

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT BUNGOMA
PETITION NO. E003 OF 2024

**IN THE MATTER OF: ARTICLES 10,20,22,23,27, 28, 29,41,47,
50 AND 236 OF THE CONSTITUTION OF KENYA 2010**

AND

**IN THE MATTER OF: THE CONSTITUTION OF KENYA
(PROTECTION OF RIGHTS AND FUNDAMENTAL
FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013**

AND

**IN THE MATTER OF: SECTIONS 5,17, 35,43, AND 46 OF THE
EMPOLYMENT ACT, 2007**

AND

**IN THE MATTER OF: SECTIONS 12 AND 23 OF THE
COUNTY GOVERNMENT ACT, 2012**

AND

**IN THE MATTER OF: SECTIONS 5,10,17,19,22,23,27 AND 30
OF THE COUNTY ASSEMBLY SERVICES ACT, 2017**

AND

**IN THE MATTER OF: VIOLATION AND THREATENED
VIOLATION OF FUNDAMENTAL RIGHTS AND FREEDOMS
UNDER (INTER ALIA) ARTICLES 10,27,28,29,41,47 AND 236
OF THE CONSTITUTION OF KENYA, 2010**

BETWEEN

ALLAN WAFULA MABUKAPETITIONER

AND

THE SPEAKER,

BUSIA COUNTY ASSEMBLY.....1ST RESPONDENT

THE BUSIA COUNTY ASSEMBLY

SERVICE BOARD.....2ND RESPONDENT

(BEFORE HON. JUSTICE DAVID NDERITU)

JUDGMENT

I. INTRODUCTION

1. The petitioner through JN & P Law Advocates LLP commenced the proceedings hereof by way of a petition dated 20th June 2024 seeking for the following orders –

- a. A declaration that the petitioner is and has been duly appointed as the clerk of Busia County Assembly Service Board/Busia County Assembly and can only be suspended or otherwise removed from office in accordance with the provisions of Section 22 and 23 of the County Assemblies Service Act;*
- b. A declaration that the purported decision by the 2nd respondent made on 7th August 2023 vide Minute No. CA/BSA/CASB/24/08/2023 to second the petitioner to the Busia County Executive/Lake Region Economic Bloc as*

communicated by the 1st respondent in a letter referenced CA/BSA/3/HR/VOL.III (30) and dated 8th August 2023 is unlawful, illegal, capricious, arbitrary, malicious, contrived and thereby constitutes a violation of the petitioner's constitutional rights under Article 236, his fundamental rights and freedoms under Article 41 and 47 of the constitution and his employment and other statutory rights;

- c. An order of certiorari quashing the decision by the 2nd respondent made on 7th August 2023 vice Minute No. CA/BSA/CASB/24/08/2023 purporting to second the petitioner to the Busia County Executive/Lake Region Economic Bloc as communicated by the 1st respondent in a letter referenced CA/BSA/3/HR/VOL.III (29) and dated 8th August 2023;*
- d. A permanent injunction restraining the respondents, whether acting directly or through third parties, agents and/or proxies, from seconding and/or transferring the petitioner from the Busia County Service Board/Busia County Assembly to the Busia County Executive/Lake Region Economic Bloc, and/or otherwise from interfering with the petitioner's contract of employment as the Clerk of the Busia County Assembly;*
- e. A finding and holding that the 1st and 2nd respondents have*

engaged in a malicious scheme of orchestrating the unlawful and unfair secondment, suspension, termination and/or removal of the petitioner from office of the Clerk Busia County Assembly;

- f. A permanent injunction restraining the 1st and 2nd respondent whether acting directly or through third parties, agents and/or proxies, from intimidating, harassing, threatening and bullying the petitioner;*
- g. A permanent injunction restraining the 1st and 2nd respondent whether acting directly or through third parties, agents and/or proxies, from intimidating, harassing, threatening and bullying the petitioner with threats for removal from office by through consideration of reports of Auditor General;*
- h. An order of reinstatement in favor of the petitioner to his position and duties as the clerk/accounting officer of the Busia County Assembly;*
- i. An order compelling the respondents to pay to the petitioner a total of Kshs. 300,500 being the transfer allowance and baggage reimbursement for transferring the petitioner from Busia to Kisumu County and any other dues/benefits owing to the petitioner including subscription fees to the Institute of Certified Public Accountants of Kenya (ICPAK);*

- j. An order for damages against the 1st and 2nd respondent, for violation to the petitioner's constitutional rights under Article 236 and his Fundamental Rights and Freedom protected under 27, 28, 29, 41 and 47 of the constitution and Statutory Rights protected under the provisions of Section 5 of Fair Administrative of Action Act and Sections 5(3), 35, 43 and 45 of the Employment Act;*
 - k. The costs and incidental to this petition;*
 - l. Interest on (i), (j) and (k) above at court rates from the date of filing this petition to the date of full and final settlements; and*
 - m. Such other, further, incidental or alternative reliefs as the honorable court may deem just and expedient.*
2. The petition is supported with an affidavit sworn by the petitioner on even date with several annexures thereto.
 3. In response to the petition, the respondents through Achach & Associates Advocates LLP filed a replying affidavit sworn by Fred Wafula Odilo, the Speaker and the Chair of the 2nd respondent.
 4. Alongside the petition, the petitioner filed a notice of motion of even date seeking for orders that –

EX-PARTE

1. This application is hereby certified urgent and service

thereof is hereby dispensed with in the first instance.

- 2. A conservatory order do issue suspending the operation and/or implementation of the decision and/or resolution by the 2nd respondent made vide MIN.*

NO.5/BSA/CASB/11/2025 at its meeting held on 11th February 2025 purporting to have made a finding without first according the petitioner a right to fair hearing, that the petitioner has engaged in acts Gross Misconduct as communicated to the petitioner by the 1st respondent vide the letter Reference No. CA/BSA/ADM/VOL. II (12) and dated 26th February, 2025 pending the service, hearing and determination of this application.

- 3. A conservatory order do issue suspending the operation and/or implementation of the decision and/or resolution by the 2nd respondent purporting to institute disciplinary proceedings against the petitioner pursuant to Section 22 and 23 of the County Assemblies Services Act (No. 24 of 2017) by requiring the petitioner to “show cause and appear before the 2nd respondent on 28th March, 2025 for removal from office proceeding” as communicated to the petitioner by the 1st respondent vide the letter Reference No. CA/BSA/ADM/VOL. II (12) and dated 26th February, 2025 pending the service, hearing and determination of this application;*

4. A conservatory order do issue restraining the 1st and 2nd respondents, whether acting directly or through third parties, agents and/or proxies, from suspending, terminating, removing from office or otherwise interfering with the petitioner's contract of employment as the clerk of the Busia County Assembly pending the service, hearing and determination of this application.

INTER-PARTIES

5. A conservatory order do issue suspending the operation and/or implementation of the decision and/or resolution by the 2nd respondent made vide MIN. NO.

5/BSA/CASB/11/2/2025 at its meeting held on 11th February 2025 purporting to have made a finding without first according the petitioner a right to fair hearing, that the petitioner engaged in acts Gross Misconduct as communicated to the petitioner by the 1st respondent vide the letter Reference No. CA/BSA/ADM/VOL. II (12) and dated 26th February, 2025 pending the service, hearing and determination of this petition;

6. A conservatory order do issue suspending the operation and/or implementation of the decision and/or resolution by the 2nd respondent purporting to institute disciplinary proceedings against the petitioner pursuant to Section 22 and 23 of the County Assemblies Services Act (No. 24 of

2017) by requiring the petitioner to “show cause and appear before the 2nd respondent on 28th March, 2025 for removal from office proceeding” as communicated to the petitioner by the 1st respondent vide the letter Reference No. CA/BSA/ADM/VOL. II (12) and dated 26th February, 2025 pending the service, hearing and determination of this petition;

- 7. A conservatory order do issue restraining the 1st and 2nd respondents, whether acting directly or through third parties, agents and/or proxies, from suspending, terminating, removing from office or otherwise interfering with the petitioner’s contract of employment as the Clerk of the Busia County Assembly pending the service, hearing and determination of this petition.*
- 8. The costs of and incidental to this application shall abide in the outcome of the petition herein.*
- 9. Such other, relief, incidental or alternative reliefs as the honorable court may deem just and expedient.*

5. In a ruling dated 1st August 2024 the court (Keli J) issued an order that *“pending the hearing and determination of the petition an interim conservatory order is hereby issued restraining the respondents and their assigns or any other person from terminating the contract of the petitioner or recruiting any other person as clerk of Busia County Assembly.”*

6. The petitioner filed a further affidavit sworn by himself on 27th January 2025 with several annexures thereto.
7. The petition was canvassed by way of written submissions. Mr. Ngwele for the petitioner filed submissions dated 27th January 2025 alongside a list and copies of decisions relied on. Mr. Achach for the respondents filed submissions dated 7th February 2025 alongside a list of cited decisions and copies thereof.
8. While the matter was pending judgment, the petitioner filed two applications, both under certificate of urgency. The first application is a notice of motion dated 7th March 2025 and upon consideration of the same the court issued the following ex parte orders on 13th March 2025 –

- 1) The respondents are granted 7 days to respond to the application.***
- 2) The petitioner is granted leave to reply to (1) if need arises and file with it written submissions in 7 days.***
- 3) The respondents to file and serve written submissions in 7 days upon service in (ii) above.***
- 4) A conservatory order is hereby issued suspending the operation and/or implementation of the decision and/or resolution by the 2nd respondent made vide MIN. NO. 5/BSA/CASB/11/2/2025 at its meeting held on 11th February 2025 purporting to have made a finding without first according the petitioner a right to a fair hearing, the***

petitioner has engaged in acts of Gross misconduct as communicated to the petitioner by the 1st respondent vide the letter Reference No. CA/BSA/ADM/VOL. II (12) and dated 26th February, 2025 pending the hearing and determination of this application.

- 5) *A conservatory order is hereby issued suspending the operation and/or implementation of the decision and/or resolution by the 2nd respondent purporting to institute disciplinary proceedings against the petitioner pursuant to Sections 22 and 23 of the County Assemblies Services Act (No. 24 of 2017) by requiring the petitioner to “show cause and appear before the 2nd respondent on 28th March, 2025 for removal from office proceeding” as communicated to the petitioner by the 1st respondent vide letter Reference No. CA/BSA//ADM/VOL. II (12) and dated 26th February, 2025 pending the hearing and determination of this application.*
- 6) *A conservatory order is hereby issued restraining the 1st and 2nd respondents, whether acting directly or through third parties, agents and/or proxies, from suspending, terminating, removing from office or otherwise interfering with the petitioner’s contract of employment as the Clerk of the Busia County Assembly pending the hearing and determination of this application.*

7) Mention on 3rd April, 2025 for further directions.

9. The second application is dated 1st April 2025 wherein the petitioner seeks to have the respondents cited and punished for contempt for breaching the orders above.
10. The filing of the two applications destabilized the hearing and conclusion of the matter and delivery of the pending judgment. While the two applications raise important issues for consideration and determination by the court, the court has *suo motu* decided to bypass the two applications and go straight into the judgment of the matter in the hope that the move shall bring this lengthy and protracted litigation to a logical conclusion. It is hoped that this judgment shall somehow determine all the issues in controversy between the parties and thereby render the two applications moot. That way, the court shall have saved precious judicial time in not writing two lengthy rulings in a matter that is only pending for judgment.

II. THE EVIDENCE

11. In the supporting affidavit the petitioner deposed that he is the clerk and accounting officer of the Busia County Assembly and the secretary to the 2nd respondent on permanent and pensionable terms as per **Section 13 the County Governments Act** and **Section 18 of the County Assembly Service Act** since 16th December 2013. He attached a copy of the letter of his appointment dated 16th December 2013.

12. He deposed that before his competitive recruitment to the above position he was the clerk to the now defunct County Council of Busia. He deposed that his duties, roles, and responsibilities in his present position are spelt out under ***Sections 16, 19, & 20 of the County Assembly Service Act.***
13. He deposed that on 10th March 2023 the County Assembly Service Board held a meeting that he was barred from attending wherein it was arbitrarily, illegally, and irregularly resolved that he was to proceed on a 90 days compulsory leave with full pay. He annexed a letter of even date communicating the above.
14. The compulsory leave was ending on 10th June 2023 but the petitioner was not recalled to resume duty but instead the compulsory leave was extended to 10th July 2023. It is further disposed that he was subsequently summoned through a short text message (SMS) sent on 29th June 2023 to appear before the 2nd respondent on 30th June 2023 without being informed of the agenda of the meeting.
15. It is further disposed that vide a letter dated 8th August 2023 the petitioner was informed that the 2nd respondent had resolved to second him to the County Executive but the letter of secondment did not provide for the terms and conditions of his engagement. He reluctantly took up the secondment as a soft-landing upon realizing that the respondents no longer wanted to have him in his lawfully held and appointed position.

16. It is deposed that after a lot of back and forth, the County Secretary finally handed to the petitioner a letter dated 22nd August 2023 informing him that he had been seconded to the Lake Region Economic Block (LREB) for an initial period of six months and he reported thereto on 24th August 2023. The secondment was extended for a further period of six months vide a letter dated 23rd February 2024.
17. It is deposed that the secondment was illegal, null, and void as the same purported to move the petitioner from the legislative arm of the County Government of Busia to the Executive in blatant violation of the *doctrine of separation of powers*, amongst many other statutory and constitutional violations of his rights.
18. In the replying affidavit, it is deposed that the petitioner was sent on compulsory leave to allow an audit report by the Auditor General which took too long and it is then that it was decided to second the petitioner to the Executive. It is deposed that the petitioner accepted the said secondment and even moved to Kisumu where the office of the LREB is located.
19. It is deposed that the petition herein was filed 10 months after the secondment and that the same is an afterthought.
20. It is deposed that the petitioner was unable to answer queries raised in the audit report notwithstanding that he requested and was given a lot of time to file a report on the same. It is deposed that the petitioner has not been terminated from his position and

the secondment was only meant to allow time for the auditing and for the petitioner to respond to the queries raised in the audit report which he has so far failed to respond to claiming that he needs more time.

21. It is deposed that the petitioner has been serving the secondment on the same terms and conditions that he served as the clerk of the County Assembly.
22. In the further affidavit, the petitioner deposed that the compulsory leave handed down to him and the subsequent secondment to the Executive are illegal and unlawful efforts by the respondents to remove him from office and to unfairly and unlawfully terminate him from his permanent and pensionable position of the Clerk to the Busia County Assembly.
23. It is deposed that it is the respondents who made it impossible for the petitioner to respond to the audit queries by denying him access to the office and the documents that he needed for an appropriate response. It is further deposed that the respondents have deliberately sought to frustrate the petitioner not to resume his permanent and pensionable position with the sole intention of them engaging a candidate of their choice as they consider the petitioner an outsider since he was not born within the County of Busia.
24. The petitioner reiterated the contents of the petition and the supporting affidavit as summarized above.

III. SUBMISSIONS BY COUNSEL

25. In the submissions dated 27th January 2025 counsel for the petitioner summarized the applicant's case as contained in the petition and in the two affidavits alluded to above.
26. It is submitted that the petitioner holds the office of the Clerk of the Busia County Assembly, a statutory office established under ***Section 13 of the County Governments Act*** and ***Sections 17 & 18 of the County Assembly Service Act*** on permanent and pensionable terms. It is further submitted that in that regard the law does not envisage a situation whereby the holder of that office may be seconded to serve in the executive arm of the County Government of Busia as such a move is an affront to the well-established ***doctrine of separation of powers***.
27. It is submitted that it is illegal and unlawful for the respondents to have purported to second the petitioner as alluded to in the affidavits in that he cannot hold any other position other than the one that he was competitively recruited to, that of the Clerk of the County Assembly. It is submitted that the purported secondment amounted to constructive dismissal.
28. Counsel for the petitioner isolated the following issues for determination –
- i. Whether the petitioner is and has been the duly appointed clerk of the Busia County Assembly;*
 - ii. Whether a clerk of a County Assembly can be seconded to*

the County Executive;

- iii. *Whether the decision by the 2nd respondent made on 7th August 2023 vide Minute No. CA/BSA/CASB/24/08/2023 to second the petitioner to the Busia County Executive is a violation of the Petitioner's Constitutional, Employment and Statutory rights;*
- iv. *Whether the petitioner is entitled to the reliefs sought out in the petition.*

29. It is submitted on the first issue that there is no dispute that the petitioner was duly and competitively appointed to the office of the Clerk of the County Assembly of Busia vide a letter dated 16th December 2013 on permanent and pensionable terms. It is further submitted that the petitioner may only be removed from that office in accordance with **Sections 22 & 23 of the County Assembly Service Act**. It is submitted that the petitioner has neither resigned from his position nor has he been lawfully removed therefrom and he is thus entitled to legally occupy, hold, and discharge the duties of that office.
30. On the second issue, it is submitted that the petitioner holds an office in the legislative arm of the County Government of Busia and he and the staff under him serve under the County Assembly Service Board. It is submitted that the petitioner cannot under any circumstances be seconded to the Executive arm of the County Government headed by the Governor as that violates the **doctrine**

of separation of powers.

31. Citing ***Pastoli V Kabale District Local Government Council & Others (2008) 2 EA 300***, it is submitted that the actions of the respondents purporting to second the petitioner from the County Assembly to the Executive is illegal, irrational, and evidently unlawful. It is submitted that the law does not provide for such an administrative action.
32. It is thus submitted that the decision by the 2nd respondent made on 7th August 2023 to transfer and second the petitioner as purported was an affront to the constitutional and statutory rights of the petitioner. Citing ***Jasper Mwiti Mutwiri V The Speaker, County Assembly of Laikipia*** no proper citation provided, it is submitted that a County Assembly and the Executive arms of a County Government are and should be separate and distinct in accordance with ***Articles 176 & 185 of the Constitution***.
33. It is thus submitted that the secondment of the petitioner as purported by the respondents was illegal and unconstitutional. It is submitted that the move violated ***Section 45 of the Employment Act, Sections 22 & 23 of the County Assembly Service Act, Section 4 of the Fair Administrative Actions Act, and Articles 41, 47, & 236(b) of the Constitution***.
34. On the reliefs sought, counsel cited various decisions including ***Esther W. Keige & Another V Kenya Forest Service & Another (2018) eKLR*** and ***Mundia Njeru Gaterial V Embu County***

Government & 5 Others (2015) eKLR urging the court to find and hold that the petitioner is entitled to all the reliefs as sought.

35. On the other hand, counsel for the respondents in submissions dated 7th February 2025 identified the following issues for deliberation and determination by the court –

- 1) *Whether a clerk of a county assembly can be seconded to the county executive*
- 2) *Whether the decision by the 2nd respondent made on 7th August 2023 vide minute No. CA/BSA/CASB/24/08/2023 to second the petitioner to the Busia County Executive is a violation of the Petitioner’s Constitutional, Employment and statutory rights*
- 3) *Whether the petitioner is entitled to the reliefs sought out in the petition*

36. On the first issue, it is submitted that the secondment of the petitioner is in accord with **Section 25 of the County Assembly Service Act** and **Section 73 of the County Governments Act**. It is submitted that the foregoing provisions of the law empower the 2nd respondent to hire, transfer, redeploy, and second employees as and when it deems fit.

37. It is submitted that the petitioner accepted the secondment and took up his new assigned role as per his letter of secondment. It is submitted that the petitioner did not protest the secondment until 10 months thereafter. It is submitted that this confirms that this

petition was filed as an afterthought.

38. It is submitted that the remuneration, benefits, and allowances payable to the petitioner remained the same upon secondment. It is submitted that the law does not inhibit the powers of the respondents in such secondment.
39. It is further submitted that the petitioner is suspected to have misappropriated public funds in his capacity as the Clerk to the County Assembly and he has been given a chance to clear his name without any success as he has always sought for more and more time without providing the information and details needed to clear his name.
40. On the second issue, it is submitted that the petitioner ratified the secondment when he took up his new posting to the LREB offices in Kisumu to represent the County Government of Busia. It is submitted that the petitioner took up the new posting on 24th August 2024 after being served with the letter of secondment the previous day. It is submitted that the petitioner did not object to the secondment and only filed this petition 10 months later.
41. It is submitted that the employer was not obliged to consult the petitioner prior to the secondment as the law does not provide for such consultations. It is submitted that the petitioner has neither been suspended nor terminated and as soon as he clears the audit queries raised he shall be allowed back to his office. It is submitted that the petitioner occupies an office in the public

service and it is only the Public Service Commission that may advertise a vacancy in the said office.

42. On the reliefs sought, it is submitted that it was upon the petitioner to prove his case as per ***Section 107 of the Evidence Act***. It is submitted that the petitioner has not come to court with clean hands as he has failed, refused, and or neglected to answer genuine audit queries leading to well-founded suspicion that he is guilty of financial malpractice and or misappropriation of funds belonging to the 2nd respondent. It is submitted that the petitioner should not be reinstated before he clears this issue.
43. The court is urged to dismiss the petition with costs.

IV. ISSUES FOR DETERMINATION

44. Upon due consideration of the petition, the affidavits in support thereof, the affidavit in opposition, the annexures to all the affidavits, and the written submissions by counsel for both parties, the court finds that the following issues commend themselves for determination –

- a) Was the secondment of the petitioner from his permanent and pensionable position as the Clerk to the County Assembly of Busia to the Lake Basin Economic Block (LBEB) under the Executive of the County Government of Busia lawful?***
- b) Is the applicant entitled to the reliefs sought?***
- c) What are the appropriate orders for the court to make***

based on the findings on the foregoing issues and on costs?

V. THE SECONDMENT

45. After successfully undergoing a competitive recruitment process the petitioner was appointed the Clerk to the County Assembly of Busia with effect from 16th December 2013 by way of a letter of appointment that he acknowledged and signed on even date.
46. For ease of reference, the said letter provided as follows –

REPUBLIC OF KENYA



BUSIA COUNTY ASSEMBLY SERVICE BOARD

Your REF

Our REF CASB/GEN.APPT/VOL.1/01

MR. ALLAN WAFULA MABUKA

Dear Sir,

RE: APPOINTMENT AS CLERK TO THE COUNTY ASSEMBLY BCASB 15

Following your application for the above position and subsequent successful interview held on 9th December 2013, and further to approval by the County Assembly on 16th December

2013, the County Assembly Service Board is pleased to offer you appointment to the position of The Clerk to the Assembly with effect from date of acceptance of his offer subject to finalization of the authentication of academic certificate and testimonials.

The following terms and conditions will apply:

1. Position

You will be engaged as The Clerk to the Assembly.

2. Reporting

You will be reporting to the County Assembly Service Board.

3. Duties and responsibilities

- i. The Administrative head of the County Assembly.***
- ii. The Accounting Officer/Authorized Officer for the County Assembly.***
- iii. Secretary to the Busia County Assembly Service Board.***
- iv. Responsible for Enhancing public understanding and knowledge of the work of the County Assembly and increasing public accessibility.***
- v. The Principal Adviser on all legislative procedures. Practices, conventions and traditions to the Speaker of the County Assembly, other Presiding Officers***

and to all Honorable Members.

- vi. The chief Advisor to the Speaker in the exercise of all powers and functions that belong to the Speaker and through the Speaker, to the House. He acts under authority and takes decisions in the name of the speaker. Orders passed by the Clerk are the orders in the name of the speaker, and the latter accepts full responsibility for those orders.*
- vii. Responsible for marshaling all legislative measures passed by the County Assembly.*

4. Performance measures

Detailed key tasks and targets will be agreed between you and the County Assembly Service Board.

5. Terms of service

This appointment will be on permanent and pensionable terms.

6. Remuneration

This position is pegged to salary scale CASB 15; Ksh120,270 – Ksh180,660 per month. Your basic entry point will be Ksh120,270 per month and your incremental date will be 1st December of every year. Other remuneration allowances include: House allowance of Kshs60,000 per month and Commuter allowance of Ksh20,000 per

month.

7. Pension/Provident Scheme

You will be a member of contributory pension or provident scheme.

8. Medical Scheme

You will be a member of staff medical scheme and you will be entitled to medical benefits.

9. Termination

A party wishing to terminate the contract will be required to give ONE-month prior notice or pay salary in lieu of notice.

You are required to signify your acceptance or otherwise of this appointment within 14 days from the date of this letter by signing in the space provided below and returning a copy of this letter to the undersigned.

Please accept my congratulations on this well-deserved appointment.

Yours faithfully

HON. BERNARD MUBINJA WAMALWA
CHAIRMAN COUNTY ASSEMBLY SERVICE BOARD

SERVICE BOARD

P.O. BOS 1018-50400, BUSIA-KENYA, TEL: +254 721675217

EMAIL:clerkbusiacountyassembly@yahoo.com

REF. CA/BSA/CASB/ADM/04 DATE: 10TH MARCH, 2023

TO

MR. ALLAN WAFULA MABUKA

P/F NO. 20010001671

RE: LEAVE WITH FULL PAY

The above subject refers.

The County Assembly Service Board in its meeting held on 10th March, 2023 deliberated on the report of the Auditor General for the year ended 30th June, 2021 dated 28th July, 2022.

In view of the adverse opinion of the Auditor General that public resources have not been applied lawfully and effectively; and that the Financial Statements for the year do not present fairly, the financial position of the Busia County Assembly Revolving Fund as at June, 2022 and its financial performance and cash flows do not comply with the Public Finance Management Act, 2012 and Busia County Assembly Members (Revolving Fund Scheme) Regulations, 2014; the Board resolved that:

- i. You proceed on leave with effect from the date of this letter to allow a Special Audit team undertake Audit exercise.*
- ii. You will be on full paid leave for a duration of ninety (90) days which may be extended in case of delay on conclusion of audit exercise.*

Yours faithfully,

HON. FREDRICK W. ODILO

CHAIRPERSON COUNTY ASSEMBLY SERVICE BOARD

49. The compulsory leave was extended on 29th May 2023 to 30th June 2023 and again to 10th August 2023.
50. In a letter dated 8th August 2023 from the acting Clerk to the County Assembly, the deputy to the petitioner, the petitioner was seconded to the County Executive allegedly on a resolution by the County Assembly Service Board. Further, a letter dated 22nd August 2023 from the Chair of the County Assembly Service Board informed the petitioner that it had been resolved that he be seconded to the LREB for a period of six months to help in setting up financial management and accounting structures.
51. The Chief Executive Officer of the LREB in a letter dated 4th September 2023 confirmed that the petitioner had reported to work on 24th August 2023.
52. In a letter dated 23rd February 2024 the Chair of the County

Assembly Service Board informed the petitioner that his secondment to LREB had been extended for a further six months from 23rd February 2024.

53. All along the period of secondment, the County Assembly Service Board and the petitioner were having a back and forth on alleged mis-accounting, queries, and or misappropriation of funds that had been raised by the Auditor General in a report for the Financial Year ending in June 2021, with the petitioner seeking more and more time and access to his former office to enable him offer a satisfactory and comprehensive response to the issues raised in the audit. The petitioner submitted a draft report on the issues with a forwarding letter dated 22nd May 2024.
54. In the ensuing back and forth with no end in sight, the petitioner approached the court and filed this petition seeking for the reliefs recited in the introductory part of this judgment.
55. As far as the court is concerned, and as per the conservatory order by Keli J, the petitioner is still an employee of the County Government of Busia as the Clerk to the County Assembly Service Board. His terms and conditions did not change upon his purported secondment to the LREB. Moreover, no person has been hired to occupy the petitioner's position as the Clerk as his assistant has only been acting. There is in force a court order affirming the foregoing and the parties have confirmed all the foregoing in their affidavits and submissions by their respective

counsel.

56. Therefore, the petitioner is still serving on the secondment that is now challenged in this petition but still holding his substantive position as the Clerk to the County Assembly and the secretary to the 2nd respondent.
57. The employment relationship between the petitioner and the 2nd respondent was created and is founded on the letter of appointment cited and reproduced above. The said letter was freely executed and accepted as the document that was to guide and govern the relationship between the parties. It is also the evidence on record that the petitioner was appointed into the position following a competitive recruitment process conducted by the Public Service Commission (the Commission).
58. The said position is in the public service and specifically governed by the agreed terms and conditions in the contract and the relevant statutory and constitutional provisions. It is always an implied term of every contract, not only those of employment, that the same is subject to all the laws of the Republic.
59. The contract between the parties is specific and clear on the terms and conditions of engagement between the parties. The said contract did not provide for secondment of the petitioner to any other job, position, assignment, undertaking, or duty. The duties and the roles of the petitioner were clearly articulated and spelt out in the said letter of appointment that forms the legal contract

between the parties.

60. It is the respondents' position that the petitioner has not been removed from his position and that there is no intention of such removal. This confirms that the petitioner is still the Clerk to the County Assembly of Busia. It is the respondents' position that they are waiting for the petitioner to clear the audit queries raised in the audit by the Auditor General and then allow him back to his office.
61. Firstly, the contract between the parties does not provide for secondment, reassignment, redeployment, and or in any other manner moving the petitioner from the office he holds to any other office, position, role, or duty. As long as the contract between the parties subsists, the petitioner cannot and should not be moved to any other office, role, or duty other than that of the Clerk to the County Assembly of Busia.
62. Further, the petitioner cannot be removed from office other than in accordance with the law as provided for in ***Sections 22 & 23 of the County Assembly Service Act.***
63. Further, the respondents cannot use or apply secondment as a unilateral punishment for alleged financial mis-accounting, mismanagement, and or misappropriation of funds for which the petitioner has not been tried and or heard and found guilty.
64. The respondents herein made the situation even worse by purporting to second the petitioner from the Legislative arm of

the County Government of Busia to the Executive arm thereof. This in my view was done in clear violation of the ***doctrine of separation of powers***. The court fully agrees with the submissions by counsel for the petitioner in that regard.

65. If the respondents are of the view that the petitioner is incompetent or has misappropriated or mis-accounted for funds belonging to the 2nd respondent, the above law is clear on the lawful way and manner of removal of the petitioner from office. The respondents have no legal basis for holding the petitioner on unlawful secondment while at the same time denying him access to his office.
66. The allegation by the respondents that the petitioner allegedly accepted and ratified the secondment is misconceived and laughable. The contract between the parties was not mutually amended to allow the said secondment. Further, the secondment was unlawful, null, and void ab initio. It did not matter whether the petitioner accepted it, did not complain about it, and or reported to his new assignment on secondment.
67. The court has this far said enough in demonstrating that the entire process of the secondment of the petitioner was flawed, unfair, illegal, unlawful, and unconstitutional.

VI. RELIEFS

68. While this court (ELRC) is the ultimate arbiter in employment and labour relations disputes, it has to be very cautious not to

enter into the management of the workplace. However, the court shall not shy away where and when its jurisdiction is properly invoked to resolve justiciable disputes between parties in an employment relationship.

69. In the considered view of the court this is one matter that needed not come to court had the respondents followed the law as set out in the foregoing parts of this judgment and respected the terms and conditions of their engagement with the petitioner. It is sad that we live in a country where politics, personal differences, competing personal interests, and other not so relevant or pleasant issues occupy and infiltrate into almost all spheres of our lives.
70. The questions that linger in the court's mind are, for example – If the respondents feel that the petitioner is not the right person to hold the position of the Clerk to the County Assembly, why can they not act to remove him in accordance with the law? If the petitioner has not answered serious audit queries alleging money was stolen, misappropriated, and or misapplied under his watch, what stops the respondents from taking a swift appropriate action with the relevant authorities? Why would the County Government of Busia continue to pay to the petitioner the salary and remuneration of the Clerk to the County Assembly when in fact he is not doing the work pertaining to that office?
71. The above and many other questions really disturb me and that is why the court has to come in and resolve this dispute. In the

foregoing paragraphs the court declared the secondment of the petitioner illegal, unlawful, null and void.

72. In the circumstances, a declaratory order shall issue that the petitioner is the duly appointed Clerk of the County Assembly Board of Busia and may only be removed or suspended therefrom in accordance with the law as pleaded in prayer (a) of the petition.
73. ***Mutatis mutandis***, a declaration shall issue that the decision by the 2nd respondent of 7th August 2023 as communicated as Minute No. CA/BSA/CASB/24/08/2023 seconding the petitioner to the County Executive to serve in the Lake Region Economic Block as communicated to the petitioner vide a letter dated 8th August 2023 Ref CA/BSA/3/HR/VOL.III (30) was unlawful, illegal, null, and void.
74. Likewise, an order quashing the decision and the letter above shall issue as prayed in prayer (c). As noted above, the respondents cannot remove the petitioner from office other than in accordance with the law.
75. Prayer (h) is for an order of reinstatement of the petitioner to the office and duties of the Clerk to the County Assembly of Busia. As noted above, and this has been confirmed by all the parties, the petitioner has neither been terminated nor dismissed from that position. He was only, albeit unlawfully, seconded to the Executive to work with the LREB. Technically, therefore, the court cannot order reinstatement as envisaged under ***Section***

12(3)(vii) of the Employment and Labour Relations Court Act.

The court shall hereby nullify and quash the secondment of the petitioner and order that he goes back to his office to work as the duly appointed Clerk of the County Assembly forthwith and that the respondents shall take all the appropriate steps to facilitate his resumption of his duties as such without intimidating, harassing, threatening, bullying, or in any other interfering with his lawful execution of the duties of that office.

76. Prayer (j) is for a sum of Kshs300,500/= being the transfer allowance and baggage reimbursement for the petitioner's move from Busia to Kisumu upon the unlawful secondment. However, while it is true that the petitioner was unlawfully seconded and indeed reported to LREB in Kisumu, no evidence was availed to confirm how the figure claimed above is arrived at. This is more or less a specific claim that need a clear policy document or receipts for payments made. The petitioner fell short in proving this claim and the same shall fail.
77. Prayer (j) is for damages against the respondents for violation of the petitioner's constitutional rights under ***Articles 27, 28, 29, 41, and 47 of the Constitution***. The court has found and held that the petitioner was unfairly, unlawfully, and without any consultation or justification removed from his lawfully held office and without a hearing seconded to the County Executive. In the considered view of the court, the petitioner was thus subjected to unlawful

labour practice and subjected to unreasonable working conditions. He was neither consulted nor heard before the said administrative action of secondment was visited upon him.

78. For the foregoing reasons, the rights of the petitioner under **Articles 41 & 47 of the Constitution** were violated and breached. Inasmuch as the respondents submitted and held that the petitioner has always been paid his due remuneration as he was always the Clerk to the County Assembly, his rights were clearly and evidently violated as above. In the circumstances, the petitioner is entitled to some compensation for the said violation of his constitutional rights. It is sad that the citizens of the great County of Busia shall have to incur and meet any compensation ordered for the unfair and unlawful actions by the respondents.
79. Doing the best that I can, in the circumstances, the petitioner is awarded damages in the sum of Kshs1,000,000/= for the said violation of his constitutional rights as enshrined in **Articles 41(1) & 47 of the Constitution**.

IX.COSTS

80. The petitioner shall have the costs of the petition as costs follow the event.

X.ORDERS

80. Flowing from all the foregoing, the petition is allowed and the court makes the following final orders in the disposal of the petition –

- a) A declaration be and is hereby issued that the petitioner is the duly appointed Clerk of the County Assembly of Busia and remains so unless removed in accordance with the law.***
- b) A declaration be and is hereby issued that the decision by the 2nd respondent on 7th August 2023 vide Minute No. CA/BSA/CASB/24/08/2023 seconding the petitioner to the County Executive of Busia to serve in the Lake Basin Economic Block as communicated by the 1st respondent in a letter referenced CA/BSA/3/HR/VOL.III (30) dated 8th August 2023 is illegal, unlawful, null, and void.***
- c) An order of certiorari be and is hereby issued quashing the decision by the 2nd respondent made on 7th August 2023 vide Minute No. CA/BSA/CASB/24/08/2023 seconding the petitioner to the to the County Executive of Busia to serve in the Lake Region Economic Block as communicated by the 1st respondent in a letter referenced CA/BSA/3/HR/VOL.III (29) dated 8th August 2023.***
- d) The respondents by themselves, agents, servants, and or others howsoever are hereby restrained from bullying, intimidating, threatening, and or in any other manner or form from interfering with the petitioner in the lawful performance and execution of his duties as the Clerk to the County Assembly of Busia.***
- e) The respondents are hereby ordered to facilitate and ensure***

the immediate, safe, and secure passage and resumption of the petitioner to his office and lawful execution of his duties as the Clerk to the County Assembly of Busia.

- f) The respondents shall ensure that all pending salaries/remuneration and allowances payable to the petitioner are immediately paid to date as he resumes his duties as if he did not leave the office at all.*
- g) The petitioner is hereby awarded Kshs1,000,000/= against the respondents jointly and severally for the violation of his constitutional rights under Articles 41 and 47 of the Constitution.*
- h) The above award shall attract interest at court rates from the date of this judgment till payment in full.*
- i) Costs of the petition to the petitioner.*
- j) In view of the contents of this judgment, the two pending applications by the petitioner are hereby declared overtaken by events with no orders as to costs.*

**DELIVERED VIRTUALLY, DATED, AND SIGNED AT
KAKAMEGA THIS 27TH DAY OF NOVEMBER, 2025.**

.....
**DAVID NDERITU
JUDGE**