



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT KISUMU**

**PETITION NO. 14 OF 2017**

*(Before Hon. Justice Mathews N. Nduma)*

**JULIUS MASIVA OBUGA.....PETITIONER**

**VERSUS**

**COUNTY ASSEMBLY BOARD OF VIHIGA.....1<sup>ST</sup> RESPONDENT**

**COUNTY ASSEMBLY OF VIHIGA.....2<sup>ND</sup> RESPONDENT**

**KILINGA MBAKA.....3<sup>RD</sup> RESPONDENT**

**RULING**

1. Application dated 11/12/2019 by the 2<sup>nd</sup> respondent, application dated 19/12/2019 by the 1<sup>st</sup> and 2<sup>nd</sup> respondents and application dated 13/1/2020 by the 3<sup>rd</sup> respondent all seek for an order to stay and review the ruling of the Court delivered on 11<sup>th</sup> December 2019.
2. Application dated 25<sup>th</sup> February 2020 by the petitioner on the other hand pray for committal and punishment of the 1<sup>st</sup> and 2<sup>nd</sup> respondents for willful disregard of the order of the court passed in the Judgment of the court delivered on 13<sup>th</sup> December 2018 and reiterated in the ruling of the Court delivered on 11<sup>th</sup> December 2019.
3. The Court notes firstly that the respondents have filed an appeal against the Judgment of the Court delivered on 13<sup>th</sup> December 2018 which appeal is still pending before the Court of Appeal.
4. The court granted the respondents/applicants in the application dated 11/12/2019 interim order which is still in place.

**Determination**

5. The issue raised by the respondents in the said applications is that this court delivered the ruling on 11<sup>th</sup> December 2019 in which the court declared the repeat of recruitment done by the respondents to have happened in defiance of the Judgment of the court delivered on 13<sup>th</sup> December 2018 and therefore null and void and that the court admonished the 1<sup>st</sup> and 2<sup>nd</sup> respondents for willful contempt of the court orders aforesaid unaware and in ignorance of subsequent orders granted to the 1<sup>st</sup> and 2<sup>nd</sup> respondents by Hon. Byram Ongaya on 4/1/2019 which orders gave a go ahead to the respondents to repeat the recruitment exercise of the Clerk of Vihiga County Government on the basis that the 1<sup>st</sup> and 2<sup>nd</sup> respondents had already complied with the directives in the Judgment of the Court delivered on 13<sup>th</sup> December 2018.
6. That all the three candidates, the court had directed to be vetted by the County Assembly were vetted and rejected by the County Assembly necessitating a fresh recruitment to fill the position of the Clerk which has now been filled by one Kilinga Ambaka.
7. That Mr Ambaka had reapplied for the position as a person with disability and was shortlisted, interviewed and recommended by the County Assembly Service Board of Vihiga for vetting by the County Assembly of Vihiga, which vetting took place and the said Kilinga Ambaka was duly re-appointed to the position.
8. The Court has considered the said applications and the replying affidavit by the petitioner/ Respondent together with oral submissions made before court by Mr. Lakewa for the 1<sup>st</sup> and 2<sup>nd</sup> respondents, Mr. Musiega for the 3<sup>rd</sup> respondent and M/s Imbaya holding brief for Mr. Kudu for the petitioner/Respondent.

9. The court is satisfied that it was not fully aware of the nature and extent of the interim orders made by Byram Ongaya at Nairobi on 4/1/2019 pursuant to an application made at Nairobi, E&LRC by the 1<sup>st</sup> and 2<sup>nd</sup> respondents.

10. The Court has now the advantage of considering the orders by Hon. Ongaya J. issued on 4<sup>th</sup> January 2019 and in particular order two (2) thereof which reads: -

11. ‘‘ That pending the inter parties hearing or further orders by the court order 2 given by the court on 31<sup>st</sup> December 2018 and issued on 2<sup>nd</sup> January 2019 is hereby set aside with the consequences that the process of recruitment, selection and appointment of the Clerk of the County Assembly of Vihiga as flowing from the advertisement inviting for applicants and closing on or before 8<sup>th</sup> January 2019 in that regard to proceed in accordance with the applicable law and procedures’’.

12. The court is satisfied therefore, the process of recruiting the Clerk of the County Assembly of vihiga had been sanctioned by a court of equal status as this one. This Court is not aware whether the Nairobi Court was aware and/or had fully appreciated the Judgment of this Court delivered on 13<sup>th</sup> December 2018 which had expressly prohibited a fresh recruitment of the Clerk and the Assembly had been directed to consider the three candidates who had earlier been recommended by the County Assembly Service Board for appointment to the said position of Clerk of Vihiga Assembly.

13. That notwithstanding the Nairobi, E&LRC had rightly or wrongly issued orders that appear to contradict the Judgment of a Court of equal status upon hearing the matter on the merits.

14. It is pertinent that the 1<sup>st</sup> and 2<sup>nd</sup> respondent have noted an appeal against the Judgment of this Court delivered on 12/2/2018. It is also clear that the ruling of this court delivered on 11/12/2019 was issued in ignorance and/or without full appreciation of the subsequent orders issued by Byram Ongaya J. at Nairobi on the same subject matter.

15. For this reason, the court is inclined and actually reviews its ruling of 11<sup>th</sup> December 2019 in terms of Rule 33(1)(a), (b) and (c) and finds that though this court had disallowed fresh recruitment of the Clerk to the County Assembly of Vihiga in its Judgment of 13<sup>th</sup> December 2018, the fresh recruitment had been subsequently authorised by an order issued by Byram Ongaya J. on 4/1/2019.

16. Accordingly, the ruling of the court delivered on 11<sup>th</sup> December 2019 is reviewed to that extent and the court finds that the fresh recruitment was lawful.

17. The court hopes that the Appeal in this matter will be prosecuted to finality so as to resolve all issues on merit determined by this court in the Judgment delivered on 13<sup>th</sup> December 2018.

18. Each party to meet their own costs of the applications.

**Ruling Dated, Signed and Delivered at Nairobi this 25<sup>th</sup> day of June 2020.**

**Mathew N. Nduma**

**Judge**

**ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> March 2020, this ruling has been delivered to the parties online with their consent. They have waived compliance with **Order 21 rule 1 of the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by **Article 159(2)(d)** of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under **Article 48** of the Constitution and the provisions of **Section 18 of the Civil Procedure Act (chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, *inter alia*, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**Mathews N. Nduma**

**Judge**

**Appearances**

Mr. Lakewe for 1<sup>st</sup> and 2<sup>nd</sup> respondents/applicants

Mr. Musiega for 3<sup>rd</sup> respondent/applicant.

M/s Imbaya for Mr. Kudu for petitioner/Respondent.

Chrispo: Court Clerk