



Olago & another v Homabay County Assembly Service Board & 3 others (Miscellaneous Case E051 of 2025) [2025] KEELRC 2623 (KLR) (30 September 2025) (Ruling)

Neutral citation: [2025] KEELRC 2623 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
MISCELLANEOUS CASE E051 OF 2025
JK GAKERI, J
SEPTEMBER 30, 2025**

BETWEEN

STEPHEN OCHIENG OLAGO 1ST APPLICANT

VIVIAN AKINYI POLO 2ND APPLICANT

AND

HOMABAY COUNTY ASSEMBLY SERVICE BOARD 1ST RESPONDENT

HOMA BAY COUNTY & 2 OTHERS 2ND RESPONDENT

RULING

- 1 Before the court for determination is the Applicant's Notice of Motion dated 2nd July, 2025 filed on 3rd July, 2025 under Certificate of Urgency seeking Orders that:
1. Spent.
 2. Decisions of the Interested Party Ordering reinstatement of the applicants and payment of withheld salaries and benefits be recognized, adopted and enforced as a judgment of this Honourable Court and a decree to issue forthwith.
 3. Spent.
 4. The Honourable Court be pleased to issue a declaration under Section 89(2) of the *Public Service Commission Act* that the current serving member of the County Secretary of the 1st respondent and the current serving member of the office of the 3rd respondent are liable to be removed from office and are otherwise unfit to hold office for wilfully refusing, neglecting and/or otherwise failing to implement the decisions of the Interested Party.
 5. The court be pleased to grant any other Orders and or directions that it deems just and fair to grant in the circumstances.



6. The costs of this application be borne by the respondents.
- 2 The motion is expressed under Section 12 of the *Employment and Labour Relations Court Act*, Rules 17 and 28 of the Employment and Labour Relations Court (Procedure) Rules 2016, Section 89(1) and (2) of the *Public Service Commission Act* and Article 162(2) of *the Constitution* of Kenya and is based on the grounds set forth on its face and the Supporting Affidavit sworn by Mr. Stephen Ochieng Olago on 2nd July, 2025.
- 3 The applicants aver that their appeals dated 4th December, 2024 to the Public Service Commission were successful vide a decision dated 14th May, 2025 which was communicated to all parties on 16th May, 2025 and via email dated 23rd May, 2025, but the decision remains unimplemented by the respondents and the court's intervention was necessary.

Respondent's case

- 4 In a Replying Affidavit sworn by Lilian Ogono on 29th July, 2025 the affiant deposed that she was a member of the Homabay County Assembly Service Board and the Board had received the decision of the Interested Party but it required a decree of the court and a Certificate of Order against County Government to enable it comply with the requirements of the *Public Finance Management Act* and all positions in the service had been filled up and the decision will necessitate the creation of new offices, which could take 6 months at least owing to bureaucracy.
- 5 That other courts had held that the Interested Party had no jurisdiction to hear appeals from decisions of the County Assembly Service Boards under Section 77 of the County Government's Act and urged the court to dismiss the application.

Applicant's further response

- 6 In a Further Affidavit sworn 4th August, 2025 Mr. Stephen Ochieng Olago deposed that 2nd respondent's response was an afterthought aimed at delaying the matter. That only the Clerk or Speaker of the County Assembly could plead and swear on behalf of the 2nd respondent and Lillian Ogono had usurped their mandate.
- 7 The affiant deposed that the respondents had no discretion as to whether or not to implement the decision of the Interested Party as they were bound, and had admitted that they were awaiting a decree to enforce the decision and reinstatement required compliance only and no evidence of appeal or reviewed had been adduced by the respondents.
- 8 That the court had no jurisdiction to consider the merits of the reinstatement ordered by the The Interested Party filed neither a response nor submissions.

Applicant's submissions

- 9 On adoption of the decision of the Interested Party as a Judgment of the court, the applicant's counsel cited and the provisions of Section 89 of the *Public Service Commission Act* to submit that the respondent's refusal to implement the decision of the Interested Party violated the principles and values of Public Service under Article 10 and 232 of *the Constitution* of Kenya, namely, high standards of professional ethics and accountability.
- 10 Reliance was placed on the sentiments of the Court in Patrick Nyaga V Kenya Forest Service; Public Service Commission; (Interested Party) Misc. App. No. E006 of 2024 and Kenya County Government Workers Union V Homa Bay County & County Assembly of Homa Bay & 5 others ELRC Misc.



- No. E118/2024, to submit that Section 89 of the *Public Service Commission Act* was clear and the respondents had no discretion to accept or reject the decision of the Interested Party.
- 11 Sentiments of the Court in *Mwakamba V Taita-Taveta County Public Service Board* [2024] KEELRC2300 (KLR) were also cited as were those in *Hussein Dayow Abdullahi & 3 others V County Government of Mandera & another* [2019] eKLR.
- 12 On costs, counsel cited the decision in *Cecilia Karuru Ng'ayo V Barclays Bank of Kenya & another* [2016] eKLR as well as *Hussein Dayow Abdullahi & 3 Others V County Government of Mandera & another* (supra), to urge the court to award costs of the application.
- 13 In their supplementary submissions, the applicants cited the provisions of Article 159(2) of *the Constitution* of Kenya and Section 77 of the *County Governments Act* to urge that the court was obligated to respect the system on dispute resolution and powers of the court were limited by dint of Section 89 of the *Public Service Commission Act*.
- 14 Reliance was placed on the sentiments of the court in *Sweta V County Government of Kakamega & 3 Others* [2024] KEELRC 1554 (KLR), where the court expressed its lack of jurisdiction to consider the merits of reinstatement by the Public Service Commission, as were those in *Mohamed Bayaan Adan V Kenya Meat Commission* [2021] KEELRC 669 (KLR) on the effects of reinstatement and *Kengross V Kilifi County Public Service Board* [2024] KEELRC 13559 (KLR).
- 15 On 30th September, 2025 during a mention to confirm compliance by the parties, counsel for the respondent's counsel informed the court that he had not purposed to file submissions.

Analysis and determination

- 16 It is common ground that Mr. Stephen Ochieng Olago and Vivian Akinyi Polo, the applicants, were employees of the County Government of Homa Bay and their employment was terminated vide letters dated 18th May, 2022, appealed to the Public Service Commission (hereinafter PSC) pursuant to the provisions of the County government's Act and the *Public Service Commission Act* and the PSC found their termination to have been unlawful and Ordered reinstatement to comparable positions as determined by the County Public Service Board without loss of benefits which the respondents were directed to pay within 30 days by the County Secretary and Clerk of Homa Bay County Assembly.
- 17 Evidence on record reveals that the PSC forwarded the decisions to the advocates on record and the respondents vide email dated 20th May, 2025 at 7:35am and vide letters dated 16th May, 2025.
- 18 The respondents admitted that they were yet to comply with the directives of the PSC because they were yet to be served with a decree and certificate.
- 19 The latter contention was unclear to the court as the Certificate of Order Against the County Government required under Section 21 of the *Government Proceedings Act* applied to money decrees as opposed to a reinstatement where a Decree would be sufficient.
- 20 As to whether Lilian Ogono had locus standi to plead and swear on behalf of the Homabay County Assembly Service Board, the court is not persuaded that she had no authority of the Board or usurped anyone's powers.
- 21 Being a member of the County Assembly Service, board, the affiant could plead and swear on its behalf if the board had so resolved.



- 22 Significantly, the applicants did not request for the authority or file a Notice to produce to enable the respondents avail the necessary resolution of the Board by dint of the provisions of Section 17 of the *County Assembly Services Act*.
- 23 In the court’s view, nothing turns on that issue.
- 24 Similarly, Lilian Ogono deposed that some unnamed courts had held that the PSC had no jurisdiction to hear appeals from decisions of County Assembly Service Boards and urged the court to pronounce itself on the issue.
- 25 The court will reluctantly accept the invitation because the allegation was not grounded on anything verifiable. Neither the courts referred to by Lilian Ogono were named nor the decisions in question brought to the court’s attention.
- 26 Equally, having opted not file submissions, the respondents denied themselves an opportunity to bring out the issue with clarity and with verifiable authorities for the court’s determination.
- 27 Be that as it may, first Article 234(1)(i) of *the Constitution* of Kenya provides that
- “The Commission shall hear and determine appeals in respect of County Government’s Public Services...”
- 28 This provision lays bare the jurisdiction of the Public Service Commission to hear and determine appeals from the entire County Governments Public Service.
- 29 Second, Section 77 of the *County Governments Act* is explicit that:
1. Any person dissatisfied or affected by a decision made by the County Public Service Board or a person in exercise or purported exercise of disciplinary control against any county public officer may appeal to the Public Service Commission (in this Part referred to as the "Commission") against the decision.
 2. The Commission shall entertain appeals on any decision relating to employment of a person in a county government including a decision in respect of—
 - a. ...
 - b. ...
 - c. disciplinary control;
 - d. ...
 - e. retirement and other removal from service;
 - f. ...
 - g. ...
- 30 A wholistic and plain reading of the foregoing provisions leaves no doubt that Section 77 of the *County Governments Act* applies to all employees of County Governments irrespective of the department or Section and captures all decisions makers at the County Government level.
- 31 Needless to belabour, County Government employees are public officers by dint of Article 260 of *the Constitution* of Kenya, the pre-eminent law of the land. They are an integral part of the County’s Public Service.



32 Significantly, the underlined portion of Section 77(1) of the County Governments Act encompass the County Assembly Service Board, which is a body corporate under the provisions of Article 260 of the Constitution of Kenya and Section 12 read with Section 14 of the County Governments Act.

33 Relatedly, Section 86 of the Public Service Commission Act provides that:

1. Any person who is dissatisfied or affected by a decision of any authority or person in respect of a County Government Public Service may appeal to the Commission against the decision.

Third, Article 260 of the Constitution of Kenya renders the position much clearer as it defines the term person in very broad terms as follows:

“Person includes a company, association or other body of persons whether incorporated or not”.

34 Since the County Assembly Service Board is a legal person, by virtue of the provisions of the County Assembly Services Act, it is a person under Section 77 of the County Government’s Act. In any event, it exercises certain powers and in the instant case it exercised disciplinary control against public officers employed by the County Government of Homabay.

35 The totality of the foregoing provisions is that the PSC has jurisdiction to hear and determine appeals against decisions made in respect of the entire complement of the County Governments Public Service.

36 It is instructive to note that the Public Service Commission Act was enacted after the Constitution of Kenya 2010 and the County Governments Act, and both the draftsman and the legislature were aware of the relevant provisions in the Constitution and the County Governments Act and in the hierarchy of norms, the latter statute prevails in the event of a conflict.

Nothing turns on this issue.

37 As to whether the court should adopt the decision of the PSC, the Interested Party as its judgment for purposes of the Public Service Commission Act provide the answer.

Section 89 of the Act provides:

1. Any person who is affected by the decision of the Commission made under this Part may file the decision for enforcement by the Employment and Labour Relations Court provided for under Article 162(2)(a) of the Constitution.
2. Any person who refuses, fails or neglects to implement the Commission's decisions is liable to disciplinary action in accordance with the applicable laws including removal from office.

38 This provision confer upon the Employment and Labour Relations Court jurisdiction to adopt decisions of the Public Service Commission as its own for purposes of enforcement. This is because the Commission has no enforcement mechanism and uniformity of enforcement of decisions imbues certainty and predictability in a legal system.

39 At this stage, and as correctly submitted by the applicants counsel, this court has no mandate to question the decision of the Public Service Commission simply because the Constitution of Kenya, County Government Act and the Public Service Commission Act have accorded the PSC exclusive jurisdiction to hear and determine appeals from County Governments Public Service and has power to uphold the decision, set the decision aside as it did in the instant case, vary the decision as it considers just or give such directions as it may consider appropriate with respect to the decision.



- 40 In the instant case, the respondents admitted they were to implement the decisions of the Interested Party and their adoption by this court would hasten the compliance process.
- 41 Since the respondents neither intimated nor demonstrated that they had sought a review of the decisions before the court by dint of Section 88 of the Public Service Commission Act and consistent with the decisions in *Murimi V County Government of Kirinyaga* and another Public Service Commission; Interested Party (supra), *Mwakamba V Taita-Taveta County Public Service Board* (supra), *Hussein Dayow Abdullahi & 3 others V County Government of Mandera & another* (supra) and *Kenya County Government Workers Union V Homabay County and County Assembly of Homabay & 5 others* (supra), all cited by the applicant's counsel, the court is satisfied that a proper case has been made for adoption as a judgment of this court the decisions of the Interested Party dated 14th May, 2025 in favour of the applicants.
- 42 Contrary to the respondents' averment that court orders are subject to establishment creation or conceptualization of new offices for the applicants, they are regrettably not.
- 43 If the respondents were impatient to fill the positions left by the applicants after their dismissal from employment during the pendency of their appeal, a fact they were aware of, they have themselves to blame as prudence would be dictated otherwise.
- 44 Having been reinstated by the Interested Party, the applicants' unpaid salary and benefits continue to accumulate against the respondents yet no services are being rendered to the public. The applicants remain in employment and their salaries and benefits are due and payable under Section 17(1) of the Employment Act.
- 45 Finally, as regards prayer number 4 of the applicants' Notice of Motion the court has no jurisdiction to enforce the provisions of Section 89(2) of the Public Service Commission Act. The Interested Party had and did not do so.
- 46 More significantly, it is a constitutional imperative that a public officer shall not be dismissed, removed from office, demoted in rank or otherwise subjected to disciplinary action without due process.
- The prayer is dismissed.
- 47 In the upshot, the applicants' Notice of Motion dated 2nd July, 2025 has merit and is granted in the following terms.
1. The decisions of the Interested Party dated 14th May, 2025 and communicated to the respondents vide letters dated 16th May, 2025 and email dated 20th May, 2025 be and are hereby adopted as Judgments of this court by dint of the provisions of Section 89(1) of the Public Service Commission Act; for purposes of enforcement.
 2. Applicants are awarded 50% costs of the instant application against the respondents.
- 48 Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 30TH DAY OF SEPTEMBER, 2025.

DR. JACOB GAKERI

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 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. 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 1B 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.

DR. JACOB GAKERI

JUDGE

