



REPUBLIC OF KENYA



KENYA LAW
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**Kazungu v County Assembly of Taita Taveta & 3 others (Petition
E008 of 2024) [2025] KEHC 895 (KLR) (27 January 2025) (Ruling)**

Neutral citation: [2025] KEHC 895 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
PETITION E008 OF 2024
AN ONGERI, J
JANUARY 27, 2025
(FORMERLY MOMBASA ELRCPET NO. E009 OF 2024)
FORMERLY VOI HCCHRPET NO. E007 OF 2024)**

BETWEEN

WISDOM MWAMBURI KAZUNGU PETITIONER

AND

COUNTY ASSEMBLY OF TAITA TAVETA 1ST RESPONDENT

CLERK, COUNTY ASSEMBLY OF TAITA TAVETA 2ND RESPONDENT

ANSELM MWADIME 3RD RESPONDENT

ROSE SHINGIRA 4TH RESPONDENT

RULING

1. The Petitioner/Applicant filed an application dated 22nd January 2025 seeking the following orders:-
 - i. That this matter be certified as urgent and service in the first instance be dispensed with.
 - ii. That pending the hearing of this application inter-parties, an order of injunction do issue to restrain the Respondent from proceeding with the intended election of the Speaker of County Assembly of Taita Taveta either on 28th January 2025 or any other day pending the inter parties hearing of this application.
 - iii. That pending the hearing of the Appeal filed against the decision made herein on 17th January 2025, an order of injunction do issue to restrain the Respondents from proceeding with the intended election of the Speaker of County Assembly of Taita Taveta either on 28th January 2025 or any other day pending the hearing of the appeal filed in the Court of Appeal.



- iv. That costs of this application be provided for.
2. The application is based on the following grounds:-
- i. That this court delivered its ruling on 17th January 2025 whereby the Petition herein was dismissed. Being aggrieved by the said decision, the Petitioner filed a Notice of Appeal and will appeal against the said ruling in whole in the Court of Appeal.
 - ii. That despite the fact that the Applicant is fighting his unlawful and unprocedural ouster from office by the Respondent, the Respondents even during the pendency of this suit proceeded to place a notice on the Kenya Gazette calling for a Special sitting of the County Assembly of Taita Taveta on 28th January 2025 the business of the day being election of the Speaker.
 - iii. That the intended Special meeting if allowed to take place will render the intended appeal nugatory and a pure academic exercise as the intended exercise is the subject matter of the said intended appeal.
 - iv. That the conservatory orders sought for herein will not in any way prejudice or interfere with the daily business or running of the affairs of the County Assembly of Taita Taveta since as per Standing Order 5 of the County Assembly of Taita Taveta, the County is permitted to elect a Speaker from amongst its members which Speaker serves until a substantive Speaker is duly elected.
 - v. That following the impeachment of the Petitioner as the Speaker of County Assembly of Taita Taveta, the said County in pursuance of the said County Standing Order 5(3) elected one Anselem Mwadime Chao to act as the Speaker of the County Assembly of Taita Taveta, while this suit is pending in the court.
 - vi. That the above position has propelled without any complications yet, on 17th January 2025 (the date when the ruling was read), a special issue of the Kenya Gazette, Notice No. 387 issued by the said Anselin Mwadime Chao was published whereby the election of the substantive Speaker of the County Assembly of Taita Taveta will take place on 28th January 2025 at 2:00p.m. Under Article 164(3) of the Constitution of Kenya 2010, there is an automatic right of appeal on a ruling rendered in Constitutional Petition matters by the High Court to the Court of Appeal.
 - vii. That the Petitioner herein has already filed an appeal as a result of having filed the Notice of Appeal, see Order 42 Rule 6 of the Civil Procedure Rules, 2010.
 - viii. That in the circumstances, the said intended election of the Speaker is in contravention of Standing Order 5(3) of the said County, since no election of a substantive Speaker can take place while the issues raised in the Petition herein are still pending in court which is the case herein as the said issues are now pending on appeal.
 - ix. That the said Anselem Mwadime Chao is the acting Speaker and is also the substantive Deputy Speaker of the County Assembly of Taita Taveta, and he therefore seems to be in a hurry to substantively take over the office of the substantive Speaker.
 - x. That in any event, once the said election takes place and a new substantive Speaker is elected then, the entire appeal will be rendered nugatory and a pure academic exercise.
 - xi. That the court herein as the court from which the said appeal is being filed from, has a duty in law to ensure that the appeal is not rendered nugatory, see Martin Nyaga Wambora =Versus=



County Assembly of Embu & Others (2015) KECA 513 (KLR) and also see, Butt Versus Rent Restriction Tribunal 91979) KECA 22 (KLR).

- xii. That the Petitioner/Applicant is ready and willing to file his record of appeal immediately he is supplied with the certified copies of proceedings and ruling delivered by this Honourable Court.
 - xiii. That this Honourable court has a duty to preserve the substance of the appeal as the appeal may be decided in one way or the other.
 - xiv. That in any event, the orders sought for herein will not in any way interfere with the daily business of the County Assembly of Taita since the business of the House can be conducted by the Deputy Speaker in the absence of a Speaker.
 - xv. That the Respondents will not suffer any prejudice if the application herein is granted as prayed but on the other hand, the intended appeal may be rendered nugatory if the orders sought for are not granted.
3. The Respondents opposed the application and filed a Notice of Preliminary Objection dated 27th January 2025 and a Replying Affidavit sworn on 27th January 2025 by GADIEL M. MAGANGA, the Clerk of the County Assembly of Taita Taveta in which he deponed as follows:-
- i. That I am the clerk to the County Assembly of Taita/Taveta thus well versed with the issues raised in the Notice of Motion dated 22nd January 2025 and the Affidavits thereof as sworn on the same date and wishes to state as follows.
 - ii. That the contents of paragraph 1 and 2 of the Supporting Affidavit are admitted.
 - iii. That in answer to paragraph 3 of the Supporting Affidavit I wish to state that the Petitioner/Applicant was impeached pursuant to the relevant provisions of the law. It is only our courts of law that can make a finding whether or not the Applicants impeachment was extremely irregular or not.
 - iv. That contra the assertions made at paragraph 4 of the Supporting Affidavit. The Applicant's Petition was not dismissed but was struck out for want of jurisdiction
 - v. That the contents of paragraph 7 of the Supporting Affidavit are admitted. Save to add that there was no Order barring the election of Anselem Mwadime Chao in line with the standing orders of the County Assembly of Taita/Taveta.
 - vi. That in reply to paragraph 6 of the Supporting Affidavit. I wish to state that contra the assertions and interpretation of standing Order No 5, it is not accurate that the provision bars election of a substantive speaker. The provision is subject to written law that provides otherwise, it is thus not absolute. That there is an amendment of substantive legislature that provides otherwise.
 - vii. That in addition to paragraph 6 above, I wish to state that the Assembly had been forced to conduct its business without a substantive Speaker for a period of six (6) months which have since lapsed.
 - viii. That as is, the legislative arm of the County Government of Taita/Taveta is crippled and without a substantive Speaker, whose functions are critical the performance and execution of the core functions of the County Government of Taita/Taveta are paralysed.



- ix. That in allowing the Orders sought, the Court would have suspended express provisions of the Constitution of Kenya, the functions of the County Government of Taita/Taveta would stand suspended.
- x. That the law does not envision the holding of a public office in an acting capacity for a period of more than six (6) months.
- xi. That am advised by my Advocate on record which advise I verily believe to be correct that the effect of this paralysis is that it contradicts the principle of interregnum and suspends the operation of the provisions of the Constitution particularly Article 178 and 185 of the Constitution, which outcome is not envisioned by the Constitution.
- xii. That in answer to paragraph 7 of the Supporting Affidavit, I wish to state that am advised by my Advocate on record whose advise I verily believe to be correct that there is no proper notice of appeal on record.
- xiii. That in reply to paragraph 8 of the Supporting Affidavit, I wish to state that the Applicant is asking the court to make Orders in anticipation, which is not legally permissible.
- xiv. That the allegations made at paragraph 9 & 10 of the Supporting Affidavit are contested. I take great exception to the insinuation of ethical misappropriation made by the deponent that is unsupported by evidence. The allegations made are serious and ought to be substantiated.
- xv. That in addition to paragraph 14 above, the ruling by the court was the first Order of business on 17th January 2025. The Court starts at 8:00 am. The ruling striking out the Petition was delivered before 9:00 am. There was thus nothing that barred the Assembly in Gazetting the date of the election of the Speaker.
- xvi. That in answer to paragraph 11 of the Supporting Affidavit the Applicant alleges violations of his right to employment will be destroyed. Am advised by my Advocate on record which advise I verily believe to be correct that no loss will be suffered that cannot be compensated. The Applicant having admitted that he is pursuing an employment claim.
- xvii. That further and in addition to paragraph 16 above, am advised by my Advocate on record which advise I verily believe to be correct, that the Applicant having admitted that he is pursuing an employment claim. This court cannot entertain this present motion.
- xviii. That in answer to paragraph 12 of the Supporting Affidavit. I wish to state that, there is nothing that threatens the substratum of the Appeal if any. The intended Appeal cannot be rendered moot should the Application herein be declined. The law is not without a relief for the Applicant.
- xix. That the contents of paragraph 13 of the Supporting Affidavit are admitted.
- xx. That in reply to paragraph 14 of the Supporting Affidavit am advised by my Advocate whose advise I verily believe to be correct that the fact that there is an acting Speaker cannot be deemed as security. In any event standing order No 5 is no longer applicable as previously stated herein.
- xxi. That the balance of convenience tilts in favour of allowing the elections to proceed. The Applicant is invited to vie again.
- xxii. That in opposition to paragraph 16 of the Supporting Affidavit, am advised by my Advocate on record which advise I verily believe to be correct that prayer (2) sought cannot issue since the court is devoid of jurisdiction.



- xxiii. That further and in addition to paragraph 22 above, am advised by my Advocate on record which advise I verily believe to be correct. That the Applicant has failed to meet the legal threshold permissible in law for grant of the orders sought herein of injunction and stay of execution.
 - xxiv. That contents of paragraph 17 of the Supporting Affidavit are opposed. The Applicant is asking the court to grant Orders that would effectively suspend the Constitution of Kenya and paralyze/suspend the County Government of Taita/Taveta.
 - xxv. That in answer to paragraph 18 of the Supporting Affidavit. Am advise by my Advocate on record which advise I verily believe to be correct, that Appeal if at stands nil chances of success the question of jurisdiction herein having been settled by superior courts.
 - xxvi. That in addition to paragraph 25 above. Am advised by my Advocate which advise I verily believe to be correct. There are still avenues for redress in the very unlikely event the intended appeal if any is to succeed.
 - xxvii. That contra the averments made at paragraph 19 of the Supporting Affidavit, it is not in the interest of justice that the motion should be allowed but in the personal interest of the Applicant. The office whose vacancy is to be filled is a public office, it cannot seize operations at the behest of the Applicant who was prior impeachment a public servant of the people of the County of Taita/Taveta.
 - xxviii. That am advised by my Advocate on record which advise I verily believe to be true that the Application herein is misconceived and/or bad in law and thus should be dismissed.
4. The application dated 22nd January 2025 and the Notice of Preliminary Objection dated 27th January 2025 were argued orally simultaneously in court.
 5. The Petitioner/Applicant's Counsel submitted that the Petition herein was struck out by this court on 17th January 2025. That the Petitioner has filed a Notice of Appeal to the Court of Appeal (COA) dated 20th January 2025 and he has since requested for copies of the proceedings and the Ruling of the court to be supplied to him.
 6. He further stated that by virtue of orders 42 Rule 6 of the Civil Procedure Rules he is seeking an injunction pending appeal.
 7. The Petitioner relied on the case of T.S.S Grain Millers (under Administration) =Versus= NIC Bank Kenya PLC (Civil Suit 13 of 2018) (2022) KEHC 12161 KLR at paragraph 15 where the court held that despite having dismissed an application, the court had jurisdiction to grant an injunction pending an appeal.
 8. The Petitioner submitted that the appeal filed in the Court of Appeal will be rendered nugatory unless the injunction is granted herein.
 9. He also relied on the case of DJ lower & Company Ltd =Versus= Credit Agricole Indosuez & Others HCCC No. 235 OF 2010 (Mombasa) unreported where Justice Edward Mureithi struck out a suit and held that the court had jurisdiction to grant stay orders.
 10. The Petitioner/Applicant also relied on the case of James Juma Mucheru & Partners Ltd =Versus= Barclays Bank of Kenya Limited (2011) eKLR where the court said that despite having struck out a case the court still had jurisdiction to grant an injunction in order to preserve the subject matter.



11. The Petitioner/Applicant argued that the right of appeal is captured in Article 164 (3) of the Constitution and further that Article 10 and 47 of the Constitution should be upheld.
12. The Petitioner/Applicant also submitted that under standing Order 5(3) of the Taita Taveta County Assembly standing orders, the election of the Speaker cannot take place where there is a litigation which is on going.
13. He said that the intended election scheduled for 28th January 2025 will be illegal, null and void in the circumstances and further that there is no vacuum in the County Assembly of Taita Taveta since there is an acting Speaker.
14. The Petitioner/Applicant said the law requires that he approaches the court of first instance before proceeding to the Court of Appeal to seek the injunctive orders.
15. The Petitioner/Applicant further said that this court has the jurisdiction to hear this matter. He said in employment matters when an employer decides to terminate the services of an employee Section 41 of the Public Service Act comes in and that is when the matter is referred to the Employment Court (ELRC).
16. However, he said in the current case what happened was a political process just like what happened in the case of Wambora and the Deputy President and the proper forum is the High Court.
17. The Respondents opposed the application and filed a replying affidavit together with a Notice of Preliminary Objection dated 27th January 2025 in which they stated that this court is devoid of jurisdiction and it is also functus officio having struck out the entire Petition.
18. The Respondent submitted that since the Petition was struck out for want of jurisdiction, the authorities relied on by the Petitioner/Applicant can be distinguished since none of them dealt with the issue of jurisdiction.
19. Counsel for the Respondent submitted that this court having struck out the Petition for lack of jurisdiction cannot now arrogate itself jurisdiction to grant the injunction.
20. The Respondent's Counsel further argued that the court can only have residual jurisdiction if it had the jurisdiction to hear the matter in the first instance.
21. The Respondents further argued that the Court of Appeal is now seized of this matter, the Petitioner/Applicant having filed a Notice of Appeal, he should proceed to the Court of Appeal under Rule 5 (2) (b) to seek stay and that he cannot proceed both in the Court of Appeal and before this court.
22. The Respondents said the moment the Petitioner/Applicant moved to the Court of Appeal, this court ceased to have jurisdiction over this matter.
23. The Respondents also submitted that in the event that this court finds that it has jurisdiction, an injunction cannot issue because the Petitioner has not met the threshold for grant of the same as stated in the case of Giella =Versus= Cassman Brown.
24. They submitted that the Petitioner has not established that he has a prima facie case with probability of success and further, they stated that in this case, the petitioner can be compensated by an award of damages since he alleges violations of his right to employment will be destroyed and therefore no loss will be suffered that cannot be compensated.



25. That the Applicant having admitted that he is pursuing an employment claim, the same can be compensated by an award of damages and therefore the balance of convenience tilts in favour of the Respondents.
26. The Respondents further submitted that the loss of employment by the Petitioner can be compensated by reinstatement and/or payment of compensation.
27. The Respondents relied on the case of Mohammed and 6 Others =Versus= County Assembly of Wajir Petition No. E009 and E017 of 2012 (known as the Wajir case) where the holding was that the Governor be reinstated.
28. The Respondent submitted that should this court grant an injunction the Taita Taveta County Assembly will be operating without a Speaker and that will suspend Articles 178 and 185 of the Constitution.
29. They said reliance was made on stating Order No. 5 which is limited by the Constitution of Kenya and the Public Service Commission Act Section 34(3) which states one can only hold office in acting capacity for a maximum of 6 months.
30. The Respondents stated that the acting period has lapsed and that is why there is haste in holding the elections and further that the Petitioner/Applicant is not barred from seeking re-election.
31. The Respondents further submitted that the Petitioner/Applicant has been abusing the court processes and further that he has not deposited any security for the due performance of the decree.
32. I have considered the submissions by both parties in the application dated 22nd January 2025 seeking an injunction pending appeal to the Court of Appeal.
33. I have also considered the Notice of Preliminary Objection dated 27th January 2025 opposing the application dated 22nd January 2025 .
34. I have also perused Affidavits filed herein by the parties and the authorities relied on by both parties.
35. The issues for determination in the application dated 22nd January 2025 and the Notice of Preliminary Objection dated 27th January 2025 are as follows:-
 - i. Whether this court has the jurisdiction to hear the application dated 22nd January 2025.
 - ii. Whether the Petitioner/Applicant should be granted an injunction pending an appeal to the Court of Appeal.
36. A brief history of this case is that the Petitioner/Applicant initially filed in Mombasa as mombasa CHPET No. 035 of 2024 which was transferred to the High Court at Voi by the High Court at Mombasa and it became Voi CHPET No. E007 of 2024.
37. The Petitioner simultaneously filed Mombasa ELRC Petition No. E008 of 2024.
38. Upon transfer of Mombasa CHPET E035 OF 2024 to Voi which became Voi CHPET No. E007 of 2024, the High Court at Voi transferred Voi CHPET No. E007 of 2024 to Mombasa ELRC where the Petitioner had filed Mombasa ELRC Petition No. E008 of 2024.
39. The ELRC Judge made a Ruling in Mombasa ELRC E007 of 2024 and transferred it back to Voi High Court where it became Voi CHPET E008 of 2024 (the current case).
40. The Respondent filed Civil Appeal No. E174 of 2024 in the Court of Appeal against the Ruling in Voi CHPET E008 of 2024 by the ELRC Judge.



41. The respondents raised a NOPO in Voi CHPET No. E008 of 2024 on the basis that this court has no jurisdiction to hear it and this court struck it out for want of jurisdiction in a Ruling dated 17th January 2025(the impugned Ruling).
42. The Respondent subsequently abandoned Appeal No. 174 of 2024 in the Court of Appeal since the suit was struck out.
43. The Petitioner/Applicant is now seeking an injunction to restrain the Respondent from proceeding with the intended election of the Speaker of County Assembly of Taita Taveta on 28th January 2025 at 2pm pending appeal to the Court of Appeal against the impugned Ruling.
44. On the issue as to whether this court has jurisdiction to grant an injunction pending appeal to the Court of Appeal, I find that it is not in dispute that the Petitioner/Applicant has filed a Notice of Appeal to the Court of Appeal dated 20th January 2025.
45. The application dated 22nd January 2025 is seeking an injunction to stop the election for the Speaker slated for 28th January 2025 at 2p.m at the Taita Taveta County Assembly pending the appeal to the Court of Appeal.
46. The Petitioner/Applicant submitted that this court has residual jurisdiction to grant the orders sought for the purpose of preserving the subject matter so that the appeal is not rendered nugatory.
47. He submitted several authorities from the High Court which have persuasive value where the High Court has exercised residual jurisdiction to grant injunctions despite having dismissed or struck out the suits.
48. Opposing the application, the Respondents said the authorities relied on by the Petitioner/Applicant can be distinguished on the basis that they were not dealing with a situation where the court of first instance had no jurisdiction to handle the cases appealed from.
49. I have considered the history of this case and I find that the same has not been heard.
50. I have also perused Standing Order 5(3) of the County Assembly Taita Taveta which states as follows:-
 - “ 2. 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.
 3. Unless otherwise provided under any written law, paragraph 2 shall not apply where the vacancy in the office of the Speaker is the subject of court proceedings and a member elected by the County Assembly to act as Speaker pursuant to Article 178(2)(b) of the Constitution of Kenya, 2010 shall preside over the transaction of business by the County Assembly until the election of a new Speaker.”
51. I find that there is currently an acting Speaker in the County Assembly of Taita Taveta and therefore there is no vacuum in the County Assembly.
52. The Standing Order 5(3) provides that there can be no election when there is a case pending in court.
53. I have considered the prevailing circumstances in this case and especially the fact that the petitioner has not been heard and the speed at which the respondents are seeking to hold the elections while there is a pending case which is contrary to their own Standing Order 5(3) and I find that there is need to preserve the subject matter.



54. I find that there is reason to suspend the orders of this court for the purpose of preserving the subject matter and to enable the Petitioner/Applicant to file his appeal.
55. I find that the requirement to deposit security for the due performance of the decree is not applicable since this is not a monetary decree.
56. The right of appeal under Article 50 of the Constitution has to be safeguarded by this court. The same is as important as the right to a fair hearing.
57. The petitioner/applicant has an automatic right of appeal to the Court of Appeal which the respondents want to curtail by holding the elections before the lapse of the said period.
58. It is therefore in the interest of justice that the election of the county speaker be halted pending appeal to the Court of Appeal otherwise the intended appeal will be rendered nugatory.
59. Therefore, on the issue as to whether the Applicant should be granted an injunction despite that his case was struck out, I find that the answer is in the affirmative.
60. The elections slated for 28th January 2025 at 2pm be and are hereby temporarily suspended for 30 days to enable the Petitioner/Applicant to exercise his right of appeal to the Court of Appeal.
61. Since courts do not act in vain, the Petitioner is granted the injunction for 30 days to enable him to move the Court of Appeal under Rule 5(2)(b) of the Court of Appeal Rules so that the appeal is not rendered nugatory.
62. The Notice of Preliminary Objection is therefore disallowed and the application dated 22nd January 2025 is allowed. The costs of this application will abide the outcome of the intended appeal.

DATED, SIGNED AND DELIVERED THIS 27TH DAY OF JANUARY 2025 IN OPEN COURT AT VOI.

ASENATH ONGERI

JUDGE

In the presence of:-

Court Assistant: Maina

Mr. Gikandi for the Petitioner/Applicant

Mr. Nyange for the Respondent

