



REPUBLIC OF KENYA

IN THE HIGH COURT

AT HOMA BAY

JR MISC. NO. 2 OF 2014

BETWEEN

REPUBLIC.....APPLICANT

AND

HOMA BAY COUNTY ASSEMBLY.....RESPONDENT

AND

HOMA BAY COUNTY

PUBLIC SERVICE BOARD.....1ST INTERESTED PARTY

HOMA BAY COUNTY GOVERNMENT.....2ND INTERESTED PARTY

EX PARTE

ZILPER OTIENO OPAPO

JOSEPH OMONDI OBUMBA

SETH GIRIAGO

BOB COLLINS OTIENO

BONFREDRINE MARK ODHIAMBO

AKELLO EMMAH OLOO

JUDGMENT

The application

1. Pursuant to leave granted on 19th September 2014, the *ex-parte* applicants (“the applicants”) moved the Court by way of the Notice of Motion dated 19th September 2014 seeking the following orders;

i. THAT orders of Certiorari do issue to remove and deliver to the Honourable Court and quash

the resolution of the Homa bay County Assembly abolishing the position of Deputy Sub County Administrators in the Homa Bay Government passed on 21st August 2014.

ii. THAT orders of Prohibition do issue to prohibit the Homa Bay County Public Service Board and the Homa Bay County Government from implementing or otherwise giving effect to the Resolution of the Homa Bay County Assembly passed on 21st August 2014 abolishing the position of Deputy Sub County Administrators.

iii. THAT orders of Mandamus do issue to compel the Homa Bay County Public Service Board and the Homa Bay County Government to honour the ex-parte applicants contracts of service including but not limited to posting and payment of salaries and allowances as and when they become due.

2. The application is supported by the Statement dated 9th September 2014 and the verifying affidavit of Zilper Otieno Opapo sworn on 9th September 2014.

3. The application is opposed through the Replying Affidavits of Otieno Bob Kephass, the clerk of the Homa Bay County Assembly sworn on 3rd October 2014, Agnes Makdowallo, Chief Executive and Board Secretary to the County Public Service Board and Isaiah Ogwe, the County Secretary, both sworn on 9th October 2014.

The facts

4. The uncontested facts emerging from the parties' depositions are common ground and are as follows.

5. On 5th August 2013, the Homa Bay County Service Board ("the Board") advertised for suitable persons to apply for the position of Sub County Administrator to serve in the County of Homa Bay. The applicants duly applied for the positions and after interviews, the applicants were not considered for the said position. They were however appointed to the position of deputy sub-county administrator on permanent and pensionable terms when the Board established the said office. According to their letters the held the post with effect from 13th May 2014.

6. In the meantime, a member of the County Assembly ("the Assembly") moved a motion to questioning the legality and procedure adopted for the creation of the position of Deputy Sub County Administrator by the Board on the ground the establishment and appointment violated **sections 60, 62, 63 and 65** of the **County Governments Act, Act No. 17 of 2012**.

7. An ad-hoc Committee of the Assembly was formed to investigate the matter. It reported its findings to the Assembly for debate. The Assembly adopted the ad-hoc Committee Report on 21st August 2014 and resolved to abolish the office of Deputy Sub-County Administrator. It directed the Homa Bay County Government and the Board to immediately abolish the position from its human resource establishment.

The applicant submissions

8. The applicants' position is that the Public Service Board has the power to establish and abolish offices in the County Public Service. The applicants rely on the provisions of **section 59** of the **County Government Act** which provides as follows;

59. (1) *The functions of the County Public Service Board shall be, on behalf of the county government, to*

a. establish and abolish offices in the county public service;

b. appoint persons to hold or act in offices of the county public service including in the Boards of cities and urban areas within the county and to confirm appointments;

- c. *exercise disciplinary control over, and remove, persons holding or acting in those offices as provided for under this Part;*
- d. *prepare regular reports for submission to the county assembly on the execution of the functions of the Board;*
- e. *promote in the county public service the values and principles referred to in Articles 10 and 232;*
- f. *evaluate and report to the county assembly on the extent to which the values and principles referred to in Articles 10 and 232 are complied with in the county public service;*
- g. *facilitate the development of coherent, integrated human resource planning and budgeting for personnel emoluments in counties;*
- h. *advise the county government on human resource management and development;*
- i. *advise county government on implementation and monitoring of the national performance management system in counties;*
- j. *make recommendations to the Salaries and Remuneration Commission, on behalf of the county government, on the remuneration, pensions and gratuities for county public service employees.*
[Emphasis mine]

9. The applicants submit that in light of **Article 176(2)** of the Constitution which provides that every County Government shall decentralise its functions and provision of its services to the extent that it is practicable and efficient, the Homa Bay County Government established the post of Deputy Sub-County Administrators bearing in mind **section 60(4)** of the **County Governments Act** which states as follows;

60 (4) In deciding whether or not to establish a public office, the County Public Service Board shall take into account—

- a. the overall workload in the county public service concerned; and*
- b. the suitability of that department but not any other to be the domicile of the public office to be established.*

10. The applicants contend that it is on the basis of the establishment of the said office of Deputy Sub-County Administrator that the applicants were issued with appointment letters. They further contend that under **section 63** of the **County Governments Act**, the Assembly did not have the power to abolish the position of Deputy Sub-County Administrator duly established by the Board. **Section 63** states as follows;

63 (1) Except as provided for in the Constitution or legislation, the County Public Service Board has the power to make appointments including promotions in respect of offices in the county public service.

(2) The power of the County Public Service Board under subsection (1) shall be exercised—

- (a) at the request of the relevant county chief officer of the department to which the appointment is to be made;*
- (b) at the request of the clerk of the county assembly; or*
- (c) on the County Public Service Board's own motion on account of best interest of the county public service and parity of treatment of public officers taking into account the circumstances of each case.*

12. Counsel for the applicants, Mr Obach submits that the County Government Act has set out an elaborate procedure for the abolition of a position within the County Public Service and that the Assembly can only abolish a position established upon the presentation of a request to it by the Board through the relevant County Executive Committee member. In this respect therefore, as the Assembly has not demonstrated that it followed the law, the Court has no option by to quash the purported action by the Assembly.

13. Counsel for the applicant further submits that this court has jurisdiction to ensure that the actions of the County Assembly are in accordance with the Constitution and the law. Counsel cited several decision which emphasise the supremacy of the Constitution and the duty of the court to enforce the Constitution among them *The Speaker of the Senate and Another v Attorney General & Others SCK Advisory Opinion No. 2 of 2013 [2013]eKLR* and *Mumo Matemu v Trusted Society of Human Rights Alliance and 5 Others NRB CA Civil Appeal No. 290 of 2012 [2013]eKLR*.

14. In summary, Mr Obach submits that the County Assembly acted in contravention of **section 62** of the *County Governments Act* in purporting to abolish the position of Deputy Sub-County Administrator and having acted *ultra vires*, this Court was entitled to issue the prayers in the motion.

The Respondent's Submissions

15. In its submissions, the respondent concedes that the creation and abolition of any new public office within the County Public Service like one of the Deputy Sub County Administrator is vested solely in the discretion of the Board in accordance with **section 59** of the *County Governments Act* but its point of departure is that the discretion vested in the Board is not absolute and it to be exercised within the parameters and guidelines set out in **section 60(1)(a)-(g)** of the *County Governments Act* which dictates the circumstances under which such offices may be created or abolished. These provisions state as follows;

60(1) The County Public Service Board shall establish a public office within the county public service if it is satisfied that—

a. the establishment of the public office shall serve public interest in line with the core functions of the county government;

b. there exists no other public office in the county public service discharging or capable of discharging the duties for which the county is requested to establish another office;

c. upon the establishment of the office, the office shall be vacant to be filled competitively and transparently in accordance with the prescribed appointment or promotion procedures;

d. the establishment of the office including its level of grading, qualification and remuneration shall not disadvantage similar offices in the county public service or occasion unfair competition for staff among county public bodies;

e. the establishment of the office shall not confer unfair advantage to a group of or individual serving public officers;

f. the county government entity has prudently utilized offices previously provided in its establishment; and

g. funding for the office to be established is duly provided for.

16. In addition, the respondent avers that the Board is under the mandatory oversight and supervision of the Assembly and that the Board cannot create or abolish offices in the County Public Service without its participation and in the circumstances and in the absence of the Assembly's approval a decision by the Board to create or abolish an office is of no effect.

17. Mr Ragot, counsel for the respondent, submits that the respondents position is anchored in **section 62** of the **County Governments Act** which is couched in mandatory terms without which whatever office is created or abolished by the Board in exercise of discretion is a nullity. It provides as follows;

62 (1) Taking into account the provisions of this Part, the County Public Service Board on its own motion, may establish or abolish any office in the county public service.

(2) If the Board intends to establish or abolish an office it shall submit its proposal to the county assembly for approval through the county executive committee member responsible for the county public service.

(3) The County Public Service Board shall give the county chief officer of the concerned department an opportunity to make representation in respect of any action to be taken under this section before making the decision in that regard.

(4) If the County Public Service Board establishes an office and the concerned department fails to fill the vacancy for a period of twelve months after its establishment, the office shall stand abolished and the County Public Service Board shall not be required to make a decision to abolish that office. [Emphasis Mine]

18. Mr Ragot further submits that the respondent position must be considered against the background of the Constitution which establishes the County Government which comprises the Assembly and County Executive and which encapsulates the oversight role to be exercised by the Assembly. He pointed out the court should be guided by the principle of separation of powers which cannot be ignored or considered insignificant as this is provided for under **Article 185** of the Constitution.

19. Counsel cited several decision to support the respondents positions among them; **Judicial Service Commission v Speaker of the National Assembly and 8 Others NRB Petition No. 518 of 2013 [2014]eKLR**, **Commission for the Implementation of the Constitution v Parliament of Kenya and Others NRB No. 454 of 2014 [2013]eKLR** and **Peter Ngoge v Francis Ole Kaparo and Others NRB HC Misc. App. 22 of 2004 [2007]eKLR**.

Interested parties Submission

20. The interested parties contend that they have no role to play in the matter as the dispute was largely between the County Assembly and the applicants. Their counsel, Mr Nyauke, submits that if there is any issue of employment it is a matter to be dealt with by the Industrial Court.

The Issue for Determination

21. The issue for determination in this matter is whether the County Assembly has the power to establish or abolish a position within the County Public Service.

22. It is common ground that **Article 176** of the Constitution provides for the establishment of County Government comprising the County Assembly and County Executive. **Article 200** of the Constitution empowers Parliament to enact necessary legislation to give effect to the provisions of **Chapter 11** of the Constitution on devolved government. In furtherance thereto, Parliament enacted the **County Governments Act**, “to give effect to Chapter 11 of the Constitution; to provide for county governments’ powers, functions and responsibilities to deliver services and for connected purposes.”

23. In addition and in relation to the County Public Service, **Article 235(1)** of the Constitution provides as follows;

235. (1) A county government is responsible, within a framework of uniform norms and standards prescribed by an Act of Parliament, for—

(a) *establishing and abolishing offices in its public service;*

(b) *appointing persons to hold or act in those offices, and confirming appointments; and*

(c) *exercising disciplinary control over and removing persons holding or acting in those offices.*

24. Parliament is empowered, under **Article 235(1)** of the Constitution, to legislate a framework for establishing and abolishing offices within the County Public Service. **Section 59** of the **Act** provides that the County Public Service Board may, “*establish or abolish officers in the County Public Service.*” **Section 51** thereof creates the position of Sub-County Administrator whose holders are to be appointed competitively by the County Public Service. The position of Deputy Sub-County Administrator, on the other hand, is one created by the Board in its discretion. The position of Deputy Sub-County Administrator, not being a position established by the Act, is one of those contemplated under **section 59(a)** of the **Act**.

25. **Section 60(1)** of the **Act** provides the criteria for establishing a position in the public service. The Board also has power to abolish a position in the public service in accordance with the enumerated criteria. **Section 62** of the **Act** circumscribes the powers of the Board to establish an office in the public service. The power to establish or abolish office is not absolute as **section 62(2)** of the **Act** which requires the Board to seek approval of the Assembly is couched in mandatory terms. The Board is required to submit its proposal to establish or abolish an office in the County Public Service to the Assembly for approval through the County Executive Committee member responsible for the County Public Service.

26. Since the Board is required to submit its proposal, it is axiomatic that the Assembly must have the power to police or enforce its own legislative authority. The power to approve carries with it the power to express disapproval. To hold otherwise would be inconsistent with the oversight power of the Assembly. Such expression of disapproval is within the Assembly’s general powers of oversight which is underpinned by **Article 185** of the Constitution which states;

185. (1) The legislative authority of a county is vested in, and exercised by, its county assembly.

(2) A county assembly may make any laws that are necessary for, or incidental to, the effective performance of the functions and exercise of the powers of the county government under the Fourth Schedule.

(3) A county assembly, while respecting the principle of the separation of powers, may exercise oversight over the county executive committee and any other county executive organs.

(4) A county assembly may receive and approve plans and policies for—

(a) the management and exploitation of the county’s resources; and

(b) the development and management of its infrastructure and institutions. [Emphasis mine]

27. **Article 185** recognises the principle of separation of powers in the County Government. Separation of powers is one of the pillars of our Constitution and the Supreme Court had this to say ***In the Matter of the Interim Independent Electoral Commission Constitutional Application No. 2 of 2011 [2011]eKLR***, “*The effect of the Constitution’s detailed provision for the rule of law in processes of governance, is the legality of executive or administrative actions to be determined by the Courts, which are independent of the Executive branch. The essence of separation of powers, in this context, is that the totality of governance powers is shared out among different organs of government, and that these organs play mutually-countervailing roles. In this set up, it is to be recognized that none of the several government organs functions in splendid isolation.*”

28. The provisions of the **County Government Act** in relation to the establishment and abolition of offices

in the County Public Service must be seen within the context of checks and balances between the executive and the legislature within the County Government. Under **section 62** of the **Act**, legislative action of the Assembly is mandatory for the Board to establish or abolish an office within the County Public Service. However, in filling the positions established with suitable persons, the Board is not subject to the control of any person or authority. **Section 63** of the **Act** encapsulates the power of the Board to make appointments once the positions have been established.

29. I therefore find and hold that the Board does not have complete and untrammelled power to establish and abolish offices and must be accountable to the Assembly within the framework of **section 62** of **County Governments Act** and **Article 185** of the Constitution.

30. It is not disputed that the establishment of the office of Deputy Sub-County Administrator was not approved as required under **section 62(2)** of the **County Government Act**. The Assembly was therefore entitled to express its disapproval of the action by the Board through an appropriate resolution. While I think the term abolish may not have been an appropriate term to use in light of **section 62(2)** of the **Act**, I nevertheless find that the intent of the resolution by the Assembly was to express its disapproval of the action by the Board and this was within its oversight function.

31. After the Assembly has expressed its disapproval, it is the Board to take steps necessary to ensure that the same is complied with or implemented as the case may be. The Assembly has a duty to respect the independence of the Board. The Assembly can only make recommendations on proposed action to be taken but cannot direct the Board on how its resolution should be implemented as such action is within the authority of the Board under **section 63** of the **County Government Act**.

32. The Court's responsibility in this case is to pronounce on the legality or otherwise of the action taken by the Assembly in relation to the Board in accordance with its mandate under **Article 165(3)(d)** of the Constitution. The High Court lacks jurisdiction to deal with employment matters as these issues are outside its jurisdiction by reason **Article 162(2)** and **165(5)** of the Constitution which establishes a court of the status of the High Court to deal with labour and employment matters. I would add that any relief in respect of employment is a matter between the applicants and the Board which is not a respondent but an interested party. I therefore decline to issue an order of mandamus directed at the Board and County Government. Any grievance regarding the applicants terms and conditions of employment must be litigated elsewhere.

Conclusion

33. Following the reasons I have outlined above, I decline to issue the orders sought in the Notice of Motion. The application is therefore dismissed.

34. Due to the public interest nature of the application and the fact that the court has for the first time outlined the powers of the Assembly and the Board, I decline to award costs.

DATED and **DELIVERED** at **HOMA BAY** this 17th day of December 2014

D.S. MAJANJA

JUDGE

Mr Obach instructed Ojienda and Company Advocates by for the *ex-parte* applicants.

Mr Ragot instructed by Otieno, Ragot and Company Advocates for the respondent.

Mr Nyauke instructed by Nyauke and Company Advocates for the interested parties.