



Owiro & another v Speaker, County Assembly of Vihiga & 4 others (Constitutional Petition E010 & E011 of 2021 (Consolidated)) [2022] KEHC 12780 (KLR) (30 August 2022) (Judgment)

Neutral citation: [2022] KEHC 12780 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
CONSTITUTIONAL PETITION E010 & E011 OF 2021 (CONSOLIDATED)**

**PJO OTIENO, J
AUGUST 30, 2022**

BETWEEN

DOROTHY AYOMA OWIRO PETITIONER

AND

SPEAKER, COUNTY ASSEMBLY OF VIHIGA 1ST RESPONDENT

CLERK, COUNTY ASSEMBLY OF VIHIGA 2ND RESPONDENT

VIHIGA COUNTY ASSEMBLY SERVICE BOARD 3RD RESPONDENT

**AS CONSOLIDATED WITH
CONSTITUTIONAL PETITION E011 OF 2021**

BETWEEN

ONZELE BENSON MUDANGAL PETITIONER

AND

SPEAKER, COUNTY ASSEMBLY OF VIHIGA 1ST RESPONDENT

CLERK, COUNTY ASSEMBLY OF VIHIGA 2ND RESPONDENT

VIHIGA COUNTY ASSEMBLY SERVICE BOARD 3RD RESPONDENT

JUDGMENT

Outline of the dispute:

1. Parliament enacted the [County Assembly Service Act](#) No 24 of 2017 to make further provisions on the County Assembly Service Board, as established under the [County Governments Act](#), whose mandates



include to direct and supervise the administration of County Assembly Service and to determine and review the terms and conditions of persons holding or acting in the office of the service.

The Petitioner's Case:

2. There arose two vacancies in the Service Board, called the Female and Male member of the Board. The two Petitioners here made applications to be so appointed, were shortlisted and navigated the interview processes and emerged the best candidates. The interview panel compiled a report and presented same to the 2nd Respondent who then tabled the same before the Respondent for discussion and the report was rejected, according to the Petitioners, without any reasons assigned.
3. The Applicants sought to exercise their rights to information and requested for reasons for rejection together with other document from the 2nd, but the request even though received, was never responded to while the Respondent set on a journey to replace the two by a discrete process unknown to law by secretly having two persons sworn in to fill the vacancies but without having their names gazette as the law dictates. It was also asserted that the Respondent had purported to terminate the Petitioners' engagement and tenure at the Service Board without due process and in denial and breach of rules of natural justice. The petitioner equally pleaded breach of procedure of the county Assembly and gave particulars of such breach to be that: -
 - a The first and second Respondents have rejected the interview Report from third Respondent without assigning any reasons for its rejection.
 - b The first and second Respondent have ignored the Petitioners constitutional right to information.
 - c Purporting to call a session on September 1, 2021 to discuss the interview report.
 - d At the said meeting of purporting to oust the petitioner as Representative of male members of the Public in the Vihiga County Assembly Service Board.
4. The petitioners reiterate that any attempt to remove them from the Office as Members of the County Assembly Service Board must comply with standing orders of the County Assembly of Vihiga and be aligned to the rules of Natural justice to give them a fair hearing enshrined in Article 50 of the [Constitution](#).
5. For those reasons, the Petitioners sought from the Court by the two separate Petitions, both dated September 6, 2022 and filed the next day, now consolidated, and prayed that: -
 - a A declaration that the third Respondent had no authority whatsoever to propose any person to occupy or exercise the office of the Respondent of male members of the public in the Vihiga County Assembly Service Board.
 - b A declaration that resolutions of any meeting organized and attended by the Respondents on September 1, 2021 or on any other date that purported to install any person to the office of Representative of male members of the Public in the Vihiga County Assembly service Board is null and void.
 - c A declaration that the 1st Respondent has no mandate to convene meetings, chair, pass resolutions or implement any resolution that will remove the petitioner as Representative of male members of the Public in the Vihiga County assembly service Board.
 - d A declaration that the petitioner is validly in office as the Representative of male Members of the Public in the Vihiga County Assembly Service Board.



- e The Respondent be debarred from purporting to replace the claimant as leader of the Representative of male members of the public in the Vihiga County Assembly Service Board currently held by the claimant.
- f A permanent injunction to restrain the respondents by themselves, its servants or agents or otherwise howsoever from purporting to replace or in any other way usurp the office of Representative of male members of the Public in the Vihiga County Assembly service board currently held by the claimant.
- g An order that the petitioner be returned to office without conditions.
- h An order that the petitioner be remunerated for their full term in office, alongside all allowances and entitlement of the office.
- i Costs of the suit and interests thereon until payment in full.

Respondents Case

6. The Respondents filed a replying affidavit on September 23, 2021 to oppose the Petition. The 2nd Respondent stated that he knows that an interview was conducted for the selection of external members to the 3rd Respondent and that a Report was presented to the floor of the House on August 18, 2021 and debate on the same was suspended due to glaring typographical and grammatical error. He stated that the Report was again tabled on August 25, 2021 when the errors had been corrected and the same was rejected by the members of the county assembly as in their right to do so. He averred that upon the rejection of the said report, as stipulated under s10(1) of the [Public Appointments \(County Assemblies Approval\) Act](#) No 5 of 2017, the Board presented to the assembly by the names of the other candidates who had come in second to the Applicant. He stated that members of the county Assembly approved the second set of nominees and that they were consequently sworn in on September 3, 2021.
7. That affidavit however doesn't exhibit any documents to show on what basis the interview report favouring the petitioners' appointment was rejected nor does it show any subsequent report acted upon to appoint persons other than the petitioners. There is equally no evidence that any other person was approved, gazetted and appointed to the two positions.

Petitioners Submission

8. Petitioner filed submissions January 17, 2022 and identified three issues to emerge for determination for determination by the court;
 - i. Whether the 1st and 2nd Respondent have violated the petitioners right of access to information.
 - ii. Whether the Respondents duly complied with the required procedure before ousting the petitioner as Representative of male Members of Public in the Vihiga County Assembly Service Board.
 - iii. Whether the Petitioner is entitled to the prayer sought.
9. The petitioners rely upon and cite the provisions of Articles 10, 20, 21, 22, 23, 28, 35, 41, 47, 50, 73, 232 of the [Constitution](#) of Kenya, section 4, [Access to information Act](#) 2016, Section 14, [County Government Act, 2012](#) and Section 9, [County Assembly Services Act](#), 2017 to ground, favour and support their case.
10. On the first issue, it is submitted that interview report prepared by the 3rd Respondent was rejected by Vihiga County Assembly on the basis of technical and typographical issues and that upon presentation of the amended report on August 26, 2021 the Vihiga County Assembly still rejected the said report



but no reasons were assigned for the rejection. It is additionally submitted that a letter written to the 2nd Respondent seeking reasons and evidence including Hansard Recordings, the order paper, votes and proceedings for both instances that the interview report was presented, the request letter was duly received but the same has not been responded to till date. Further submissions was to the effect that they are entitled to seek and have information from the Respondents as envisaged under Article 35 of the Constitution of Kenya and that failure to provide the requested information violated Articles 10, 35,73 and 232 of the Constitution and, Section 4, Access to information Act.

11. On the second question for determination, the petitioners submitted that on September 1, 2021, in flagrant disregard of Standing Orders of the Vihiga County Assembly some members of the County Assembly purported to hold a meeting evidenced by a copy of the order paper contained in the Petition and that on September 3, 2021, organized and conducted a swearing in of two external members of the 3rd Respondent before having their names published in the gazette as by law mandatory. It was then submitted that the Petitioners having applied and successfully navigated the interview for the Positions of Female and Male Members of the Public in the Vihiga County Assembly Service Board, by virtue of having scored the highest in the respective positions cannot be ousted from office by conceited do-overs by the Respondents as has been purportedly done. The Respondents were accused of having failed to adhere to the set laws and procedure in ousting the petitioner as Representative of male members of the Public in the Vihiga County Assembly Service Board.
12. On the third issue for determination and concerning the appropriate remedies, there was reliance on the decision in Attorney General v Kituo cha Sheria & 7 others (2017) eKLR for the proposition that rights are inherent and not granted by the state as largesse but are due to every human being with the state being merely obligated to answer to the constitutional command to obey.
13. To discourage dishonest dealings, unlawful procedures and promote accountability counsel relied on Katiba institute v President Delivery Unit & 3 others (2017) eKLR to express the purpose and effect of right to access to information as an accountability, responsiveness and openness tool for it is impossible to hold accountable a government which operates in secrecy. The same decision, Katiba institute (supra) was cited for the proposition that where a petitioner succeeds in establishing a breach of a fundamental right, he is entitled to the remedy as of course.
14. A conclusion was then drawn that they have proved the case to the requisite standards and urged the court to grant them relief sought as prayed.

Respondents Submission

15. On their part, the respondents came up with three issues they consider to deserve being answered by the court to be: -
 - i. Whether the petitioners were still in office at the time of the recruitment process?
 - ii. Whether any procedural processes flaunted at the time of the impugned recruitment?
 - iii. Whether the petitioners are entitled to any remuneration?
16. Based on those issues, it was submitted that the Petitioners were members of the Vihiga County Assembly Service Board from August 2017 or thereabout till the day their contracts were terminated as a result of a court ruling in a case in which their appointments had been contested. It was added that the court ruled that there be fresh recruitment of the external members of the board which ruling declared the positions vacant and the petitioner cannot be heard saying that he was still the holder of that office as at the time of the petition.



17. The Respondents position was that the procedure for recruitment of a member of the board is clearly outlined in the first schedule of the county assemblies service Act. They submitted that the candidates were shortlisted, interviews conducted and thereafter the third respondent came with a report that they forwarded to the county assembly for approval. The 1st nominees to be presented to the Assembly were rejected and this forced the board to present other nominees as prescribed the law. It was then submitted that all this was done accordance with prescribed law and the petitioner herein does not contend to that. On the complaint that the petitioners' nominations were rejected without any reason being given, the respondents contend and submit that the law under the County Assemblies Service Act does not provide that the County Assembly gives reasons upon rejection of a name of any nominee.
18. It was then submitted, in conclusion, that the Respondents are not in any way indebted to the Petitioner he was accordingly remunerated the whole period he was a member of the Vihiga County Assembly Service Board and that no remedies are due to them and the petition ought to be dismissed.

Analysis, Issues and Determination

19. Having perused the two petitions, the response thereto and the submissions by both sides, the court took the view that the pleadings replicate in both in all aspects save for the names of the petitioners. The court thus deemed it a befitting case for consolidation and therefore invoked the power donated by Rule 17, The *Constitution of Kenya (Protection of rights and fundamental Freedoms) Practice and Procedure Rules, 2013*.
20. Having appreciated the respective positions of the parties, the court has isolated and discerned the following issues to present themselves for determination: -
 - i Whether in failing to give the information sought, the respondents violated, the petitioners' rights?
 - ii Whether the Respondents followed the Right procedure in ousting the Female and Male member of the Public in the Vihiga County Assembly Service Board?
 - iii Whether the petitioners are entitled to any of the remedies sought or at all?
 - iv. What orders should be made as to costs?

Whether in failing to give the information sought, the respondents violated, the petitioners' rights?

21. Articles 35 and 47 of the *Constitution* and the Fair Administrative Actions Act vest upon the petitioners the right to seek and be provided with information in the custody of the respondents. In this matter the information sought were the reasons for the decline to accept the recommendation by the 3rd respondent to have the petitioners appointed as members of the 3rd Respondent. There is no assertion that the information was never sought nor is it the petitioners' case that the same has been provided. The position taken by the 2nd respondent is that the Assembly was entitled, in law, to reject the proposal and that the remedies sought have been overtaken by events. In the replying affidavit, while it is asserted in admission that the names were indeed rejected for the second time and that new set of names were then presented, approved and finally appointed and sworn in, the reasons for that second rejection were never given just as no evidence of who the new nominees were. In effect the assertions are not supported by any evidence. To this Court, that affidavit falls short of expectations that it was to avail the very material to help the court come to a fair and just determination.
22. Without evidence that the request by the petitioners was honoured or a valid reason why same could not be provided, the petitioners' assertions remain uncontested. It being not denied that there was



made a request for reasons, which request was delivered to the 2nd Respondents' on August 27, 2021 and the total silence to the assertion that no acknowledgement nor response has been given only show that the respondents were not keen to respect and fulfill the petitioners right to request and be given access to such information. Pursuant to Article 35 of the constitution, as read with sections 4, Access to information Act and Fair Administrative Actions Act, it was the inescapable duty of the 2nd Respondent to avail such documents as requested in the letter of August 27, 2021 as are available with no liberty to question the reasons for request or to hold an opinion why the information should not be accessed by the applicant.

23. The court reads the provisions of the statutes, Access to information Act¹, to make it mandatory for every information sought to be given unless there be established a justification under section 6 of the Act. The respondents ought to be reminded of the decision in Nairobi Law Monthly v Kenya electricity Generating Company & 2 Others (2013) eKLR where the Court stated what the state should bear in mind when considering the request to access information;

“The consideration to bear in mind is that the right to information implies the entitlement by the citizen to information, but it also imposes a duty on the State with regard to provision of information. Thus, the State has a duty not only to proactively publish information in the public interest-this, I believe, is the import of Article 35(3) of the Constitution of Kenya which imposes an obligation on the State to ‘publish and publicise any important information affecting the nation’, but also to provide open access to such specific information as people may require from the State...

The recognized international standards or principles on freedom of information, include maximum disclosure: that full disclosure of information should be the norm; and restrictions and exceptions to access to information should only apply in very limited circumstances; that anyone, not just citizens, should be able to request and obtain information; that a requester should not have to show any particular interest or reason for their request; that ‘Information’ should include all information held by a public body, and it should be the obligation of the public body to prove that it is legitimate to deny access to information.”

24. The petitioner for the purposes of Article 35(1) (a) as read with section 4 of the Access to information Act was entitled to seek and have information with corresponding obligations to the respondent to obey the law and allow the petitioner access information. The Respondent violated the Petitioners right under the Constitution.
25. Failure to respond in time and at all with the attendant denial of access to the information is prima facie a denial and therefore an infringement of the constitutional right. Nothing of substance in the petition turns around this finding for no declaration is sought in that regard nor are damages sought for denial of the right to access information.

¹ S.4(2) Subject to this Act, every citizen's right to access information is not affected by—

a) any reason the person gives for seeking access; or

b) the public entity's belief as to what are the person's reasons for seeking access.

3) Access to information held by a public entity or a private body shall be provided expeditiously at a reasonable cost.

4) This Act shall be interpreted and applied on the basis of a duty to disclose and non-disclosure shall be permitted only in circumstances exempted under section 6.

5) Nothing in this Act shall limit the requirement imposed under this Act or any other written law on a public entity or a private body to disclose information.



Whether the Respondents followed the Statutory procedure in ousting the petitioner as Female and Male member of the Public in the Vihiga County Assembly Service Board?

26. The first schedule to the County Assembly Services Act enacted under Section 9(2) of the Act provides for the procedure for appointment of a member of the Board. It provides the Procedure for Appointment of a Member of the Board and obligates the 2nd respondent as the secretary to the board to place a notice in both the Gazette and at least two daily newspapers of national circulation declaring a vacancy in the board and inviting applications from those interested.
27. It was submitted by the respondent and not disputed by the petitioners, hence a common ground, that the Petitioners were members of the Vihiga County Assembly Service Board from August 2017 or thereabout till the day his contract was terminated. The termination was a result of a court ruling in a matter where their appointment had been contested thus the need for fresh recruitment of the external members of the board. By virtue of the ruling, the respondents contend, the position fell vacant and the petitioner cannot be heard saying that he was still the holder of that office as at the time of the petition. On the other hand, the petitioners take the position that having been rejected by the assembly, it was not open for the assembly to accept other names without an open and transparent process for the respondents to organize and conducted a swearing in of two external members of the 3rd Respondent before having their names published in gazette.
28. Up to this juncture, it emerges that the fault is alleged as against the assembly and two beneficiaries are named but not made parties to the petition yet the orders sought are inescapably targeted at undoing those acts. In fact, a reading of the petition at paragraphs 6, 7, 8 and 9 of the petition show clearly that it is the appointment and assumption of office by those two members that is the core target of the petition. The question is whether a court can give adverse orders against parties not before it without breaching the right to a hearing. I will at the end and in rendition give the obvious answer to this question.
29. What would be the procedure where the county assembly rejects the interview report by the 3rd respondent? Paragraph 6 and 7 of the 1st Schedule when read together point to the liberty of the board to make fresh recommendations based on the data and material from the interviews previously conducted and submit alternative names. That is a procedure acceptable for the first rejection. For a subsequent rejection, fresh process begins before nominations are made and forwarded to the assembly. While the Schedule is silent on the obligations of the assembly to give its decision to reject an interview report, that silence does not negate on the obligation upon the assembly when it undertakes the administrative action of approving recommendation by the 3rd respondent where such decision, as is demonstrated, portended adverse effects on the petitioners.
30. The court finds that there was liberty upon the assembly to consider the interview report and approve or reject the recommendation, but do so while observing the national values and principles of governance. On the fact availed to court it is not possible to assess the conduct of the assembly to have complied with the constitution yet it was the duty of the 1st and 2nd respondents, as the leadership of the assembly, even where the assembly never deemed it right to seek joinder, to avail documents evidencing compliance but they did not. Coupled with refusal to avails access to the information sought, I find that the two respondents, 1st and 2nd, have not been true to their obligations as public office holders in pursuing and promoting good governance, transparency and accountability by their offices in the assembly.
31. That finding goes as far as the duty to give reasons and access to information is concerned however as far as the procedure of recruitment is concerned, I find that the law was complied with in seeking to



recruit for the two position noting that a court had determined so. It is therefore the finding of the court that there was compliance with the law under the act in the manner the new board members were nominated and sworn into office. Accordingly, the 2nd question is answered in the affirmative.

Whether the Petitioners are entitled to any of the remedies sought or at all?

32. As crafted, the eight substantive prayers in the petition fault the process by which the assembly rejected the nomination of the petitioner and seemingly obtained another interview report with alternative recommended nominees who were then approved, sworn in and assumed offices; and the proceedings of the assembly allegedly convened by the assembly at which the approval was made. As said before, interrogating those processes would demand the participation of the assembly and the two persons who were subsequently appointed, before any order that may be adverse to them can be validly made. Based on that mundane position of the law, I consider prayers b) and c) are not tenable in this petition.
33. Both parties adverted to orders by a court by which the appointment of the two petitioners was successfully challenges but none of them bothered to cite the decision nor exhibit a copy for use by the court. I consider that to be failure by both Counsel on their duty to court.
34. The court has, owing to its duty to dig out the truth, thanks be to technology and kenyalaw.org, come across the decision delivered on June 2,2021, in Kisumu Employment and Labour Relations Court, *Tom Shavisa vs Hazina Mudeizi, Speaker County Assembly of Vihiga & 3 Others* [2021] eKLR, where the Court declared the appointment of the Petitioner as member of the Board a violation of the Constitution and directed that fresh process be initiated.
35. With a judicial pronouncement that the positions were vacant which fact the petitioners acknowledged and applied to fill, it cannot be validly argued that the petitioners were validly in the office after the order, termination letter and applications to fill the positions. This court finds that it lacks the jurisdiction to countermand the decision by a court of concurrent jurisdiction. To grant prayers d), e), f), g) and h) would be to question the decision of June 2, 2021 or just reverse the same contrary to law.
36. Flowing from the above conclusion, the ultimate, but inevitable, rendition the court has come to, noting that no prayers were made regarding violation of the right to access information by way of declaration or damages, is that the petitioners are not entitled to any of the orders sought. Consequently, the two petitions fail and are dismissed.
37. Being a public interest matter pursuing compliance with the law, there shall be no orders as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAKAMEGA, THIS 30TH DAY OF AUGUST 2022.

PATRICK J O OTIENO

JUDGE

In the presence of:

Mr Siganga for the Petitioners/Applicants

Mr Khasiala for the Respondents

Court Assistant: Kulubi

