



REPUBLIC OF KENYA



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**Mweresa v County Government of Vihiga & another (Constitutional Petition
E003 of 2025) [2025] KEHC 12870 (KLR) (18 September 2025) (Ruling)**

Neutral citation: [2025] KEHC 12870 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
CONSTITUTIONAL PETITION E003 OF 2025**

JN KAMAU, J

SEPTEMBER 18, 2025

**IN THE MATTER OF DEVOLVED GOVERNMENT
AND THE COUNTY EXECUTIVE COMMITTEE**

AND

**IN THE MATTER OF THE PRINCIPLES OF PUBLIC SERVICE &
STAFFING OF COUNTY PUBLIC SERVICE UNDER ARTICLE 232 & 235**

AND

**IN THE MATTER OF THE COUNTY PUBLIC SERVICE
UNDER THE COUNTY GOVERNMENTS ACT**

AND

**IN THE MATTER OF THE STATUTORY POWER OF THE COUNTY
PUBLIC SERVICE BOARD TO ESTABLISH AND ABOLISH AN OFFICE
UNDER SECTION 60 OF THE COUNTY GOVERNMENTS ACT**

AND

**IN THE MATTER OF: ALLEGED CONTRAVENTION OF ARTICLES 177,
232, 235 OF THE CONSTITUTION OF KENYA AND CONTRAVENTION
OF SECTIONS 36, 46, 59, 59A, 60, 61 AND 62 OF THE COUNTY
GOVERNMENTS ACT AND SECTION 19 OF THE HEALTH ACT**

AND

**IN THE MATTER OF THREATENED VIOLATION OF THE RIGHT
TO HEALTH; THE PRINCIPLES OF PUBLIC FINANCE; SECTION
14, 20 AND 21 OF THE FACILITY IMPROVEMENT FINANCING
ACT; SECTION 14 OF VIHIGA COUNTY HEALTH SERVICES ACT**

BETWEEN

DR CLARENCE EBOSO MWERESA PETITIONER



AND

COUNTY GOVERNMENT OF VIHIGA 1ST RESPONDENT

VIHIGA COUNTY PUBLIC SERVICE BOARD 2ND RESPONDENT

RULING

INTRODUCTION

1. In their Notice of Motion dated 6th May 2025 and filed on 7th May 2025, the Respondents sought for orders setting aside the orders of this court issued on 28th February 2025 and that the court declare that the Petition as presented was incompetent, did not raise any cause of action or constitutional issues for determination and/or was frivolous, vexatious and a gross abuse of the court's process. They further prayed that the Petition and the pending applications herein be dismissed with costs.
2. CPA Peter Inonda, the 2nd Respondent's Secretary, swore an Affidavit in support of the said application. They averred that the 2nd Respondent received a request from the 1st Respondent through the County Chief Officer responsible for health services for establishment of the Office of Chief Executive Officer (CEO) for Vihiga County Referral Hospital.
3. They stated that the 2nd Respondent considered and approved the request following which the qualifications for the office were defined and an advertisement to that effect rolled out in a national media. They added that as they were establishing the said office, the County Assembly of Vihiga had originated a motion for upgrading the hospital to a corporation status and had developed a bill incorporating the office.
4. They contended that the said Vihiga Teaching and Referral Hospital Bill was subjected to public participation by the County Assembly of Vihiga where views of the public including the Petitioner's were considered and that the proposal for the establishment of the office was never contested. They were categorical that the Bill had been assented into law by the Governor, Vihiga County.
5. They pointed out that they had fully complied with the legal requirements for the establishment of the said office and, therefore, the court was justified to lift the orders earlier issued halting the recruitment to enable them proceed with the exercise to conclusion without delay. They contended that by the time the court stayed the process, a total of seven (7) applications had been received and the exercise of long and shortlisting was to commence and that they had received continuous inquiries from the said applicants who were eager to know the outcome of the process.
6. They further stated that the advertisement of job opportunities in the media was a costly affair and that any delay in disposing of this matter would lead to requirement for fresh advertisement resulting in a cost as high as Kshs 500,000/= from public kitty which could be avoided.
7. They averred that as the County Assembly was not a party to this Petition, the continued suspension of filling an office created through county legislation amounted to frustrating the powers of the County Assembly guaranteed by Article 187 of *the Constitution* amounting to denial of natural justice.
8. On 19th May 2025, the Petitioner swore a Replying Affidavit in opposition to the said application. The same was filed on 21st May 2025. He averred that the Respondents had not provided any evidence that they received an indent for establishment of the office of the CEO and that they did not attach any minutes to show that the 2nd Respondent deliberated on the same. He added that Section 62 of the



County Governments Act was instructive that the establishment of an office in the public service was possible only at the 2nd Respondent's own motion.

9. He was categorical that his Petition herein questioned the procedural validity and that the Respondents ought to prove compliance and that they sought the necessary statutory advice. He further averred that the Respondents did not annex any evidence to prove that an approval of the request was achieved and that the 2nd Respondent had been receiving anxious enquiries from the applicants.
10. He admitted to have been notified that the County Assembly had introduced a Bill seeking to establish the Vihiga Teaching and Referral Hospital through a letter to the Union representing doctors of which he was a member and further that it was seeking written submissions on the same. He asserted that he delivered its written submissions to the County Assembly on his own behalf and on behalf of the union and pointed out the illegality in proceeding with the process outside the ambit of the County Governments Act and the Constitution. He added that he also noted in the said submissions that there was ongoing litigation touching on the establishment of the said new office and that it was inadvisable to do anything that may alter the status of affairs.
11. He raised concerns on collusion by different county public entities in establishing an office unprocedurally. He faulted the process of public participation and contended that the Bill must have been rushed through since at the same time it was being processed, recruitment had also begun even before the establishment of the said new office.
12. He further contended that the substance of the communications created the impression that the said Bill was a private member bill, yet the substance of the arguments of the Respondents suggested that the Bill was actually introduced to advance government policy. He was emphatic that Government Bills had a special procedure under the standing orders and that private members did not move bills founded on government policy where the majority party was also the party in government. He urged the court to take note of the conspiracy and find that where public affairs were managed so opaquely, then the aim was usually not for public good.
13. The Respondents' Written Submissions were dated 7th July 2025 and filed on 8th July 2025 while those of the Petitioner were dated and filed on 25th July 2025. The Ruling herein is based on the said Written Submissions that both parties relied on in their entirety.

Legal Analysis

14. The Respondents submitted that the contested office was currently incorporated in the Act which had commenced operation after publication on 30th May 2025. They were categorical that the facility was no longer under the Medical Superintendent as the in-charge because administratively the transformed hospital was now under a Chief Executive Officer. They were emphatic that there was an Act of the County Assembly, Vihiga, operationalising the office of the Chief Executive Officer.
15. They urged the court to dismiss the Petitioner's averments on the ground that the 2nd Respondent was not bound to seek the approval of the County Assembly while discharging its functions including establishing new offices or abolishing offices after the amendment of the Act introducing Section 58A making the Board independent. They added that the said County Assembly had then granted its approval through the passing of the relevant Act which made it unjustified to freeze the position.
16. They contended that the Petitioner's claim that there was no public participation was without merit as he admitted that the County Assembly invited him and the public through public notification to present their views before passing the law. They argued that if the process was illegal or in violation of the court process then Petitioner would not have been involved in the public participation.



17. They asserted that the legislative powers/functions of the County Assembly were conferred by Articles 1(3)(a) and 185(1) and (2) of *the Constitution* and the same could not be interfered by this court and that that was why the Petitioner avoided to enjoin the County Assembly in this suit as it would be a futile pursuit. They argued that whereas the court would interfere with the transaction of a legislative process in the course by resorting to the applicable Standing Order of the Assembly, it would not do so with the law-making process until it is concluded and a petition to declare the law unconstitutional could be entertained pursuant to the powers conferred to it under Article 165(3)(d) (i) of *the Constitution*.
18. They further submitted that all county health services including health facilities and pharmacies were the exclusive functions of the county governments as provided for under the Fourth Schedule, Part 2 Section 3(a) of *the Constitution*. They, therefore, argued that in the circumstances of this case, the national *Health Act* which established the office of the Medical Superintendent in a hospital and placed that position to be at the top of the management of the facility was inapplicable and that if that law contradicts the County legislation, the County law, in this case the Vihiga Teaching and Referral Hospital Act prevails.
19. They invoked Article 191 of *the Constitution* and specifically sub-article (6) on conflicts of national laws and county laws and asserted that the only available opportunity for the Petitioner was to challenge the constitutionality of the Vihiga Teaching and Referral Hospital Act which he had not done. They added that he also failed to join the County Assembly to this Petition to question the process it followed to pass the law.
20. They were categorical that the Petitioner's comments on the new law were of no essence and were an attempt to mislead the court to maintain an order which had been overtaken by events and further were in violation of the rules of natural justice and fair administration of justice. They were emphatic that the court could not stifle the constitutional mandate of a county assembly in the manner sought.
21. They placed reliance on the case of *Law Society of Kenya vs AG & Another; National Commission for Human Rights & Another (Interested Parties)* [2020]eKLR where it was held that the court could not interfere with constitutional functions of public bodies traceable to the constitutional doctrine of separation of powers. In that regard, they argued that the court herein could not impede the operationalisation of the new county legislation establishing the office of the Chief Executive Officer for the facility by the application of an argument being advanced by the Petitioner.
22. They pointed out as the court did not find the advertisement to be unlawful and only put the process on hold, it would be unnecessary to call for fresh advertisement for the position which shall be costly and in violation of Section 1 A & B of the *Civil Procedure Act* on the overriding objective and the duty of the court.
23. They further cited Section 3(2) of the High Court (Organisation and Administration) Act Cap 8C (Laws of Kenya) and argued that it would not be economical to the 1st Respondent to compel it to re-advertise the position which had not been filled and the advert was still running. In the premises, they prayed that the interim orders herein be discharged and that the suit would automatically be rendered incompetent. They added that if the Petitioner wanted to breath into it, he would have moved to file the required amendments to address the new development which he had not done.
24. On his part, the Petitioner submitted that Supreme Court had defined the primary objective of conservatory orders in public law as being, to preserve the issues in dispute to ensure that the dispute was not rendered an academic exercise or that the dispute did not change its character so as to deny the court jurisdiction and it was the duty of the court to ensure that. In that regard, he cited the case of



Board of Governors, Moi High School, Kabarak & Another vs Malcom Bell, SC Applications Nos 12 and 13 of 2012 (eKLR citation not given).

25. He denied the Respondents' allegation that the Petition was related to employment issues and asserted that it was about the creation of a new office in the county public service. He added that the filing of the said office was only a consequence yet it had not happened as no person had been shortlisted, interviewed or appointed to office. He pointed out that if the court allow the Respondents to fill the position, there would be accrued employment rights and that was when this court's jurisdiction would be compromised. He urged the court to exercise caution while considering the prayer for lifting of the orders.
26. He invoked Section 62 of the County Governments Act and argued that the Respondents' claim that the County Assembly on its own motion proceeded to establish the said new office was contrary to the said section. He added that the Respondents had not provided any explanation to the claim that they did not sought the advisory opinion of the County Director of Health, instead, they claimed that the 1st Respondent did not have a County Director of Health.
27. He further submitted that the Respondents had provided no response to the issue of having violated the National Health policy, the Health Act and the other provisions of law save to argue that health was a devolved function. He added that no conflict of laws had been demonstrated to suggest that they were bound by the national laws. He was emphatic that he had a prima facie case with a likelihood of success.
28. He contended that the Respondents had not shown any prejudice they would suffer if the conservatory orders are granted and that they had also not controverted any of the averments of fact made by him, including the possible loss of public funds and the administrative disruption that would be occasioned by the creation of a new office to perform the function of an already existing office.
29. He further contended that the Respondents had not controverted the existence of the office of Medical Superintendent which currently performs the very functions intended to be performed by the new office. He urged the court to find that on a balance of probabilities, there was likely to be administrative disruption if the office of the CEO is filled without abolishing the office of the medical superintendent and which disruptions had unforeseeable irreversible consequences on the operations of the hospital.
30. He asserted that the Respondents had not proved in evidence that the conservatory orders would occasion the paralysis of the hospital operations. He contended that the Respondents had not directly pointed to any public interest at stake and neither had they controverted the public interest values at stake as pointed in his application and submissions. He urged the court to find that there was no cognizable public interest in lifting the conservatory order.
31. He faulted the Respondents for not annexing the entire Bill in question to prove whether it addressed the issues of transition, abolishment and creation of the new office. He urged the court to find that the issues raised in his Petition herein were not moot. In this regard, he relied on the cases of Supreme Court Petition No 13 of 2020 as consolidated with Petition No E019 of 2020 Kenya Railways Corporation & Ors vs Okiya Omtatah & Ors and Supreme Court Petition No 6 of 2022 (both eKLR citations not given) without mentioning the holding he relied on therein.
32. He urged the court to find the Respondents' application herein as defective in law and an abuse of the court process and that it did not disclose any grounds for setting aside the conservatory orders.
33. Article 185(1) and (2) of the Constitution vests legislative authority in the County Assembly and empowers it to make laws necessary for the effective performance of county government functions. The said Article provides as follows:-



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(emphasis court).
34. The Fourth Schedule of *the Constitution* of Kenya stipulates as follows:-The functions and powers of the county are:-
1. Agriculture, including...
 2. County health services, including, in particular- a. county health facilities and pharmacies (emphasis court).
35. Section 8(1)(b) of the *County Governments Act* Cap 265 (Laws of Kenya) sets out the role of the County Assembly as follows:-
- “The county assembly shall perform the roles set out under Article 185 of *the Constitution*.”
36. A reading of the aforesaid Fourth Schedule indicated that it allocated to county assemblies the function of making laws in relation to county health services including county health facilities. As the Respondents had adduced evidence that the impugned Bill had already been assented into law by the Governor, Vihiga County on 15th April 2025 and that it was the said Act that had created the impugned office of the Chief Executive Officer of the Vihiga County Referral Hospital, this court agreed with the Respondents that the only option the Petitioner had was to challenge the constitutionality of the Act creating the impugned office.
37. Be that as it may, while determining the Respondents’ Preliminary Objection dated and filed on 27th February 2025, in its Ruling of 18th September 2025, this court had held that it had no jurisdiction to hear and determine this matter at this stage.
38. In the premises, it followed that the interim orders that had been issued by this court on 28th February 2025 be discharged forthwith.

Disposition

39. For the foregoing reasons, the upshot of this court’s decision was that the Respondent’s Notice of Motion Application dated 6th May 2025 and filed on 7th May 2025 was merited and the same be and is hereby allowed in terms of prayers No (4) and (5) therein.
40. As this was a public interest litigation and it would be unconscionable to award costs to a government against its citizen, this court hereby directs that each party will bear its own costs of this application.
41. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 18TH DAY OF SEPTEMBER 2025

J. KAMAU

JUDGE

