



REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram: Koome CJ & P, Ibrahim, Wanjala, Lenaola & Ouko SCJJ)

PETITION (APPLICATION) NO. E008 OF 2024

-AS CONSOLIDATED WITH-

APPLICATION NO. E013 OF 2024

-BETWEEN-

CHARLES OWINO LIKOWA.....PETITIONER

-AND-

ISAAC ALUOCH POLO ALUOCHIER.....1ST RESPONDENT

VINCENCIA AWINO KIONGE.....2ND RESPONDENT

COUNTY ASSEMBLY OF MIGORI.....3RD RESPONDENT

(Being applications for stay of execution of the judgment of the Court of Appeal at Kisumu (Kiage, Ngugi M., Ngugi J. JJA) in Civil Appeal No. E037 of 2023 as consolidated with Civil Appeal No. E038 of 2023 delivered on 26th May, 2023 and Reasons thereof delivered on 27th February, 2024 as well as for injunctive orders and admission of additional evidence)

Representation:

Mr. Omondi for the Applicant
(Omondi Abande & Company Advocates)

Mr. Isaac Aluochier, the 1st Respondent
(Appearing in person)

Ms. Agnes Awuor for the 2nd Respondent
(Agnes Awuor Advocate)

Mr. Okongo Kennedy for the 3rd Respondent
(Okongo Wandago & Company Advocates)

RULING OF THE COURT

[1] **WHILE APPRECIATING** their correlation, this Ruling will dispose of two Motions, the first by the petitioner, Charles Owino Likowa dated 18th March, 2024, seeking conservatory orders and the second by the 1st respondent, Isaac Aluoch Polo Aluochier dated 20th May, 2024, seeking injunctive orders and admission of additional evidence; and

[2] **UPON READING** the Motion dated 18th March, 2024 and filed on even date by Charles Owino Likowa, the petitioner, pursuant to Article 163(4)(a) of the Constitution, Sections 3, 3A, 21(1)(A), 23A, 24 of the Supreme Court Act, No. 7 of 2011 and Rules 31 and 32 of the Supreme Court Rules seeking the following orders:

1. **Spent**
2. *There be stay of execution of the Judgment of the Court of Appeal as appealed from, pending the hearing and determination of the appeal;*
3. *A Conservatory Order be issued stopping fresh election of Speaker County Assembly of Migori, pending hearing and determination of this Appeal;*
4. *A Conservatory Order be issued stopping the implementation of the judgment of the High Court dated 21st February, 2023, issued in **Migori High Court Constitutional Petition No. E006 of 2022**, quashing the election of the Petitioner, **Charles Owino Likowa** and requiring the County Assembly of Migori, pursuant to Article 178(1) as read with Section 21(1) of the Elections Act, to elect its Speaker afresh within 21 days, as affirmed by the Judgment of the Court of Appeal dated 26th May, 2023, and Reasons dated 23rd February, 2024, pending hearing and determination of the Petition of Appeal;*
5. *A Conservatory Order preserving and affirming the position of the Petitioner, Charles Owino Likowa, Speaker County Assembly of*

Migori, do remain in office and continue serving and exercising functions, powers, duties and responsibilities as contemplated by Article 178(1) of the Constitution and Section 7(1)(b) and 9A of the County Governments Act, pending the hearing and determination of the Appeal.

6. *The Court be pleased to issue such further conservatory orders with respect to the position of the Speaker, County Assembly of Migori, as to ensure continuity of ordered functions at the County Assembly of Migori and preserve the subject matter of the appeal, pending hearing and determination of the Petition of Appeal; and*

[3] UPON PERUSING the grounds on the face of the application, the supporting affidavit by Charles Owino Likowa, sworn on 18th March, 2024 and submissions of even date wherein the petitioner states that he seeks conservatory orders to forestall the execution of the judgment of the Court of Appeal dated 26th May, 2023 and the Reasons for the Judgment dated 23rd February, 2024 and delivered to the parties on 27th February, 2024; the Court of Appeal affirmed the decision of the High Court dated 21st February, 2023 nullifying his election as the Migori County Assembly Speaker and directing the County Assembly to conduct a fresh election of its Speaker pursuant to Article 178(1) as read with Section 21(1) of the Elections Act as well as Section 9A of the County Governments Act, within 21 days. He further urges that his Petition of Appeal raises issues of constitutional interpretation and application specifically that the decision of the Court of Appeal, affirming that of the High Court, reopened a concluded constitutional process, in a manner not contemplated by the Constitution or statute; that pursuant to Article 178(1) of the Constitution, once a Speaker of any County Assembly is elected as the first order of business for a newly elected County Assembly, the Speaker holds office for a term of five years unless removed in the manner contemplated by Articles 178(3) and 200(2)(c) of the Constitution; that a Speaker's election can only be challenged through the process contemplated by Article 87 of the Constitution

and by special electoral dispute resolution mechanism, provided for under Section 75 of the Elections Act, which did not happen in his case; and

[4] FURTHER, that, if the orders of the Court of Appeal below are implemented, it would be irreversible and would trigger other constitutional and legal processes that would be difficult to undo later, in the event his appeal was successful; that such an action would also render his appeal nugatory hence the plea for conservatory orders; that the Court of Appeal correctly found that the Petition before the High Court was not supported by any evidence and therefore there was no basis to support a finding that his election was flawed and unconstitutional nor was there any reason given to support nullification of his election as Speaker; that the 2nd respondent's mandate of presiding over the election of the Speaker is invoked only during the first sitting of the County Assembly after a general election pursuant to Section 7A and 21 of the Elections Act, and having done so, becomes *functus officio*; and that since there are no legal provisions for conducting a repeat of the election process as ordered by the Court of Appeal, the 2nd respondent would be acting *ultra vires* the Constitution, Statute law and Standing Orders of the Assembly in doing so; and

[5] ADDITIONALLY, as regards the 1st respondent, it is argued that the High Court correctly found that he never returned his nomination papers with all the mandatory documents which were required of all candidates who contested for the position of Speaker; and that therefore he was correctly locked out of the process as Article 193(1)(b) of the Constitution requires that one of the requirements for qualification for a Member of County Assembly is to satisfy any educational, moral and ethical requirements prescribed in law; and

[6] UPON PERUSING the response by the 3rd respondent by way of replying affidavit sworn by Edward Ouma Ooro, the Leader of the Majority Party at the County Assembly of Migori on 28th March, 2024 and submissions of even date in support of the Motion which are on similar grounds as advanced by the petitioner; and

[7] UPON PERUSING the 1st respondent's response dated 25th March, 2025 wherein he states that he is opposed to the application but the grounds he raises are actually in support of it; and in any event he contends that, following the petitioner's and the 2nd respondent's judgment review applications dated 24th and 27th February, 2023, respectively, filed before the High Court in Migori, the parties entered into a consent with respect to the manner of resolving their dispute and further agreed to review, set aside and/or vacate the Judgment of the High Court dated 21st February, 2023; the High Court in Migori declined to adopt the consent citing the reason that the Court of Appeal had already affirmed its Judgment and also stated that it would proceed to render its decision on two review applications pending before it; the High Court further declined to issue and/or uphold the stay of execution orders of a fresh election for the office of Speaker of the County Assembly for Migori which were to be held within 21 days of 4th March, 2024; that pursuant to Section 22 of the Supreme Court Act, the Court may remit proceedings back to a court or tribunal with jurisdiction to deal with a matter and he therefore requests the Court to remit the Consent to the High Court for adoption; alternatively, he requests that the Court adopt the consent of the parties to allow them to resolve the dispute in the manner that they agreed upon, in line with Section 29C(1) of the Supreme Court Act which provides that the Court shall promote and encourage alternative dispute resolution mechanisms per Article 159(2)(c) of the Constitution; once the consent is adopted, the Motions and the related ***Petition of Appeal No. E008 of 2024*** would be rendered wholly unnecessary; and

[8] UPON PERUSING the petitioner's rejoinder dated 20th April, 2024 wherein he reiterates the contents of his application and submissions while further adding that, should fresh elections aforesaid be conducted and either the petitioner is elected as Speaker or a newly elected speaker comes into office, and the petitioner's appeal is allowed, the contestants would have expended a considerable amount of resources in time and money; therefore public interest lies in upholding the will of the people, exercised by their elected

representatives who voted for the petitioner to assume the office of Speaker; their will having been so exercised, the Court should safeguard and protect it; and none of the parties would be prejudiced in granting the orders sought; and

[9] UPON PERUSING the second Motion filed by Isaac Aluoch Polo Aluochier, the 1st respondent, dated 20th May, 2024 and filed on 21st May, wherein he seeks the following orders:

- a) *A permanent order stopping the election for the Speaker of the County Assembly of Migori that was advertised in the Standard Newspaper on 15th May, 2024 and to be held on 28th May, 2024;*
- b) *The expeditious and lawful conduct of an election for an acting or transitory Speaker of the County Assembly of Migori, with candidates for the same limited to existing members of the County Assembly of Migori;*
- c) *The prohibition of the conduct of an election for a substantive speaker of the County Assembly of Migori, until the hearing and determination of the instant proceedings; and*
- d) *The admission of additional evidence; and*

[10] UPON PERUSING the grounds on the face of the application, supporting affidavit sworn by the 1st respondent on 20th May, 2024 and submissions of even date wherein it is argued that, on 15th May, 2024, the Acting Clerk of the County Assembly of Migori, the 2nd respondent, placed an advertisement that appeared on page 26 of the *Standard Newspaper* advertising the vacancy in the office of the Speaker of the County Assembly of Migori following the impeachment of the Petitioner; that the ongoing election for Speaker fails to recognize the 1st respondent's right under Article 38(3)(c) of the Constitution to hold the office of Speaker upon his automatic election at the close of nomination period at 9.00am on 19th September, 2022 being the only duly nominated candidate; that according to Article 178(2), the individual responsible for overseeing the election of a permanent Speaker in the event of a

vacancy is an existing member of the County Assembly while in contrast, the person in charge of supervising the election of a temporary or acting Speaker is the Clerk, who is not a member of the County Assembly; as the 2nd respondent is not a member of the County Assembly, she does not have the authority to preside over the election of a new substantive Speaker under Article 178(2)(b); consequently, he urged that the ongoing election for the Speaker of the County Assembly of Migori advertised in the Standard newspaper of 15th May, 2024 and conducted by the 2nd respondent ought to be cancelled; and

[11] **ADDITIONALLY**, on the plea for admission of additional evidence, it is submitted by the 1st respondent that the additional evidence consists of the nomination papers of the 8 candidates who returned them during the nomination period ending at 9:00 am on 19th September, 2022; this evidence is directly relevant to the case before the Court as the 2nd respondent used it to determine which nominated candidates met the requirements in the County Assembly of Migori's Standing Order 5, as specified in Section 21(1) of the Elections Act as well as Section 9A(1) of the County Governments Act, as read with Article 178(3) of the Constitution; that he obtained this evidence as a result of the negotiations by the parties to settle their dispute using out-of-court resolution whereby the papers were filed at the High Court at Migori in ***Petition No. E006 of 2022*** on 14th February, 2024; that a review of the nomination papers revealed that only the 1st respondent met all the nomination requirements; that the new additional evidence satisfies the criteria outlined in Section 20(2) of the Supreme Court Act, 2022 as it is directly relevant to the case before the Court; it has the potential to influence the Court's decision; it could not have been reasonably obtained for use during the trial; was not within the knowledge of the 1st respondent; removes any ambiguity or uncertainty surrounding the case, is credible, has merit, would not hinder the other parties from responding effectively, and reveals intentional deception to the Court; and that a transitory Speaker can and should be elected as soon as possible from among the members of the County Assembly of Migori, so that the business of the County Assembly can continue unhindered.

[12] **HAVING** considered the totality of the applications, responses and rival arguments by the parties, **WE NOW OPINE** as follows:

- i. We are alive to the fact that, under the provisions of Section 23A of the Supreme Court Act, this Court has jurisdiction to issue an order for stay of execution, an injunction, stay of further proceedings or any other conservatory or interim orders, on such terms as the Court may deem fit.
- ii. It is also well established, following our decision in the case of *Gatirau Peter Munya vs. Dickson Mwenda & 2 others*, SC Application No. 5 of 2014, [2017] eKLR that an applicant must satisfy the Court that an appeal is arguable and is not frivolous; that unless the orders of stay are granted, the appeal will be rendered nugatory; and thirdly, it is in the public interest that the order of stay be granted.
- iii. The gist of the appeal herein is the determination of the question whether a serving County Assembly Speaker elected by members of that County Assembly at its first sitting after a general election can be removed from office contrary to the provisions of Article 178(3) and legislation enacted pursuant thereto, in this case the provisions of Section 21(5) of the Election Act as well as Section 11 of the County Government Act. However, before we determine the arguability of the petitioner's appeal, the 1st respondent has brought to the Court's attention a pertinent fact, through his application dated 20th May, 2024; that the petitioner was impeached by Members of the County Assembly of Migori on 23rd April, 2024 and is no longer the Speaker of the said County Assembly. The resulting effect is that, this Court would be engaging in an academic exercise if it were to determine the petitioner's Motion and any decision rendered would be no more than an academic statement. As a matter of public policy, this

Court, and indeed any other court, should not exercise its jurisdiction or act in vain. We decline the invitation to do so in this case and therefore all the prayers in the petitioner's Motion, having been overtaken by events, must be dismissed.

- iv. Similarly, the 1st respondent's Motion aforesaid has been overtaken by events and in any event, the issues raised in it do not relate to the appeal before us but a whole new cause of action arising from the *Standard Newspaper* advertisement dated 15th May 2024 calling for the election of a new Speaker for the County Assembly of Migori following the impeachment. Any challenge to that issue lies elsewhere.

[13] CONSEQUENTLY, it would not be a useful venture or beneficial for either the Court or the parties to sustain the two Motions before us. As regards the Petition of Appeal, in view of the changed circumstances, with the removal of the petitioner as Speaker, directions should be taken before the Deputy Registrar of this Court on what issues are left for our determination, if at all.

[14] On costs, the award of the same is discretionary and follows the principle set out by this court in *Jasbir Singh Rai & 3 other v Tarlochan Singh Rai & 4 others*, SC Petition No 4 of 2012; [2014] eKLR that costs follow the event. We exercise our discretion to order that each party shall bear its costs.

[15] ACCORDINGLY, and for the reasons aforestated we make the following orders:

- i. ***The Petitioner's Notice of Motion dated 18th March 2024 and filed on even date be and is hereby dismissed;***
- ii. ***The 1st Respondent's Notice of Motion dated 20th May, 2024 and filed on 21st May, 2024 be and is hereby dismissed;***
- iii. ***Directions to be taken before the Deputy Registrar of this Court on whether the Petition of Appeal herein should proceed to hearing;***

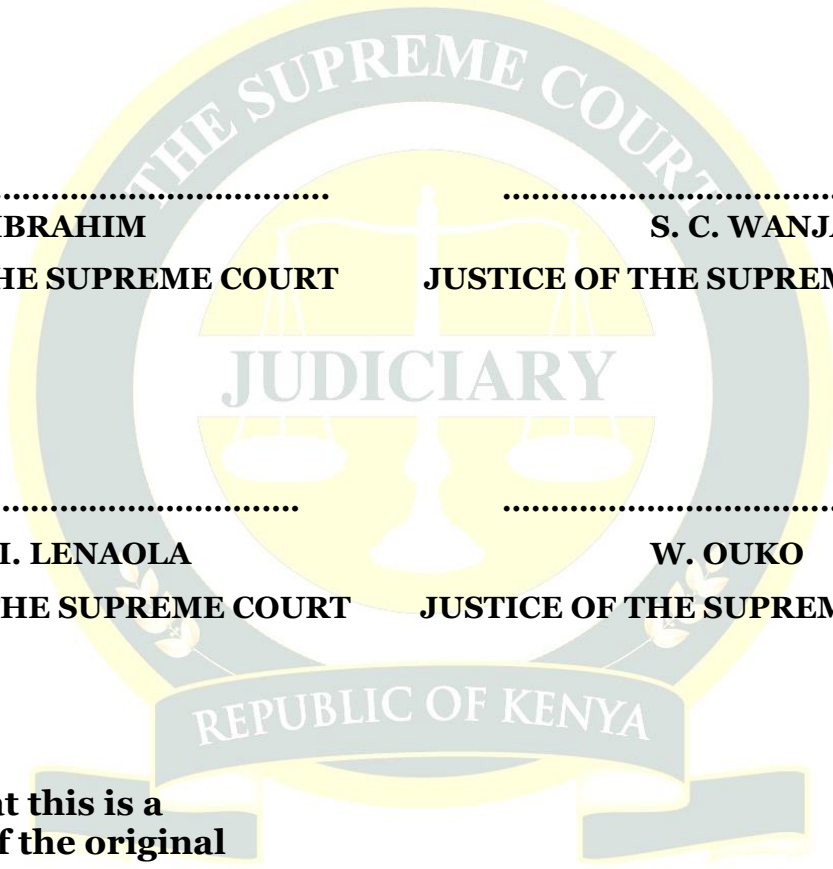
iv. Each Party shall bear their costs of the two Applications.

It is so ordered.

DATED and DELIVERED at NAIROBI this 26th day of July, 2024.

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**M.K. KOOME
CHIEF JUSTICE & PRESIDENT
OF THE SUPREME COURT**



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M.K. IBRAHIM

JUSTICE OF THE SUPREME COURT

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S. C. WANJALA

JUSTICE OF THE SUPREME COURT

.....

I. LENAOLA

JUSTICE OF THE SUPREME COURT

.....

W. OUKO

JUSTICE OF THE SUPREME COURT

**I certify that this is a
true copy of the original**

**REGISTRAR
SUPREME COURT OF KENYA**