Cases

Kenya

1. *Council of Governors & 47 others v Attorney General & 6 others* Reference 3 of 2019; [2019] KESC 65 (KLR); [2019] eKLR - (Explained)
2. *In the Matter of the Interim Independent Electoral Commission (Applicant)* Constitutional Application 2 of 2011; [2011] KESC 1 (KLR); [2011] eKLR; [2011] 2 KLR 32 - (Explained)
3. *In the matter of the principle of gender representation in the National Assembly and the Senate* Advisory Opinions Application 2 of 2012; [2012] KESC 5 (KLR); [2012] eKLR; [2012] 3 KLR 718 - (Explained)
4. *In the Matter of the Speakers of the 47 County Assemblies* Advisory Opinions Application 3 of 2014; [2016] KESC 7 (KLR); [2016] eKLR - (Explained)
5. *Secretary Isiolo County Assembly, Deputy Speaker Isiolo County Assembly & Chief Whip (Majority) Isiolo County Assembly v Speaker (Mohammed Tubi) Isiolo County Assembly* Petition 418 of 2014; [2014] KEHC 2192 (KLR); [2014] eKLR - (Explained)
6. *Speaker of the Senate & another v Attorney-General & another; Law Society of Kenya & 2 others (Amicus Curiae)* Advisory Opinion Reference 2 of 2013; [2013] KESC 7 (KLR); [2013] eKLR - (Explained)

Statutes

Kenya

1. Constitution of Kenya articles 47, 50(1); 50(2)(c); 50(2)(f); 50(2)(k); 50(2)(l); 61; 159(2); 163(6); 176(1); 177; 178; 181; 185 - (Interpreted)
2. County Governments Act (cap 265) sections 3(d); 7(b); 11 - (Interpreted)
3. Fair Administrative Action Act (cap 7L) In general - (Cited)
4. Supreme Court Act (cap 9B) sections 3, and 13 - (Interpreted)
5. Supreme Court Rules, 2012 (cap 9B) rule 41 - (Interpreted)

Advocates

None mentioned

ADVISORY OPINION

A. Introduction

1. In their Reference dated June 10, 2019, the Speakers of the County Assemblies of Nandi, Kericho and Meru (the applicant) seek this court's advisory opinion under articles 163(6) of the *Constitution* and



sections 3 & 13 of the [Supreme Court Act, 2011](#). The Reference is premised on the provisions of articles 6(1), 159(2), 176(1), 177, 178, 181 & 185 of the [Constitution](#) as well as sections 3(d), 7(b) & 11 of the [County Government Act 2012](#) and is supported by the affidavit of Joshua Kiptoo, the Speaker, Nandi County Assembly.

2. The advisory opinion is sought on the following issues;
 - (a) Whether the [Constitution](#) limits the possible grounds for removal of the Speaker of a County Assembly;
 - (i) If it does, are the grounds similar to those for the removal of a Governor under article 181 of the [Constitution](#) or other state officers?
 - (ii) Therefore, what are the grounds for removal of the Speaker of a County Assembly?
 - (b) Whether there are fair hearing and administrative measures and/or procedural safeguards to secure the process of the removal of a Speaker of a County Assembly in accordance with article 47 as read with article 50(1) & (b), (c), (f), (k) and (l) of the [Constitution](#) and the [Fair Administrative Action Act 2016](#).

B. Applicant Case

3. On jurisdiction, the applicant contend that under article 163(6) of the [Constitution](#) as read with rule 41 of the [Supreme Court Rules 2012](#), this court has the requisite jurisdiction to render an Advisory Opinion in this matter. In support of that submission, the applicant rely on this court's decisions [In the Matter of the Principle of Gender Representation in the National Assembly and the Senate](#) (2012) eKLR; [In the Matter of Interim Independent Electoral Commission](#) [2011] eKLR; [Council of Governors v Attorney General & 7 others](#) [2019] eKLR; and [In the Matter of the Speaker of the Senate & another](#) [2013] eKLR
4. On the merits of the matter, the applicant's case is that unlike other appointive or elective positions of State officers where there are provisions providing grounds for the removal from office stated in either the [Constitution](#) or statute, there are no express provisions in the [Constitution](#) or in any statute on the grounds for the removal of a Speaker of a County Assembly. Section 11 of the [County Governments Act](#) only provides for the removal procedure but not the grounds for removal. They further submit that this lacuna leaves room for abuse of the County Assemblies' authority hence the need for an Advisory Opinion in this matter to provide for a unified system to govern the process of the County Speakers' impeachment.

C. Attorney General's Submissions

5. In response, the Attorney General submitted that this Reference is incompetent as the matter is *res judicata*, the same issues raised herein having been determined by this court in [Speakers of the 47 County Assemblies v Commission on Implementation of the Constitution & 2 others](#) (2016) eKLR. Like in this matter, one of the issues in that Reference was what constitutes valid grounds and the procedure for the removal of a Speaker of a County Assembly under section 11 of the [County Governments Act](#). Again, like in that Reference, the issue in this one is not only justiciable but it does not raise any novel constitutional question that merits this court's intervention. On those submissions, the Attorney General urged this court to decline to render the Advisory Opinion sought.



D. Analysis

6. The jurisdiction that article 163(6) vests in the Supreme Court to offer Advisory Opinion is circumscribed. As this Court stated *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate*, Sup Ct Appl No 2 of 2012, [2012] eKLR [para 25] the objective of an Advisory Opinion is

“... to unravel a legal uncertainty in such a manner as to promote the rule of law and the public interest.” This Court added *in the Matter of the Speaker of the Senate & another* [2013] eKLR, that the matter for Advisory Opinion must be one of great public importance which “bears novelty, and ill-fits the conventional dispute-settlement scheme” and calls for expeditious resolution; or it must be a matter that “raises a variety of structural, management and operational challenges unbeknown to traditional dispute settlement.” The matter must therefore be urgent portending a paralysis to the institution concerned unless it is resolved immediately.”

E. Determination

7. Flowing from these established legal principles, we find that this matter does not qualify for an Advisory Opinion. This is because *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* [2012] eKLR Advisory Opinion No 2 of 2012, this court warned at paragraph 18 that:

“The Supreme Court must guard against improper transformation of normal dispute issues for ordinary litigation into Advisory Opinion causes, as the court must be disinclined to take a position in discord with the core principles of the Constitution.”

8. This Reference seeks an Advisory Opinion on the grounds and procedure for removal of the Speaker of a County Assembly. That issue was raised in the said matter of *Speakers of the 47 County Assemblies v Commission on Implementation of the Constitution & 2 others*; Advisory Opinion Reference No 3 of 2014 where this Court held that the issue having been raised in High Court Constitutional Petition No 418 of 2014—[*The Secretary Isiolo County Assembly & Others v The Speaker Isiolo County Assembly*—it was a contested justiciable issue that should and had been canvassed before the High Court although it was not clear if it had been substantially determined by the court. As such the issue could only come to this court through the appellate process if appropriate and necessary. If the High Court cannot provide relief, the parties should seek legislative intervention. This matter is therefore not only justiciable fit for trial in the lower courts in the normal way but also *res judicata*. It is accordingly incompetent and an abuse of the court process.
9. In the circumstances, we decline to exercise our discretion to assume jurisdiction in this matter and we accordingly dismiss it. Although the matter is justiciable and already *res judicata*, since it is grounded on public interest, we hold that each party should bear its own costs.

F. Final Orders

- (a) The Reference dated June 10, 2019 and filed on June 17, 2019 is hereby dismissed;
- (b) Each party to bear its own costs.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF AUGUST, 2020.



.....

D. K. MARAGA

CHIEF JUSTICE & 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

