



Makumi & 4 others v Speaker County Assembly of Kitui & another (Constitutional Petition E001 of 2024) [2024] KEHC 2812 (KLR) (19 March 2024) (Ruling)

Neutral citation: [2024] KEHC 2812 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITUI
CONSTITUTIONAL PETITION E001 OF 2024**

**RK LIMO, J
MARCH 19, 2024**

BETWEEN

**HON. PRISCILLA MAKUMI 1ST APPLICANT
HON. TITUS KASINGA 2ND APPLICANT
HON. MARK NDINGO 3RD APPLICANT
HON. SAMMY MUNYITHYA 4TH APPLICANT
HON. MERCY MUEMA 5TH APPLICANT**

AND

**THE SPEAKER COUNTY ASSEMBLY OF KITUI 1ST RESPONDENT
WIPER DEMOCRATIC MOVEMENT KENYA 2ND RESPONDENT**

RULING

1. The application before the court is dated 4th March 2024 and brought pursuant to provisions of Articles 19, 20, 21, 22, 159 and 258 of *the Constitution*, Rules 13 and 19 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. The Applicants are seeking the following orders;
 - i. Spent
 - ii. That the Petition filed together with this application be heard expeditiously and on priority basis within such a period as this Honourable Court may direct.
 - iii. That pending the hearing and determination of this application and the entire petition, a conservatory order do issue suspending the reconstitution of the Kitui County Assembly Business Committee and the Kitui County Assembly Selection Committee and the two committees as reconstituted on 14th February 2024 and on 28th February, 2024 respectively be



barred from holding any sittings, incurring any expenditure as allowances or otherwise or in any other way howsoever, carrying out the mandate designated or reserved for the two committees under the Kitui County Assembly Standing Orders.

- iv. That pending the hearing and determination of the Petition, an order does issue in terms of Section 6 and 11 of the *Fair Administrative Action Act* compelling the Respondents, jointly, severally to supply the Petitioners/ Applicants with written reasons for the decision to drop them from the two Committees.
 - v. That costs of this application be provided for.
2. The Notice of Motion is supported by grounds set out on the face of the application and the supporting affidavit of Mark Nding'o sworn on 4th March 2024. The grounds upon which the reliefs are sought are;
- a. That no prejudice will be suffered if the two reconstituted committees are suspended. The business of the assembly will continue to run in the normal manner through the committees as constituted before the impugned decision of the Respondents.
 - b. That the Applicants are members of the County Assembly of Kitui who have been serving in the Selection Committee of the Assembly. The first Petitioner/ Applicant has also been serving as a member of the Business Committee of the Assembly.
 - c. That as members of the two committees who served diligently, the Petitioners/Applicant had a legitimate expectation that they would continue to serve in those committees and they would not be arbitrary or whimsically dropped from the committee without an explanation, notice or consultation.
 - d. That Standing Order 156 of the County Assembly of Kitui Standing Orders provides as follows with respect to the removal of a member from a committee.
 - a. The party whip of the relevant party must give a notice in writing to the Speaker of the county Assembly, communicating the decision to discharge a member from a committee; and
 - b. The Speaker must inform the affected member within three days of receipt of the notice from the relevant political party.
 - e. That in this case, the Petitioners were not supplied with or copied on any notices to the Speaker, requiring their removal from the committees. The Speaker did not also give any notice to the Petitioners as required by the Standing Orders. This constitutes a travesty of the laid down procedures and any action founded on a travesty of procedure is invalid.
 - f. That a notice to the Speaker under Standing Order 156 cannot issue to a Political Party unless and until the individuals affected by that decision have been given an opportunity to be heard. This was not done in the present case.
 - g. That on 13th February 2024, the 1st Respondent approved for debate and allowed a motion to be moved and approved, dropping the name of the 1st Petitioner from the Assembly Business Committee. This motion was tabled on 14th February 2024. The motion was engineered, presented for approval and tabled for adoption by the County Assembly of Kitui without any form of prior notice to the first Petitioner by the Respondents or their agents. No explanation was also given for the decision to remove the first Petitioner from the Business Committee.



- h. That despite written protests from the Petitioners/Applicants, the 1st Respondent on 27th February 2024, approved and permitted a motion to be tabled before the Assembly on 29th February 2024 for debate and approval of the list of members to the Assembly Selection Committee with the outcome that the Petitioners/Applicants were dropped from the Assembly Selection Committee arbitrarily, whimsically and without any prior consultation, explanation or notice to them.
- i. That the Assembly Business Committee and the Selection Committee as constituted do not meet the gender threshold set by the Constitution and the 1st Respondent's decision to allow the motion to be tabled and approved ran foul of the Constitution. These Committees now ought to be barred from holding any sittings pending the hearing and determination of this Petition. The constitution required that the membership of these committees should not contain more than two thirds from one gender.
- j. That the Respondents have not supplied reasons or justification for their decisions and the Petitioners/Applicants are aggrieved. Without providing reasons or proffering a lawful justification for this action, a presumption is raised against the Respondents that the decision to drop the Petitioners/Applicants from the two committees was actuated by malice and inspired by ulterior considerations. As individuals directly affected by the decision to drop their names from the two committees, the Petitioners' rights under Articles 27 and 47 of the Constitution are implicated.
- k. That the County Assembly of Kitui as established under the Constitution and as guided by the County Assembly of Kitui Standing Orders, functions through committees and the Petitioners/Applicants are entitled to be afforded the widest possible opportunity to serve the public through the committees. The Petitioners are entitled to serve the public and Article 236 of the Constitution protects the integrity of public service.
- l. That in the course of debate before the assembly, members of the assembly pointed out that the committees as proposed would not meet the gender threshold set by the Constitution but the first Respondent nevertheless allowed the debate and passing of the committees. The decision by the 1st Respondent to permit the discussion, vote and approval of an unconstitutional list constituted a subversion of the Constitution and amounted to an actionable dereliction of duty.
- m. That the Selection Committee is a pivotal committee as it determines the composition of the other committees of the assembly in accordance with Standing Order 152 of the County Assembly of Kitui Standing Orders. This Committee will imminently begin its sittings, denying the Petitioners a chance to participate and despite the fact that it is not properly constituted as required by the Constitution and the Standing Orders.
- n. That if conservatory orders are not issued to suspend the two reconstituted committees as constituted, there will be compounding of illegalities and unconstitutional actions as these committees will then proceed to run the business of the Assembly including putting in place other committees. If this court ultimately determines that the two committees were not properly constituted, it may then become necessary to annul and invalidate all actions taken by the two committees. The conservatory order is intended to countermand the ripple effect. Any actions taken by these two committees will constitute fruits of a poisonous tree.
- o. That it is in the interest of justice to hear this application urgently and to grant the orders as sought.



- p. That is if only fair and just that this application be heard expeditiously for the court to address itself to the question of the legitimacy of the Respondent's decision to drop the Petitioners from the house committees and to have in place committees whose composition flies in the face of constitutional demands on gender balance.
- q. That the Respondents and particularly the first Respondent had the opportunity to right the wrong and to defend *the Constitution* after receiving written notices from the Petitioner and also after the issues raised in this Petition were raised by members of the County Assembly on the floor. The first Respondent surprisingly chose a path of Constitutional subversion. The Petitioners are now before this court to right the wrongs.
3. The applicants have supported this application with an affidavit sworn by Mark Ndingo sworn on 4.3.2024 where he has basically reiterated the above grounds with the exhibits to demonstrate their averments particularly the membership of various committees of the County Assembly of Kitui.
 4. The Applicants have further through learned Counsel Mr. Kimuli submitted that they deserve to be given Conservatory Orders suspending reconstitution of what he terms two pivotal Committee that is Business Committee and Selection Committee.
 5. Counsel for the Applicants submits that the Business Committee runs the business of the Assembly while the Selection Committee determine membership of all the other Committees of the County Assembly. They argue that if the said two Committees are not lawfully constituted, then the other Committees will be founded on quicksand and illegality. It is on that basis that the applicants are asking this court to suspend the reconstitution of the said two Committees.
 6. The Applicants contend that the reconstitution of the 2 Committees violated *the Constitution* of Kenya. They also contend that there was no Notice issued under Standing Order 156(3) because the Petitioners were not notified about their discharge from the Committees. They aver they were not served and have pointed out the procedure provided under Standing Order 156 (1) which requires the removal of a Committee member to be originated by Assembly Majority Party via its internal mechanism was not adhered to.
 7. The applicants further point out that the cited two Committees do not meet the critical gender balance Contrary to the provisions of Article 27 (8) of *the Constitution*.
 8. The Applicants contend that unless the orders sought are given loss and prejudice will be occasioned as the integrity of process of the Assembly will be brought into question. They have placed reliance on the decision of Gitarau Peter Munya Vs Dickson Mwenda Kithinji (2014) Eklr where the Supreme Court dealt with principles of issuing Conservatory orders.
 9. The 2nd Respondent, Wiper Democratic Movement – Kenya, has thrown its weight behind the Petitioners and supported this application vide an affidavit sworn by its Secretary General sworn on 6th March 2024. It avers that the 1st to 5th Petitioners are members of Wiper Party and that their removal from Committees went against the Party's principles on gender parity.
 10. It submits though learned Counsel Mr. Lenkidi that the applicants have made out a case for issuance of Conservatory orders pointing out there are critical issues raised in the Petition about the notices and procedural questions arising from removal of the applicants. It contends that the balance of convenience tilts in favour of Conservatory Orders being issued to avoid irreparable loss to the applicants and the 2nd respondent.



11. The 1st Respondent has vehemently opposed this application and has based its opposition to an affidavit sworn by Hon. Kevin Kinengo Katisya, the Speaker County Assembly of Kitui Sworn on 6th March 2024.
12. The 1st Respondent in a comprehensive replying affidavit faults the applicants for miscomprehending the Standing Orders of the County Assembly of Kitui in respect to constitution the Assembly Committees.
13. According to the 1st Respondent, the applicants were not removed or discharged from house Committees in accordance with Standing Order 156 of the County Assembly of Kitui but instead the term of the County Assembly Business Committee came to an end in December 2023 in accordance with Standing Order 2 and 24 of the County Assembly of Kitui Standing Orders.
14. The first Respondent contends that with respect to Committee on Selection, the Committee was duly reconstituted by the County Assembly in line with Standing Order 152 (2) of Kitui County Assembly Standing Orders.
15. The 1st Respondent avers that the County Assembly Business Committee is the engine that runs the County Assembly operations and transactions on a day-to-day basis and issuance of interim orders as sought would in its view paralyse the entire County Assembly of Kitui which in its view would not be in public interests. He asks this court to exercise some Judicial restraint in that regard.
16. In its oral submissions through learned Counsel M/s Kioko, the 1st Respondent submits the Assembly Committees are constituted at the beginning of every session and argues that a “Session” should be viewed under Standing Order 2 and 24 of Kitui Assembly Standing Orders. He argues that every session ends in December of every year and begins in February of the succeeding year as stipulated under Standing Order 151. He contends that the impugned Committees were a fresh Constitution upon lapse of the term of the previous Committees of the Assembly.
17. He faults the applicants for seeking to be considered for appointment to house Committee through the back door through this court. He takes the position that he has no role deciding who sits in which Committee and that his role is to ensure that Standing Orders and the Laws are adhered to.
18. He contends that the names of members to occupy positions in various committees were forwarded by the Leader of Majority Party and reiterates that as a Speaker he has his role to play on the membership of the various Committees. He has therefore distanced himself from the disputes on membership of Committees saying it is due to the wrangles in the Wiper Party and submits that the same ought to be resolved through Internal Party Mechanism.
19. Counsel further faults the 3rd Petitioner for swearing an affidavit in support of this application arguing that there is no express authority from the other Co-Petitioners/Applicants. He holds that the omission to get the authority from Co-petitioners is fatal to this application and entire petition and he relies on the decision in the case of Sadala -vs- Ndanyi (2021) Eklr.
20. He submits that the issue of gender Parity raised here is strange because he contends that even in the previous committees there was no gender parity and no one raised any issue adding that the 3 petitioners herein are men which in his view amounts to double speak because he argues that even if the 3 men petitioners were to be re-appointed the gender parity would not be realized.
21. He finally argues that the orders sought are directed to compel the County Assembly of Kitui yet the County Assembly through its clerk has not been sued. He submits that adverse orders cannot be issued against a party who has not been sued.



22. On the balance of convenience, the 1st Respondent contends that if interim orders as sought are given, the County Assembly of Kitui would be greatly prejudiced in a way that cannot be remedied by any amount of costs. He submits that the applicants on the contrary can be easily compensated by way of costs.
23. This court has considered this application and the response by both the 2nd Respondent who has thrown its weight to this application and the Petition and the 1st Respondent.
24. The main issue in this application is whether or not the conservatory as sought should be issued. The applicant's are seeking to have some conservatory orders in the nature of suspending the two impugned Committees of the County Assembly of Kitui to wit;
 - a. Kitui County Assembly Business Committee and
 - b. County Assembly Selection Committee.
25. A Conservatory order is a Judicial remedy sought or issued by a court to preserve a subject matter until the Suit/Petition is heard and determined. It is in other words an order of status quo ante so that the substratum of the suit/petition is preserved, or so that the same is not rendered an academic exercise.
26. At an interim stage a Court must navigate a thin line by avoiding to delve onto the merits of the suit/petition prematurely before hearing the parties but at the same time having an overview of the substance of the suit/petition itself and whether a case is made on a prima facie basis to warrant conservatory orders.
27. The nature and the principles guiding the grant of conservatory orders are now well settled. The Supreme Court in *Gatarau Peter Munya v Dickson Mwenda Kithinji & 2 others (2014) eKLR*, the Supreme Court discussed the nature of conservatory orders as follows: -

“Conservatory orders” bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as “the prospects of irreparable harm” occurring during the pendency of a case; or “high probability of success” in the applicant’s case for orders of stay.

Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant courses.”
28. The Supreme Court in the case of *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others (supra)* summarized the principles for grant of conservatory orders as;
 - a. The Appeal or intended appeal is arguable and not frivolous
 - b. Unless the orders sought are granted, the appeal or intended appeal, were it to eventually succeed, would be rendered nugatory
 - c. That it is in public interest that the conservatory orders be granted.
29. A court dealing with an application for conservatory orders must maintain the delicate balance of ensuring that it does not delve into issues which are in the realm of the main petition. The Court in



Muslim for Human Rights (Milimani) & 2 others v Attorney General & 2 others (2011) eKLR, stated as follows;

“The court must be careful for it not to reach final conclusion and to make final findings. By the time the application is decided; all the parties must still have the ability and flexibility to prosecute their cases or present their defences without prejudice. There must be no conclusivity or finality arising that will or may operate adversely vis-a vis the case of either parties. The principle is similar to that in temporary or interlocutory injunctive in civil matters. This is a cardinal principle and happily makes my functions and work here much easier despite walking a tight legal rope that I could easily lose balance with the slightest slip due to any laxity or being carried away by the passion or zeal of persuasion of any one side”.

30. The Applicants’ position is that they were serving as a members County Assembly of Kitui’s Selection Committee while the 1st Applicant’s position is that she was additionally serving as a member the Kitui County Assembly’s Business Committee. They aver that on diverse dates, they were discharged from the aforementioned committees without due procedure which was contrary to the provision of Standing Order 156 of the County Assembly of Kitui Standing Orders. They further aver that reconstitution of the committees currently offends the two-thirds gender rule.
31. This court went extra mile in navigating that thin line during the hearing of this application by inquiring from the counsels on record what really was in issue particularly on whether the lifespan of various House Committees are lapse with lapse of every session of the Assembly i.e. begins in February and ends in December after recess of the Assembly or subsists even after recess. The counsels on record were in agreement that the House Business or the County Assembly Business Committee ends with every session of the Assembly as defined under Standing Order 2 and Standing Order 24 of Kitui County Assembly Standing Orders. If that is the case the, the 1st Respondent’s position that the balance of convenience tilts in favour of not conservatory orders, it at this interlocutory stage is sound.
32. This court finds that the applicants on a prima facie basis have not persuaded this court that there is basis to issue orders that have the potential to paralyse the operation of a public institution as crucial as County Assembly with all its statutory and constitutional roles which I do not wish to go into at this stage.
33. Vide submissions by counsels before the court, parties agreed that the Kitui County Business Committee has a life span of one year and that the committee is reconstituted when the Assembly resumes operations after recess. Going by this submission operation of Standing Order No. 151 of the Kitui County Assembly Standing Orders which provide for notice upon discharge of a member does not arise in the case of the Business Committee specifically in reference to the 1st applicant who was its member. What is left for the court to decide on is whether the applicants were discharged from the selection committee or there was a reconstitution of the said committee in the substratum of the petition.
34. The other issue of gender parity is a critical issue in the petition herein upon which I do not find it appropriate to render myself on way or the other at this stage because of the potential of this court rendering itself prematurely particularly in light of interesting twist provided by the 1st Respondent’s contention that 3 of the Petitioners herein are men and that gender parity would not be attained even in the event that the applicants were to be appointed to their previous positions. The issue of gender rule is a cardinal one in *the constitution* and requires comprehensive interrogation and consideration in the main petition. I will therefore leave that issue for substantive consideration at the later stage in the main petition.



35. On the other hand, this court finds that the reconstitution of Select Committee, this court finds that procedural steps stipulated under Standing Order 151 appears to apply and all the counsels on record are in agreement in this regard. This court finds that the applicants have made out a case to warrant an orders of status quo ante pending the determination of the petition. This means that the reconstitution of the select committee as per the list forwarded to the assembly vide a letter by Majority Leader dated 27.2.24 is suspended and the status quo ante in respect to that Committee shall be either maintained pending the determination of the Petition herein or reconstitution be done in accordance with Standing orders 151 and 156 of Kitui County Assembly Standing Orders whichever comes place first. This order is made purely for public interest and the interest of Justice. The applicants and the respondents were silent in prayer 4 of this application so I will treat is as abandoned as no representations were made in that regard. I shall not make any order as to costs at this stage. I will also encourage the parties herein to explore Alternative Justice System like Alternative Dispute Resolution or Mediation pursuant to Article 159 (2) (c) of *the Constitution*. In the alternative the parties are directed to take a mention date for directions on the disposal of the Petition timely.

DATED, SIGNED AND DELIVERED AT KITUI THIS 19TH DAY OF MARCH, 2024

HON. JUSTICE R. K. LIMO

JUDGE

