

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT BUNGOMA**

**PETITION NO. E002 OF 2025**

**IN THE MATTER OF CONTRAVENTION OF ARTICLES 19, 21,**  
**22, 27(1) OF THE CONSTITUTION OF KENYA**

**IN THE MATTER OF SECTION 21 OF THE COUNTY**  
**ASSEMBLY SERVICE ACT**

**FREDRICK EKASIBA ATYANG .....PETITIONER**

**-VERSUS-**

**THE BUSIA COUNTY**

**ASSEMBLY SERVICE BOARD .....1<sup>ST</sup> RESPONDENT**

**THE SPEAKER OF**

**BUSIA COUNTY ASSEMBLY .....2<sup>ND</sup> RESPONDENT**

**GABRIEL ERAMBO .....3<sup>RD</sup> RESPONDENT**

**-AND-**

**ALLAN WAFULA MABUKA .....1<sup>ST</sup> INTERESTED PARTY**

**CAROLYNE IMUKUTET APAA .....2<sup>ND</sup> INTERESTED PARTY**

**(BEFORE HON. JUSTICE DAVID NDERITU)**

**RULING**

## **I.INTRODUCTION & BACKGROUND**

1. In a petition dated 29th October 2025 filed through Teddy & Company Advocates the Petitioner is seeking for the following reliefs

–

- i. *A declaration be and issued that the appointment of the respondent as the acting clerk of Busia County Assembly contravenes the provisions of Section 21 of the County Assemblies Service Act hence null and void.*
- ii. *A declaration be and is hereby issued that the appointment of the third respondent as the Acting Clerk of Busia County Assembly contravenes the provisions of Article 27(1) and (5) of the Constitution of Kenya.*
- iii. *An order of certiorari be and is hereby issued to bring before the High Court and quash gazette notice dated 5<sup>th</sup> August, 2024 or any other gazette notice thereafter appointing and or confirming the 3<sup>rd</sup> respondent as the Acting Clerk of Busia County Assembly.*
- iv. *An order of injunction be and is hereby issued barring the 3<sup>rd</sup> respondent from acting, continuing to act as the Acting Clerk of the County Assembly of Busia.*
- v. *An order of refund directing the 3<sup>rd</sup> respondent to refund all the Special Duty Allowance, Acting Allowance, Per Diem and any*

*other benefits earned by him while acting as Acting Clerk of the Busia County Assembly.*

*vi. An order that the respondent bears the costs of the petition herein.*

*vii. Any other relief that this court shall deem just, fit and appropriate to grant in favour of the petitioner.*

2. The petitioner introduces himself as an adult of sound mind residing within the County of Busia in the Republic of Kenya.
3. The background of the matter as presented by the Petitioner is that the 1st Interested Party is the substantive Clerk of the County Assembly of Busia whereas the 2nd Interested Party is the Deputy Clerk. It is stated that as of 5th August 2024 the 1st Interested Party suffered inability to serve as the Clerk to the County Assembly of Busia. On 5th August 2024 the Chairperson of the Busia County Assembly Service Board, the Speaker of the County Assembly and the 2nd Respondent herein, issued a gazette notice appointing the 3rd Respondent as the Acting Clerk to the County Assembly for a period of six months.
4. It is posited that the notwithstanding that the above appointment was contrary to **Section 21 of the County Assemblies Act** and thus illegal and unlawful *ab initio*, the 3rd Respondent continued in that position as at the filing of this petition.

5. It is on the foregoing basis that the Petitioner filed this petition and simultaneously filed a notice of motion (the application) of even dated seeking for the following orders –
1. *That the application herein be certified as urgent and fit to be heard exparte in the first instance.*
  2. *That pending the inter-parties hearing and determination of the application herein, a conservatory order be issued against the respondents jointly and severally, their agents, servants, employee and any other person acting under their instructions, barring the 3<sup>rd</sup> respondent from acting, continuing to act as the Acting Clerk of the County Assembly of Busia.*
  3. *That pending the inter-parties hearing and determination of the petition herein, a conservatory order be issued against the respondents jointly and severally, their agents, servants, employee and any other person acting under their instructions, barring the 3<sup>rd</sup> respondent from acting, continuing to act as the Acting Clerk of the County Assembly of Busia.*
  4. *That the costs of this application be borne by the respondents.*
6. Upon service of the petition and the application, the Respondents *inter alia* filed two notices of preliminary objection (POs). The 1st and 2nd Respondents through Achach & Associates Advocates filed a PO dated 10th November 2025 raising the following preliminary points –

1. *That the petitioner lacks the requisite locus standi to institute and bring this matter before this Honourable Court owing to the complete absence of an employment relationship between the petitioner and the 1<sup>st</sup> and 2<sup>nd</sup> respondents.*
2. *That this honorable court lacks the requisite jurisdiction to hear and determine this suit and doing so would offend the wording and spirit of Article 162(2)(a) of the Constitution of Kenya 2010 as well as Section 12 of the Employment and Labour Relations Court Act, 2011.*
7. The 3rd Respondent through Andole & Associates Advocates filed a PO dated 6th November 2025 raising the following preliminary issues for determination by the court –
  1. *The Employment and Labour Relations Court lacks jurisdiction to determine matters related to the appointment and removal of County Public Service Board members; and*
  2. *The petitioner lacks locus standi to institute the action herein as there is no employer-employee relationship it has with any of the respondents.*
8. While the court directed the Respondents and the Interested parties to respond to the application by the Petitioner and the petition itself, it was further ordered that the two POs be heard and determined ahead of the application and the petition in view of the jurisdictional

objections raised in the two POs. Further, it was directed that the two POs be canvassed by way of written submissions.

9. This ruling is thus in regard to the two POs as filed and presented by the Respondents and opposed by the Petitioner and the Interested Parties.

10. ***Rule 24(1) of the Employment and Labour Relations Court***

***(Procedure) Rules, 2024*** provides as follows – ***A party shall file pleadings electronically and shall, within seven days of the filing, supply the court with one hard copy of the pleadings or such number of hard copies as the court may direct.***

11. It is, therefore, up to every litigant and or its counsel to ensure that the court is supplied with all pleadings and documents filed in court in at least one hard copy. This rule applies to submissions as well although the same are not pleadings. The logic behind this provision is that while the Judiciary is slowly migrating towards digitalizing its documentation and processes, the old-fashioned filing and documentation system shall continue until such a time that the process is complete. A Judge may opt to write a judgment or a ruling from a remote location whereby the online files may not be accessible. Likewise, it is not possible for a Judge to simultaneously juggle between the online platform and virtual court.

12. The court has perused the physical file again and again and despite several promises by counsel for the 1st and 2nd Respondents that a

hard copy of the written submissions would be availed the same never reached the court. The court shall thus proceed without the advantage of reading those submissions.

13. For the 3rd Respondent Andole & Associates filed written submissions dated 6th November 2025 in support of its PO dated 6th November 2025. On the first ground, it is submitted that the court (ELRC) lacks jurisdiction to determine the issues raised in the petition as the same pertains to appointment and or removal of a County Public Service Board Member, the 3rd Respondent. It is submitted that since the Petitioner has cited contravention of **Articles 19, 21, 22, & 27 of the Constitution**, the proper forum for determination of violation of constitutional rights is the High Court under **Article 165(3) of the Constitution**. Counsel cited **County Assemblies Forum; Parliamentary Service Commission (Interested Party) V Attorney General & 3 Others (2022) KESC 66 KLR**.
14. Further, counsel cited the decision of the Court of Appeal in **Governor, County Government of Kakamega & 4 Others V Omweno & 12 Others (2025) KECA 190 (KLR)** that followed the reasoning of the Supreme Court cited above.
15. On the second ground, it is submitted that the Petitioner lacks *locus standi* on which to file the petition. It is submitted that no employer-employee relationship has been disclosed between the Petitioner and the Respondents. It is further submitted that other than stating that he

is a resident of Busia County, a voter therein, and participating and contributing to the development of the said County, there is no lawful basis disclosed upon which the Petitioner can lawfully present and prosecute the petition and the pending application. The Petitioner is described as a busy body.

16. In opposition to the POs counsel for the Petitioner isolated two issues for determination –

(i) *Whether this court has the jurisdiction to determine the petition and application dated 29<sup>th</sup> October, 2025.*

(ii) *Whether the petitioner/applicant has the requisite locus standi to institute the petition and application herein.*

17. On the first issue, it is submitted that the Petitioner is challenging the appointment of the 3rd Respondent as the Clerk to the County Assembly in acting capacity while there is a serving Deputy Clerk, the 2nd Interested Party. It is submitted that the said appointment offends **Section 21 of the County Assemblies Act**. It is further submitted that the 3rd Respondent has continued to occupy the said office beyond the initial period of six months contrary to the gazette notice that appointed him.

18. It is submitted that the petition herein is based on the employment relationship between the Interested Parties herein and the 1st Respondent. It is argued that based on **Article 162(2)(a) of the Constitution** and **Section 12 of the Employment and Labour**

**Relations Court Act** this court has the requisite jurisdiction to hear and determine the issues raised in the petition.

19. It is submitted that this is a court of equal status to the High Court with jurisdiction to interpret and apply the Constitution in matters employment and labour relations. Counsel cited the decision of the High Court (Majanja J) in **United States International University (USIU) V Attorney General (2012) eKLR** and that of the Court of Appeal in **Judicial Service Commission V Gladys Boss Shollei (2014) eKLR** in support of the foregoing argument.
20. It is submitted that this court not only possesses jurisdiction to enforce labour rights under **Article 41 of the Constitution** but also under all other laws and provisions and Articles of the Constitution so long as the same relate to employment and labour relations.
21. On the second issue, it is submitted that the Petitioner filed this petition based on **Article 22(1) of the Constitution**. It is further submitted that in his supporting affidavit the Petitioner has deposed that he is a resident of Busia County and a dedicated citizen who is affected by decisions made in the County. Further, it is submitted that **Article 258(1) of the Constitution** allows the Petitioner to present and prosecute this petition in court. It is submitted that the petition is intended to stop the Respondents from continued violation of the constitutional rights of the citizens of Busia County. It is conceded that there is no employment relationship between the

petitioner and the respondents but it is urged that the Petitioner has the requisite legal standing to file and present the same based on the constitutional provisions cited above.

22. Further, it is submitted that the claimant is exercising the sovereign power of a citizen under **Article 1 of the Constitution**.

23. It is concluded that the court has both territorial and substantive jurisdiction over the issues and matters raised in the petition and the court is urged to dismiss the two POs with costs.

24. Through JN & P Law Advocates the 1st Interested Party submitted in opposition to the two POs. It is submitted that the Respondents have misapprehended the jurisdiction of this court and limited themselves to a narrow view that is no longer tenable. Counsel submitted that the Supreme Court in **Kenya Tea Growers Association & 2 Others V National Social Security Fund Board of Trustees & 13 Others (2024) eKLR** confirmed the jurisdiction of this court in interpreting and applying the constitution and in determining and remedying violation of rights in matters employment and labour relations.

25. Further, counsel has urged the court to be persuaded by the decision of Makau J in **Mwangi & Another V Speaker, County Assembly of Laikipia & Another (2024) KEELRC 1872 (KLR)** which case the facts and circumstances were similar and identical to those in the present case on the interpretation and application of **Section 21 of the County Assemblies Act**. Further, counsel urged the court to be

persuaded by the decision of Rika J in *Okiya Omtata Okoit V Attorney General & Another (2022) KEELRC 2 (KLR)* wherein the court opined that **Section 12 of the Employment and Labour Relations Act** is not exhaustive on the jurisdiction of the court and that the court is seized of the jurisdiction to hear and determine all matters employment and labour relations.

26. It is submitted that the issues raised in the petition relate to employment, deployment, creation of offices, and public administration that are essentially employment and labour relations matters.

27. On the locus standi of the Petitioner to file and prosecute the petition, it is submitted that the issues raised in the petition are of public interest under **Article 22(2) of the Constitution**. It is further submitted that the issues complained of have an impact on public funds and the integrity of a public office in the County Assembly of Busia. It is thus submitted that the Petitioner has *locus standi* premised on **Articles 22 and 258 of the Constitution**.

## **II. ANALYSIS & DETERMINATION**

28. It is settled law that a PO properly raised should consist of matters or points of law as opposed to facts that may require a hearing or an inquiry by the court to ascertain the validity and veracity of such facts. That is the gist of the ratio in the *causa classicus Mukhisa Biscuits Manufacturing Limited V West End Distributors Limited*.

29. The two POs as analyzed in the foregoing part of this ruling raise two preliminary issues that the court has been called to adjudicate on. The first issue is whether this court has jurisdiction over the subject matter and, the second issue is the questioned and or lack of *locus standi* on the part of the Petitioner to file and present the petition.
30. At the core of petition is that the 1st Interested Party is the substantive Clerk to the County Assembly of Busia. Sometimes in August 2024 the 1st Interested Party purportedly suffered inability to execute the duties and roles of that office. Consequently, the 2nd Respondent appointed the 3rd Respondent to act in that position for an initial period of six months but he continues to act as such. The 2nd Respondent is the substantive Deputy Clerk to the County Assembly. It is the Petitioner's case that the appointment of the 3rd Respondent and his continued holding of that office violates **Section 21 of the County Assemblies Act**.
31. It is the petitioner's case that in the absence or inability of the 1st Interested Party the law provides that the 2nd Interested Party, the deputy, should take over in accord with **Section 21 of the County Assemblies Act**.
32. As stated in the foregoing part of this ruling the Respondents objected to the petition on two preliminary points that the court has been called to determine as primary objections.

33. In *Odongo V County Assembly of Nakuru & Others* this court (Nderitu J) had the occasion to examine the jurisdiction of this court and held that the issues and matters listed in **Section 12 of the Employment and Labour Relations Court Act** are neither exhaustive nor conclusive on the jurisdiction of this court. However, the Court of Appeal took a different view on appeal and held that the jurisdiction of this court (ELRC) is limited and restricted to circumstances and situations where there is an employer-employee relationship between the parties in the matter before the court. While that opinion is binding on this court, I do not agree with the same.
34. The Court of Appeal took the same or similar position in *Governor, County Government of Kakamega & 4 Others V Omweno & 12 Others (supra)*.
35. It is my considered view that this court has jurisdiction in all matters employment and labour relations and those incidental thereto and hence **Section 12 of the Employment and Labour Relations Court Act** is neither exhaustive nor conclusive. In my view, all matters related or incidental to employment and labour relations are within the purview and jurisdiction of this court. May it is advertisement for vacancies, long-listing, shortlisting, composition of interview panels, interviewing, recruitment, deployment, redeployment, *et al*, all those are matters within the purview and jurisdiction of this court. This court therefore agrees with and is bound by the decision and position

taken by the Supreme court in ***Kenya Tea Growers Association & 2 Others V National Social Security Fund Board of Trustees & 13 Others (supra)*** based on the purposeful and expansive interpretation of the law regarding the jurisdiction of this court.

36. But then, the first issue before this court for determination is whether indeed the issue(s) raised in the petition are within the purview and jurisdiction of this court. Is the issue(s) as framed and presented in the petition based on ***Section 21 of the County Assemblies Act*** within the category of matters employment and labour relations or incidental thereto as envisaged under ***Section 12 of the Employment and Labour Relations Court Act?***

37. The Petitioner's case is that in absence of the Clerk to the County Assembly, the 1st Interested Party, the Deputy Clerk, the 2nd Interested Party is rightfully and lawfully supposed to take over that role under ***Section of 21 of the County Assemblies Act*** cited above. Is the failure by the Respondents to comply with this law a matter within the jurisdiction of this court for it to remedy?

38. It is not complained that either of the Interested Parties has been terminated or the terms and conditions of their engagement tampered with or unfair or unlawful disciplinary action taken against them. In any event, and curiously so, the said Interested Parties have only been named as such. They are not parties in the petition and as such

they have not complained of the alleged illegality in their capacity as employees of the County Government of Busia.

39. There is no doubt that the petition raises serious issues of alleged violation of the law by the 2nd Respondent in appointing the 3rd Respondent as the Acting Clerk to the Assembly in violation of the law for purportedly by-passing the 1st Interested Party in blatant abuse of **Section 21 of the County Assemblies Act**. It is not at this juncture denied that the 3rd Respondent is an employee of the County Assembly Board just like the 1st and 2nd Interested Parties.
40. In my considered view, the issues raised in the petition relate to appointment and deployment of employees and the same falls within the jurisdiction of this court as the same are employment matters. It is clearly an administrative action in employment. This court agrees with the position taken by Makau J in **Mwangi V Speaker, County Assembly of Laikipia & Another (supra)** and finds and holds that this court is properly seized of the jurisdiction over the subject matter of the petition.
41. On the second issue of the *locus standi* or lack thereof of the petitioner in filing and prosecuting the petition, the court notes that the Petitioner describes himself as a resident of Busia County and a voter therein and he proclaims filing this petition in public interest under **Articles 22 and 258 of the Constitution**. In my considered view, the Petitioner cannot be described as a busy body. There is an

alleged blatant violation of the law by the Respondents and such actions have financial, administrative, and other consequences on the citizens and residents of Busia County. The persons directly affected by the impugned actions by the 2nd Respondent have been named and joined in the petition as the 3rd Respondent and the 1st and 2nd Interested Parties and the court shall thus have an occasion to consider their respective positions in due course.

42. The Petitioner should actually be commended for coming forward to challenge what he considers to be a blatant violation of the law that the persons directly affected, for whatever reasons, have not found necessary to challenge. Clearly and evidently, there is a public interest aspect in the petition that the Petitioner should be allowed to pursue and justify by way of a full hearing and determination of the petition.

43. For all the reasons stated above the two POs raised are hereby dismissed.

### **III. ORDERS**

*(i) The two preliminary objections raised by the respondents are hereby dismissed for lack of merits.*

*(ii) Costs in the cause.*

**DELIVERED VIRTUALLY, DATED, AND SIGNED AT  
KAKAMEGA THIS 19<sup>TH</sup> DAY OF MARCH 2026.**

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**DAVID NDERITU**  
**JUDGE**

ORIGINAL