

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram: Maraga, CJ &P, Ibrahim, Wanjala, Njoki & Lenaola, SCJJ)

REFERENCE NO. 4 OF 2017

–BETWEEN–

**THE SPEAKER, COUNTY ASSEMBLY OF
SIAYA COUNTY APPLICANT**

–AND–

**THE GOVERNOR, SIAYA COUNTY.....1ST INTERESTED PARTY
ATTORNEY GENERAL.....2ND INTERESTED PARTY**

ADVISORY OPINION

A. INTRODUCTION

[1] By his Reference dated 1st November 2017, the Speaker, the County Assembly of Siaya (the Applicant) seeks this Court's advisory opinion under Article 163(6) of the Constitution on the following two issues:

- a)** *Whether Sections 30(2)(b) and 31(d) of the County Government Act and Article 179(2)(b) empower the County Governor to redeploy or transfer a sitting member of the County Executive Committee from one portfolio to another; and*
- b)** *Whether, assuming that the answer to the question above is positive, such redeployment/transfer amounts to a fresh appointment and that*

the Governor is required by law to submit the names of such persons as nominees under sections 30(2)(b) and 31(d) of the County Government Act and Article 179(2) of the Constitution to the County Assembly for approval.

[2] The Reference was supported by the affidavit of George Okode sworn on 1st November 2017.

B. BACKGROUND

[3] The Applicant submits that the County Assembly of Siaya County has faced challenges in discharging its role under the Constitution and the County Government Act with regard to the powers of the County Assembly in approving/vetting members of the County Executive Committees already serving their terms, whenever the Governor decides to move them to a different portfolio. He submits that this challenge has arisen because both the Constitution and the County Government Act are silent on such redeployments. That because of this silence/lacuna in law, the County Assembly of Siaya claims it has had cases where the Governor has attempted to redeploy a member of the County Executive Committee from one portfolio to another without presenting such redeployment to the County Assembly for approval.

C. APPLICANT'S CASE

[4] The Applicant's case is fairly straight forward. In the current constitutional dispensation, the Applicant argues, power belongs to the People. As such, by Article 179(2)(b) of the Constitution, as read together with Section 30(2)(d) of the County Governments Act, requiring the County Governors to appoint members of the County Executive Committees with the approval of the County Assemblies, the People's power is maintained as is the case in public appointments. And since **Section 2** of the ***Public Appointment (County Assemblies Approval) Act***, defines

“appointment” to include “re-appointment to the same body whether or not in the same capacity”, redeployment of members of the County Executive Committee amount to reappointments.

[5] In the Applicant’s view, it would therefore be absurd to accept the Siaya County Governor’s contention that he has absolute powers to re-deploy members of the County Executive Committee without the approval of the County Assembly as that would deprive the People their power of assessing and determining the suitability and competence of such Executive Committee members to serve in the new portfolios. He contends that accepting the Governor’s contention would give room for mischief by Governors who would nominate a person for a particular portfolio that matches the person’s knowledge, experience and career only as a stepping stone to land him later at a more sensitive and ‘strategic’ portfolio that such a person would not qualify for thus negating the necessity of the requirement for vetting in the first place.

[6] Asked by the Court where the County Assembly’s power to re-vet is drawn from, Counsel for the Applicant, Mr. Omollo, submitted that the power streams from the principle of public participation, one of the national values and principles of governance under Article 10 of the Constitution. He added that under Article 196(1)(b) of the Constitution, each County Assembly has to facilitate public participation and involvement in the legislative and other business of the assembly and its committee.

[7] The Applicant cites this Court’s decision ***In the Matter of the National Land Commission*** [2015] eKLR in urging that vetting matches skills with the specific portfolio and ensures integrity, suitability and qualification, which alongside public participation are essential principles of checks-and-balances.

D. SUBMISSIONS BY THE ATTORNEY GENERAL

[8] The Attorney General, the 2nd Interested Party, was represented by Counsel Mr. Bitta, during the oral “on-line” hearing. While in its written submissions dated 3rd August 2018, the Attorney General aligns his submissions with the Speaker’s case, in the oral submissions by his counsel, Mr. Bitta, he urges this Court not to exercise its discretion to render the advisory opinion sought as the nature of this matter is well suited for determination by the High Court. Counsel further argues that the matter revolves around the interpretation of Statutes and a ruling was delivered by the Speaker of the County Assembly without the Supreme Court being told what happened after that. These, it is urged, are matters to be settled by the High Court.

[9] Mr. Bitta also urged that the applicant had not sought the opinion of the Attorney General before coming to this Court. Mr. Bitta contends that as per this Court’s Rules, the opinion of the Attorney General is provided for and must be sought before one approaches this Court for an advisory opinion. On the basis of all these, counsel urged that the Court should decline to exercise its discretion to render the advisory opinion sought.

E. SUBMISSIONS BY THE GOVERNOR OF SIAYA COUNTY

[10] In opposing the Reference, the Governor of Siaya County, the 1st Interested Party, submits that a re-deployment or transfer is a prerogative of the Governor in exercise of his executive powers. It is an internal executive management exercise on to which, under the doctrine of Separation of Powers, the County Assembly is precluded from encroaching. It does not amount to a reappointment.

[11] The Governor urges that the appointment envisioned under Article 179(2)(b) of the Constitution, where the Governor submits the name(s) to the County Assembly for approval, is the one the Governor makes upon his/her election and assumption of office, or a first-time appointment of one as a member of the County Executive Committee upon a vacancy arising in the County Executive.

[12] The Governor urges that the vetting tradition is borrowed from the presidential system of the United States where the President's powers to make appointments is limited and he is precluded from riding roughshod over other arms of the government, hence the Appointment Clause (Article II section 2, Clause 2 of the United States Constitution). He urges that this system is replicated at both the national (Article 132(2)) and the county (Article 179(2)(b) level of government in Kenya. He submits that the Appointment clause has four distinct purposes: *prevent one branch from creating and filing the same office; prevent diffusion of the appointment power; enhancing political accountability; and, ensuring that more qualified officers are appointed.* It is thus urged that the essence of the Appointment clause is not to load the Senate on the President.

[13] Flowing from the foregoing, counsel for the Governor, Mr. Wanyama cited the case of **County Government of Nyeri & another v Cecilia Wangechi Ndungu** [2015] eKLR in urging that the Court of Appeal held that a governor has the residual power to re-shuffle the executive if, in his opinion, the transfer will lead to performing the function in a more satisfactory manner. Counsel urges that in any event, the County Assembly has full power to, at any time, summon a member of the County Executive to account for his or her performance hence re-vetting cannot be accurately argued as the only way of ensuring accountability.

F. ANALYSIS

[14] We have of late noted a plethora of references by State Organs seeking this Court's Advisory Opinion on all manner of issues. We would, in the circumstances, like to make it clear that the Supreme Court is not a legal adviser of State organs. Further, the scope of an Advisory Opinion under Article 163(6) of the Constitution does not extend to offering legal advice. As the provision states, the jurisdiction the Article vests in the Supreme Court is to offer Advisory Opinion, and even then, that jurisdiction is circumscribed.

[15] 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] this Court stated the objective of an Advisory Opinion to be “*seeking to unravel a legal uncertainty in such a manner as to promote the rule of law and the public interest.*”

[16] In that 2012 Advisory Opinion, this Court identified a matter for Advisory Opinion as being one not suitable for the ordinary dispute-resolution mechanism – with pleadings, and progressing from the lowest to the highest Court. The matter for advisory opinion must also be urgent and entail the danger of paralysis to the institution concerned. As this Court stated in ***The Matter of the Speaker of the Senate & another*** [2013] eKLR, it must be a matter of great public importance which “*bears novelty, and ill-fits the conventional dispute-settlement scheme, which is most appropriate in a matter involving two individuals, or one between State and individual*” and calls for expeditious resolution; it must be a matter that “*raises a variety of structural, management and operational challenges unbeknown to traditional dispute settlement.*” In ***the Matter of Interim Independent Electoral Commission [2011] eKLR*** [para.33], this Court added that the matter suitable for advisory opinion must be one that “*... does not flow from any contest of rights*” or claims

[17] This Court has also emphasized the need to seek the opinion of the Attorney General before coming to this Court for an advisory opinion. In ***Re The Matter of the Interim Independent Electoral Commission*** [2011] eKLR, this Court pointed out that;

“[55]...By Article 156(4) ... of the Constitution, the Attorney-General is designated the principal [legal] advisor of the Government It can be said that the Attorney- General bears the mantle of the “chief lawperson” of Government in its diverse dimensions. The various departments [and levels]

of the Government have the liberty to seek the Attorney-General's opinion on any legal question of relevance to their day-to-day operations."

[18] That position was reiterated thus ***In the Matter of the National Gender and Equality Commission*** [2014] eKLR;

"[40] ...Though there is no mandatory requirement to first seek the Attorney-General's opinion, this Court has held that, as a matter of good practice, such opinion should be sought. Clause 41(4) of the Supreme Court Rules provides:

"The Court may on giving the parties an opportunity to be heard, reject a reference in whole or in part if –

...

(c) the matter in respect of which the reference is made can in the opinion of the Court be resolved by the advice of the Attorney-General, and such advice has not been sought . . ."

G. DETERMINATION

[19] On these established legal principles, does this matter qualify for an Advisory Opinion? We are afraid it does not.

[20] In this matter, it is pleaded that the Applicant has had instances where the Governor of Siaya County has attempted to redeploy members of the County Executive Committee from one portfolio to another without presenting the proposed transfer to the County Assembly for approval. In one such instance the County Assembly protested necessitating the Speaker's Ruling issued on 28th August, 2014, in which he declared any such reshuffle without the County Assembly's approval an illegality. Despite that Ruling, the issue persists even in other counties, hence the need for an Advisory Opinion.

[21] The County Assembly holds the view that a reshuffle of the County Executive Committee members or redeployment of the County Executive Committee members amounts to a reappointment, according to them, requiring their vetting and approval. The Governor on the other hand understands the vetting process to be limited one's first appointment as a member of the County Executive Committee.

[22] This is clearly a justiciable live issue in Siaya County on the varied interpretation of the vetting provisions in the Constitution as well as the County Governments Act and the Public Appointments (County Assemblies Approval) Act. As this Court cautioned in ***Speaker of Senate and Another v. The Attorney General and 4 Others***, *Advisory Opinion No. 2 of 2013 eKLR*, at paragraph 18:

“The Supreme Court must guard against improper transformation of normal disputed 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.”

[23] This caution was reiterated in ***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 emphasized that contested justiciable issues should be canvassed before the High Court and should only reach this Court through the appellate process where necessary and appropriate.

[24] Further, the Applicants also did not seek the Attorney General's opinion as stated above.

[25] For the foregoing reasons we decline to exercise our discretion to assume jurisdiction in this matter and we accordingly dismiss it. Although fairly frivolous, since it hinged on public interest, we find that each party should bear its own costs.

H. FINAL ORDERS

(a) *The Reference dated 1st November 2017 and filed on 3rd November 2017 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