



Adundo v Chair-Kisumu County Assembly Service Board & 5 others (Civil Appeal 258 of 2019) [2025] KECA 239 (KLR) (13 February 2025) (Judgment)

Neutral citation: [2025] KECA 239 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPEAL 258 OF 2019
HM OKWENGU, HA OMONDI & JM NGUGI, JJA
FEBRUARY 13, 2025**

BETWEEN

PHILIP OTIENDE ADUNDO APPELLANT

AND

CHAIR-KISUMU COUNTY ASSEMBLY SERVICE BOARD ... 1ST RESPONDENT

KISUMU COUNTY SERVICE BOARD 2ND RESPONDENT

COUNTY SECRETARY KISUMU COUNTY 3RD RESPONDENT

BEN OLOO OPIYO 4TH RESPONDENT

CEC-FINANCE & PLANNING – KISUMU COUNTY 5TH RESPONDENT

CHIEF FINANCE OFFICER KISUMU COUNTY 6TH RESPONDENT

(Being an appeal against the Judgment of the Employment & Labour Relations Court at Kisumu (Nderi, J.) dated 7th March, 2017 in ELRC Case No. 378 of 2016)

JUDGMENT

1. Litigation leading to this appeal, was commenced by the appellant, Philip Otiende Adundo, in the Employment and Labour Relations Court (ELRC) in Kisumu.
2. In his amended statement of claim, the appellant sought various reliefs, including, a declaration that the Chairperson Kisumu County Assembly Services Board (the 1st respondent), had no mandate to suspend or dismiss him from his employment as a Clerk to the County Assembly of Kisumu; that the purported disciplinary proceedings and dismissal were unlawful; a declaration that he is validly in office and an employee of the 2nd respondent; and an order that his full payments including salary, emoluments and allowances and all monies due to him from the 2nd respondent from the period of his purported suspension to date, be paid.



3. In a response to the amended claim, the 1st, 2nd and 4th respondents denied the appellant's claim. These respondents contended that although the appellant was serving as a Clerk to the County Assembly of Kisumu, his appointment was illegal, null and void because it was effected in violation of lawful court orders. In addition, that the appellant was guilty of gross misconduct, dereliction of duty, financial impropriety, gross abuse of office, violation of trust, and breach of his contract of service. These factors led to his suspension and subsequent dismissal from employment by the Kisumu County Services Board (the 2nd respondent, hereinafter the Board).
4. The 1st, 2nd and 4th respondents maintained that the appellant was dismissed following an appropriate disciplinary process. This included an audit report which the Board relied on being availed to the appellant, and an opportunity to be heard being given to him before the decision was taken. These respondents also indicated that they had a counter claim against the appellant, but the counter claim was not clearly spelt out. Despite our careful perusal of the record of appeal, we were not able to trace any response to the appellant's claim or amended claim, from the 3rd, 5th, and 6th respondents.
5. The record shows that the appellant's claim came up for hearing on 17th July, 2018, when Mr. Achura, who was appearing for the 3rd, 5th and 6th respondents, informed the court that they had no interest in the matter and were not filing any submissions. Mr. Aron, who was appearing for 1st, 2nd and 4th respondents informed the court that their clients had not been communicating with them, and they had filed an application to cease acting for them but they had subsequently received instructions to continue acting. They, therefore, sought a date to file their submissions. The learned Judge then gave the parties seven days within which to file the written submissions, and thereafter the parties filed their written submissions. No evidence was adduced before the trial Judge, nor did any of the parties formally adopt any affidavit as evidence.
6. Upon considering the appellant's claim, the response by the respondents and the rival submissions filed by the appellant and the respondents, the learned Judge delivered a judgment in which he dismissed the appellant's claim, finding that the appellant was lawfully dismissed from his employment, after failing to defend himself on allegations of gross misconduct, despite an opportunity to appear before the Board, being given to him, and also the Board giving him ninety days within which to appeal the Board's decision.
7. In determining whether the appellant was lawfully and fairly removed from his position of Clerk to the County Assembly of Kisumu, and whether the appellant is entitled to the reliefs sought, the learned Judge found most of the reliefs sought by the appellant, having been overtaken by events, as the appellant had ceased to be an employee of the respondent on 14th July, 2017, when he was summarily dismissed, and that his position had already been taken over by the 4th respondent.
8. The learned Judge noted that Article 235(1) of *the Constitution* allows the Board to exercise disciplinary control including removal process over persons holding or acting in County offices, and therefore the Board had the mandate to remove the appellant from his position as Clerk to the County Assembly of Kisumu, subject to due process.
9. The learned Judge found that the appellant was lawfully and fairly removed from office, in accordance with Section 44(4)(g) of the *Employment Act*; that he was informed of the disciplinary proceedings but failed to attend the disciplinary proceedings, and therefore he waived his legal rights to a fair hearing and fair administrative action. The Judge dismissed the appellant's assertions that his suspension and dismissal were revoked by the County Assembly, holding that the assembly had no such mandate.
10. In his memorandum of appeal, the appellant has raised six grounds in which he contends that the learned Judge erred in law:



- i. in finding that the appellant had not produced evidence to prove that he had been terminated unlawfully, un-procedurally, and unfairly as an employee of the 1st respondent on 2nd February, 2017, when the evidence was availed and was uncontroverted;
 - ii. in finding that the Honorable Judge erred in law and fact in failing to find that the appellant is entitled to payment of salaries and allowances for the duration he was on suspension as provided for in law;
 - iii. in failing to find that with the respondents' failure to adduce evidence to support the allegations against the appellant, the evidence of the appellant was unchallenged and a claim by the appellant ought to have been allowed in its entirety;
 - iv. by failing to consider the full effect of the consent order entered into by the parties as regards the appellant's salary and allowances and therefore arriving at a wrong decision;
 - v. in failing to reinstate the appellant or enter judgment as claimed, after finding fault on the part of the respondents; and
 - vi. in failing to find that the judgment and decision of the learned Judge was against the weight of the evidence.
11. In support of the appeal, the appellant filed written submissions in which he identified three issues from the grounds stated in his memorandum of appeal. The issues were: whether the appellant's termination of employment was lawful; whether the appellant was entitled to payment of salaries and allowances for the duration he was on suspension; and whether the learned Judge arrived at the right determination by observing that the appellant failed to attend disciplinary proceedings of the Board.
 12. The appellant, referring to Section 43 and Section 45 of the *Employment Act*, argued, that in deciding whether it was just and equitable for an employer to terminate the employment of an employee, the court should consider the procedure undertaken by the employer in reaching the decision to dismiss the employee. The appellant maintained that he was never addressed on any outcomes from the investigation which was conducted by the respondents in accordance with the suspension letter that was served upon him. Nor were any other reports availed to him. The appellant maintained that the procedures provided in the Human Resources Manual for Public Service 2016, were not followed, nor was he served with any purported letter of dismissal. In addition, that an examination of the letter of suspension and letter of dismissal showed that the reasons given in the two letters were completely different, thereby revealing a travesty of justice.
 13. In regards to payment of salary and allowances for the duration that the appellant was on suspension, the appellant submitted that the parties recorded a consent on 1st November, 2017, for him to be paid half salary and full allowances, until the determination of the matter in the trial court, but that consent was not honored, even though there was no order setting aside the consent that was recorded. The appellant maintained that he never failed or refused to attend the disciplinary proceedings, and that despite the flawed procedure employed by the Board, he was willing to attend the proceedings. He pointed out that the minutes of the proceedings produced in court were all forged.
 14. The appellant, therefore, urged the Court to allow his appeal; declare his suspension unfair, un-procedural and unlawful; and order that he be paid all his withheld salary, emoluments and allowances. Further, that a declaration be issued that he is still an employee of the respondent, and that he be awarded damages and costs of the suit.



15. The 1st, 2nd and 4th respondents filed joint submissions through their advocate, Okongo Wandago & Company. In the submissions, counsel raised an issue regarding the jurisdiction of the Court to hear the appeal. He pointed out that Articles 234(2)(i) of the Constitution confers on the Public Service Commission, powers to hear and determine appeals in respect to County Government Public Service; that the staffing of the County Government is undertaken as contemplated by Article 235 of the Constitution; that pursuant to Article 200, Parliament has enacted the County Government Act and the County Assembly Service Act, which establish the office of the Clerk of the County Assembly and creates the County Assembly Services Board as a body corporate. Section 77 of the County Government Act, also creates an appellate process in regard to decisions made by the Public Service Commission, as an alternative dispute resolution mechanism available to any dissatisfied person. In particular, Section 87(2) of the Public Service Commission Act prohibits the filing of legal proceedings in any court in regard to matters within the jurisdiction of the Commission, until the appellate process provided under that Act is exhausted.
16. Counsel for the 1st, 2nd and 4th respondents, therefore, submitted that since the appellate process had not been exhausted, the jurisdiction of the ELRC was deferred and the ELRC had no jurisdiction to entertain the proceedings. In this regard, counsel cited Secretary, County Public Service Board & Another -vs- Hulbhai Gedi Abdille [2017] eKLR; Nakuru Court of Appeal - Civil Appeal No. E136 of 2022; and The Clerk, County Assembly of Nakuru & 3 others -vs- Kenneth Odongo & 2 others.
17. Furthermore, counsel for the 1st, 2nd and 4th respondents submitted that most of the prayers sought by the appellant had been overtaken by events, and the ELRC could not act in vain. This was because the appellant was dismissed on 14th July, 2017, and the position had already been given to someone else; and that although there is a provision in the law for reinstatement of a dismissed employee within a period of three years, it is more than three years since the appellant was dismissed.
18. On whether the appellant's dismissal was unlawful or unfair, counsel submitted that the Board had the mandate to dismiss the appellant; and that the appellant committed a fundamental breach, through dereliction of duty and gross insubordination, which actions provided sufficient justification for termination of his employment.
19. Counsel for the 1st, 2nd and 4th respondents added that a disciplinary process to inquire into the allegations of the appellant's breach, was commenced and the appellant was accorded numerous opportunities to be heard, and even had lawyers attend the proceedings in one of the hearings, but the appellant himself chose not to attend the proceedings or respond to the allegations made against him. Bifu -vs- Barclays Bank of Kenya [2014] eKLR; Judicial Service Commission -vs- Gladys Boss Shollei & another [2014] eKLR; and Jared Aimba -vs- Fina Bank Limited Industries Cause No. 252 of 2009, were relied on, for the proposition that an employee who refuses to submit to the jurisdiction of his employer by refusing to attend a disciplinary hearing, cannot turn around and allege that his rights have been violated, and therefore the dismissal was lawful and fair. Counsel pointed out that the appellant did not specifically request for an order of reinstatement nor did he make out a case for the same.
20. The 3rd, 5th and 6th respondents also filed written submissions through Amondi & Company Advocates. Counsel for the 3rd, 5th and 6th respondents submitted that these respondents' engagement in the suit are peripheral, and limited to the fact that they acted upon a request by the Board through its Chairperson, the 1st respondent, for the seconding of an officer to act in the position of the Clerk to the County Assembly of Kisumu pending the substantive filling of the position. Counsel argued that the statutory framework under the Public Finance Management Act 2012, lays the basis for the 5th and 6th respondents as heads of the County treasury, to change the mandate in respect of the affected bank accounts at Kenya Commercial Bank (KCB) and Central Bank, the moment they were formally



informed of changes in the office of the Clerk to the County Assembly of Kisumu, who according to law is the accounting officer of the legislative arm. Therefore, the 3rd, 5th and 6th respondents acted in public interest in executing their mandate to ensure that the County Assembly of Kisumu operated smoothly after the changes in the office of the Clerk to the County Assembly.

21. In regard to whether the 3rd respondent acted lawfully in seconding the 4th respondent as Clerk to the County Assembly of Kisumu, counsel for the 3rd, 5th and 6th respondents had three reasons to justify the action. First, that the request from the Board and 3rd respondents for secondment of an officer has both constitutional, statutory and regulatory underpinnings, as per Article 189(1) of *the Constitution*, and Section 5 of the Kisumu Assembly Services Act 2014. Second, that the 3rd respondent averted disruption in the County Assembly's operations, and collusion between the executive and legislative arm of government. Third, that the 4th respondent's secondment was done lawfully, and in accordance with the process provided under the Public Service Commission of Kenya, County Public Service Human Resource Manual.
22. Counsel argued that the 5th and 6th respondents acted lawfully in changing the mandate of the affected bank accounts, that were held by the County Assembly of Kisumu at KCB and Central Bank of Kenya, as these respondents were under a duty to ensure that the financial operations at the County Assembly are aligned to the relevant provisions of the *Public Finance Management Act*, Section 104(1) (o) & 105(1)(3), of which, obligated them to advise the County Government entities, including the County Executive Committee and the County Assembly, on financial matters, to ensure that the Assembly is functional; and that the accounting officer has the requisite authority in regard to the County Assembly's bank accounts.
23. Finally, counsel for the 3rd, 5th and 6th respondents submitted that pursuant to Section 87 of the *Employment Act* and Section 12 of the Employment and *Labour Relations Act*, there is no employment relationship between the appellant and the 3rd, 5th and 6th respondents, and, therefore, the court had no jurisdiction to adjudicate on the appellant's suit or grant the orders sought.
24. The primary duty of this Court in a first appeal, as stated under Rule 31(1)(a) of the Court of Appeal Rules, is to reappraise and reevaluate the evidence on record, with a view to drawing inferences of facts and coming to an independent conclusion. (See also *Abok James Odera t/a A.J Odera & Associates -vs- John Patrick Machira & Company Advocates* [2013] eKLR). With this obligation in mind, and noting that there was no evidence adduced before the trial court, we have carefully considered the record of appeal, the rival submissions, the authorities cited and the law. The issues that we discern for determination is whether the appellant's termination was lawful and whether it was procedurally fair.
25. Before addressing the issues that we discern, we must first dispose of the issue of jurisdiction that was raised by the 1st, 2nd and 4th respondents. In their submissions these respondents challenged the jurisdiction of this Court to hear this appeal, on the grounds that the appellant did not exhaust the resolution mechanism provided under the *County Governments Act*, Section 77 of which provided for an appellate process from the Board, to the Public Service Commission. However, a perusal of the response by the 1st, 2nd and 4th respondents, to the appellant's amended statement of claim, does not reveal any objection to the jurisdiction of the ELRC in hearing the suit. Nor was the issue raised in the submissions that were filed before the learned Judge in the trial court. Therefore, the learned Judge was not called upon to render an opinion on the issue of jurisdiction, and the matter cannot, in the circumstances of this case, be raised before this Court for the first time. We say this even though we are aware that it is a sound principle of law that jurisdictional questions can be raised at any time in proceedings even for the first time on appeal. See, for example, *Lemita Ole Lemein v Attorney General & 2 Others* [2020] eKLR; *Jamal Salim v Yusuf Abdulahi Abdi & Another* (Civil Appeal No. 103



of 2016 [2018] eKLR and *Adero & Another vs. Ulinzi Sacco Society Limited* [2002] 1 KLR 577. While that is the general rule regarding jurisdictional questions, it is different where the jurisdictional question is pegged on the doctrine of exhaustion. This is because the doctrine of exhaustion bereaves a court of jurisdiction only by preclusion: that the court is precluded from considering the dispute presented to it until the litigant has first pursued available statutory remedies outside the court. Consequently, the doctrine of exhaustion has known exceptions. It can also be waived or forfeited. The circumstances under which exhaustion requirements may be excepted, waived or forfeited by the parties to a litigation are factual and require factual findings. This is the reason the doctrine of exhaustion as a jurisdictional bar must be raised in the first instance at the trial court. A party cannot wait and raise it on appeal where the adversary cannot present factual material to demonstrate the non-applicability of the doctrine to the particular controversy before the court.

26. The appellant's letter of employment, which the appellant annexed to his affidavit that was sworn on 27th June, 2017, states that he was appointed as Clerk to the County Assembly of Kisumu. The appointment was done by the Board, in accordance with the *County Governments Act*, Cap 265 and the *County Assembly Services Act*, Cap 265D. Section 12(7)(b) of the *County Assembly Services Act*, mandates the County Assembly Service Board to constitute offices in the County Assembly Service, and to appoint and supervise office holders. Of relevance, is Section 13(1) of that Act, that provides for the appointment of a Clerk of the County Assembly by the County Assembly Services Board with the approval of the County Assembly.
27. In addition, Section 22 of the *County Assembly Services Act* empowers the County Assembly Services Board to suspend or remove the Clerk to the County Assembly for the following reasons:
 - a. inability to perform the functions of the office, whether arising from infirmity of body or mind;
 - b. gross misconduct or misbehavior; (c) incompetence;
 - d. bankruptcy;
 - e. violation of the provisions of *the constitution*, including chapter six of *the Constitution*; or
 - f. violation of the provisions of this Act.
28. The 1st, 2nd and 4th respondents submitted that the appellant's appointment was not lawful. We reject this submission as it was simply a red herring. This is because the issue before the learned Judge was the appellant's termination of services and not his appointment. Moreover, the respondents dismissed the appellant from employment for reasons which were not related to the legality of his appointment. Thus, we must confine ourselves to the issues that were before the trial court, which is, first, whether there was lawful cause for the termination of the appellant's employment; secondly, whether due process was followed; and thirdly, whether the appellant was entitled to the reliefs that he sought.
29. The question whether or not a termination is unfair, is dependent on whether or not in taking the action against the employee, the employer adhered to the twin requirements of due procedure and substantive justification in accordance with the provisions of the *Employment Act* or other relevant statute. Section 47(5) places a burden on the employee to establish that unfair termination of an employment or wrongful dismissal has occurred, after which the burden shifts onto the employer to justify the grounds for the termination of employment or wrongful dismissal.



30. In *Pius Machafu Isindu vs Lavington Security Guards Limited* [2017] eKLR, this Court in applying the *Employment Act*, had the following to say in considering whether there was termination of employment and if so, whether the termination was fair:

“There can be no doubt that the Act, which was enacted in 2007, places heavy legal obligations on employers in matters of summary dismissal for breach of employment contract and unfair termination involving breach of statutory law. The employer must prove the reasons for termination/dismissal (section 43); prove the reasons are valid and fair (section 45); prove that the grounds are justified (section 47 (5), amongst other provisions. A mandatory and elaborate process is then set up under section 41 requiring notification and hearing before termination. The Act also provides for most of the procedures to be followed thus obviating reliance on the *Evidence Act* and the *Civil Procedure Act*/Rules. Finally, the remedies for breach set out under Section 49 are also fairly onerous to the employer and generous to the employee but all that accord with the main objective of the Act as appears on the preamble:

‘to declare and define the fundamental rights of employees, to provide basic conditions of employment of employees’

These provisions are a mirror image of their constitutional underpinning under Article 49 which governs rights and fairness in labour relations.”

31. Under Section 44 of the *Employment Act*, an employer can lawfully terminate the employment of an employee without notice or with less notice than that to which the employee is entitled, where the employee has fundamentally breached his obligation arising under the contract of service. Section 44(4) of the *Employment Act* identifies the following matters as amounting to gross misconduct justifying the summary dismissal of an employee.

- a. ...
- b. ...
- c. an employee willfully neglects to perform any work which it was his duty to perform, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract, to have performed carefully and properly;
- b. an employee uses abusive or insulting language or behaves in a manner insulting to his employer or to a person placed in authority over him by his employer;
- b. an employee knowingly fails, or refuses, to obey a lawful and proper command which it was within the scope of its duty to obey, issued by his employer or a person placed in authority over him by his employer;
- c. in the lawful exercise of any power of arrest given by or under any written law, an employee is arrested for a cognizable offence punishable by imprisonment and is not within fourteen days either released on bail or on bond or otherwise lawfully set at liberty; or
- b. an employee commits, or on reasonable sufficient ground is suspected of having committed a criminal offence against or to the substantial detriment of his employer or his employer’s property.”



32. Regarding the matter of the appellant, Section 44(4) of the *Employment Act* has to be read together with Section 22 of the *County Assembly Services Act* (see paragraph 27 above), in regard to the grounds for termination. Of importance, is also Section 43 of the *Employment Act* that provides as follows:
1. In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.
 2. The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.
33. It was not disputed that the appellant was suspended from his employment through a letter dated 1st December, 2016. The letter read in part as follows:

“Dear Mr. Adundo,

Re: Suspension From Duty Pending Investigations

On several occasions during successive Board meetings from May to date, members have raised pertinent issues touching on financial mismanagement, irregular procurement process for which you have been requested to respond severally, but you have treated members’ concern with contempt. Members did put in place financial expenditure and capped ceiling on in order to stem ran away financial expenditure under your management. You have promptly ignored and acted outside the mandate given to you by the Board.

You were invited by the Board to attend a meeting on Thursday, 1st December, 2016 to respond to matters of serious financial implications stated herein below, but you acted in gross in subordination to the Board and declined to attend. Be informed that you are an appointee of County Assembly Service Board and answerable to the Board in all matters pertaining to the Board mandates as provided in the County Government Act, County Assembly Service Board Act and Constitution of Kenya 2010.

.....

In view of the foregoing, the Board has resolved to suspend you pending investigations by Auditor General, EACC and CID.

Take notice effective from the date hereof you shall receive half salary, no allowances, or privileges, return all assets of Assembly including surrender of IFMIS Token to Chief Finance Officer Treasury, and Motor Vehicle to transport officer County Government where it originated.

Further take notice that you must desist from operating from or visiting Assembly premises until further notice.

Your sincerely, Signed.

Hon. Ann Adul,

Chairperson, County Assembly Service Board/Speaker

34. The 2nd respondent contends that the appellant was served with a notice on 5th June, 2017, which required him to appear before the Board on 8th June, 2017 at 10.00 am to respond to the allegations on misuse of funds and abuse of office while serving as the Clerk to the County Assembly of Kisumu.



A letter dated 7th June, 2017 was also served on the appellant informing him that the disciplinary proceedings had been rescheduled from 8th June, 2017 to 13th June, 2017, but the appellant opted not to attend the disciplinary proceedings.

35. The appellant contended that the termination of his employment was unlawful, because neither the Board nor the 1st respondent had any authority to suspend him from his employment. He also contended that the purported meeting of the Board held on 1st December, 2016, which resulted in his suspension, was an illegal meeting. Further, the appellant maintained as per his affidavit sworn on 27th June, 2017, that he was not properly served with the notice to show cause, and that he was not given an opportunity to respond to the allegations against him because he was summoned by the Board to a meeting dated 8th June, 2017, which aborted. The appellant maintained that he was not addressed on the outcome of any investigations in line with his suspension letter. He also maintained that the respondents did not follow the provisions of the Human Resource Manual for Public Service 2016. It is noteworthy that there was no evidence adduced before the trial court and therefore the parties solely relied on pleadings, the list of documents and the written submissions. The appellant swore an affidavit on 27th June, 2017, in support of his application to amend his claim. Other than this, there were affidavits which were sworn in support of some interlocutory applications which were part of the record of appeal. From the affidavit sworn by the appellant on the 27th June, 2017, the appellant admits having received a letter dated 5th June, 2017, requesting him to appear before the Board. That despite protesting the short notice, he proceeded to the venue of the meeting on 8th June, 2017, but there was no meeting. Instead, he received another letter dated 7th June, 2017, asking him to defend himself against new allegations of misuse of funds. He maintained that the Board did not follow the rules.
36. It is apparent that the appellant was served by the 2nd respondent with a notice of suspension, and was later summoned for disciplinary proceedings. Although the appellant questions the legality of the meeting dated 1st December, 2016, minutes of the meetings were availed before us and we are satisfied that the meetings did take place. We are also satisfied from the affidavit of the appellant that he was in fact summoned to appear before the Board on 8th June, 2017, which date was subsequently changed to 13th June, 2017, through a letter which was also served on him.
37. A look at the suspension letter shows that it was quite comprehensive on the issues that the appellant was being accused of and also stated the fact that the appellant was invited to appear before the Board to respond to the allegations, but he failed to attend the meeting. The appellant cannot therefore be heard to complain that he was not served with a notice to show cause. Contrary to the [County Governments Act](#) and the County Assembly Services Board Act, which placed the appellant under the authority of the Board, the appellant was resistant to the authority and mandate of the Board in regard to his employment and made it difficult for the Board to exercise its disciplinary mandate over him. Having neglected, failed or refused to attend the disciplinary proceedings, first, before the suspension and secondly, before the decision leading to his dismissal, the appellant has only himself to blame. We find that the Board properly exercised its mandate over the appellant and exercised due process in the disciplinary process.
38. The letter of summary dismissal that was served upon the appellant was comprehensive just as the letter of suspension. We reproduce it herein in full as follows:

“ Philip Otiende Adundo, P.O. Box 4617 – 40100, Kisumu.

“Without Prejudice”

Dear Mr. Adundo,



Re: Summary Dismissal For Gross Misconduct And Financial Mismanagement.

Aware that you were suspended pending investigations into allegations of financial impropriety and mismanagement of Kisumu County Assembly finances during your tenure as the Clerk and Accounting Officer (i.e., Authority to Incur Expenditure-AIE Holder). You are also aware that investigations involved external National Government Agencies, including but not limited to Auditor General, EACC, CID and Kisumu County Auditors. Whilst awaiting the reports of the external agencies, a report of Kisumu County Audit office dated 2nd May, 2017 was received and laid before the County Assembly Service Board for deliberations that informed the review of your suspension.

The Board also took into consideration your conduct prior to and after your suspension.

You were accorded opportunity to appear before the Service Board accompanied by your lawyer if you so wished to respond to audit queries raised by the Auditors. You have in your possession written communication vide letter Reference No. KCA/SP/2017/VOL I Dated 6th June, 2017. You unilaterally without any justifiable cause declined to appear before the Board. Needless to say that this was the second time you treated the Board who is your employer with contempt.

The findings of the Board are as follows:

(A) Gross Misconduct

Treating the Board, your employer with contempt by willfully neglected to perform carefully and properly an assignment which was within your mandate. Engaging in partisan politics contrary to the code of conduct for public officers thereby tarnishing the reputation of the Assembly. Causing tension and insecurity in the Assembly with hired goons when suspended on 1st December, 2016. Exhibiting poor working relations with the Speaker who is also the Chairperson of the Service Board, your employer. Exhibiting poor leadership and management style at the expense of service delivery thereby tarnishing the reputation of the Assembly. Failure to rise to the occasion as Chief Advisor to the Speaker and Members of County Assembly on procedural matters. Usurping and ignoring the authority of the Service Board in matters of policy guidelines on sound financial management and unilaterally incurring irregular expenditure without authority of the Board. Misleading Members of Assembly to invalidate decisions of the Service Board knowing full well that Members of Assembly have no role in day to day management other than their Constitutional mandate of representation, Legislation and Oversight. Forcing entry and occupying office on 5th June claiming that your period of suspension had expired, without following laid down procedure as to whether or not the suspension had been reviewed and or terminated by the Board.

B. Financial Mismanagement

Special Audit report established that there was a systematic abuse and irregular expenditure of the Assembly finances under your watch as the Clerk .

You rewarded yourself payment of Kshs.504,000 as accommodation upon reporting on duty from Siaya County Government on 25th July, 2015. This was not supported by any legal instruments or circular from S.R.C. Paid yourself Kshs.10Million without any cause or supporting documents. Accumulated and failed to retire imprest of more than Kshs.2.1 million, and paid yourself per diems for all trips made by members, in some instances the trips overlapped. Un-procedural cash purchase of uniforms Ksh.1,057,550/- above maximum threshold for goods purchased under quotation of Kshs.1 million. Financial loss due to purchase of the generator at Kshs.1,930,000/- above maximum threshold, no inspection and acceptance satisfaction and installation at a further cost of Kshs.246, 369. Taking imprest of 1.5 million for a trip to Spain which never took place. Using staff



bank account to transfer irregular funds from Assembly Accounts at the Kenya Commercial Bank (KCB).Failing to account for unspent balance of Kshs.44,018,000Million from Assembly budget for the financial year 2015/16 and declaring a paltry Kshs.1,982,000/- as unspent balance as at 30th June, 2016.Willful failure to put effective controls for imprest management leading to abuse.Failure to remit statutory deductions from Members, Staff and Service Providers leading to huge back log of unremitted taxes to:

- i. KRA - 57Million
- ii. Loan - Kshs.35Million (members)
- iii. Gratuity - Kshs.4Million (members)Engaging in irregular procurement process for self-enrichment such as purchase of generator and installation of the same at exorbitant cost.Awarding tender to a single contracting firm for Hansard equipment after visiting various County Assemblies with a director of the same contracting firm, a direct conflict of interest.Fraudulent falsification of tender award for Medical Insurance Cover by Cooperative Insurance Company (CIC) for the period 2015/16 leading to escalation of the sum insured from Kshs.14.2 million to 26.4 million for self-enrichment pocketing Kshs.10 million.Engagements in dubious and exorbitant staff training schemes with no return on investment and or value addition and without the approval of the Service Board whose mandate amongst others is the provision of Structured Training for Staff and Members of Assembly.Engaging County Assembly in unnecessary and costly legal suits likely to drain coffers of the Assembly in compensation claims.

In reviewing your suspension and taking into consideration issues afore-stated, the Board invoked the provisions of the following legislation and rules.

Constitution of Kenya 2010, Chapter six and Articles 201 (a) (d) & (e)County Government Act, Articles 13 (1) (4)[*Public Finance Management Act Regulation No. 18 of 2012*](#). Section 149(1), a-b, sub sec (2) 1 a, b, c, d, e, f, k, l, q, r.[*Employment Act*](#) Section 44. (4) c, d, e, f, g.The [*Public Officer Ethics Act*](#) 8. 9. a, b, c, & g, 10(1) and 12(1).[*Fair Administrative Action Act*](#) No. 4 of 2015. Section 4 (1) (4) (a).County Public Service Human Resource Manual Section 11.21.1a, b, c, f, j, m, o, p, t, v, x, aa, bb, ff, ii and jj.County Assembly Human Resource Manual D28, a, c, d, h, i.Kisumu County Service Board Act, 2014 Section 20 b, e, f, g.

It is the Board's finding that you are unfit to continue serving as the Clerk of the County Assembly of Kisumu and you are hereby SUMMARILY DISMISSED effective from this 14th day of July, 2017.

Consequently, you are directed within 14 days from the date of this letter to avail your Personal File No. 20080002606 to the office of the undersigned and complete the following documents for further action.

- i. Official secrete (Declaration Act for officers leaving the service).
- ii. Final Financial Declaration form.
- iii. Clearance form.

You are at liberty to appeal the decision of the Board within Ninety (90) working days.

Singed Benson Opiyo

Secretary CASB



County Assembly Of Kisumu

39. As per minutes of the Board held on 14th June, 2017, the main Agenda was to discuss the disciplinary case of the appellant after he failed to appear before the Board on 13th June, 2013, to respond to allegations against him of misuse of funds and abuse of office, the members of the Board discussed the allegations against the appellant and resolved that the appellant be summarily dismissed on grounds of misconduct and financial mismanagement. The allegations in the comprehensive letter of dismissal all fell within Section 22 of the County Assembly Service Act and Section 44(4) of the Employment Act, and therefore, there was substantive justification for the dismissal.
40. We reject the appellant's contention that he was not informed about the disciplinary proceedings. In addition, to the appellant's affidavit that we have earlier adverted to, a letter from the appellant's advocate S.O. Madhialo & Company Advocates, shows that the appellant forwarded a letter from the Board to his advocate, who protested the attempt by the Board to initiate disciplinary proceedings against the appellant. Thus, it is clear that the appellant was aware of the disciplinary proceedings but made a deliberate and conscious decision not to attend the disciplinary proceedings. In regard to the appellant's contention that the minutes of the Board were actually a forgery as there was no meeting held on 1st December 2016, (the day the Board allegedly resolved that he be suspended), or 13th June, 2017, when he was to appear before the Board, there were no allegations of forgery that were raised in the appellant's claim or amended claim, nor was there any evidence adduced in support of the alleged forgery. In any event, allegations of forgery are of the same species as fraud: they must not only be alleged with specificities and particulars; but they must be proved at a slightly higher standard than the run-off-the-mill civil claim.
41. The learned Judge cannot be faulted for holding that the appellant's rights to a fair hearing and fair administrative action under Article 50 and 47 of the Constitution were not violated. We come to the conclusion that the appellant's services were lawfully terminated by the Board following due process in accordance with the Employment Act and the County Assembly Services Act. In addition, there was substantive justification for the dismissal of the appellant as he failed to respond to the allegations of gross misconduct and financial mismanagement that he was accused of despite being given an opportunity to appear before the Board and respond to the allegations. In the circumstances, the Board had every reason to believe that the allegations had substance.
42. The upshot of the above is that, the appellant's suspension and dismissal was lawful and procedurally fair. The appellant did not adduce any evidence to show any salaries or allowances that he was entitled to, that was not paid to him. He has made reference to a court order, but if there was any such order, the same should have been subject of execution, and cannot be addressed in this judgment. The appellant's employment having come to an end through his summary dismissal, and him having not offered any evidence to show that he is entitled to any relief with regard to payment of salaries and allowances, his claim in that regard was properly dismissed.
43. Accordingly, this appeal has no merit. It is dismissed with costs.

DATED AND DELIVERED AT KISUMU THIS 13TH DAY OF FEBRUARY, 2025.

HANNAH OKWENGU

.....

JUDGE OF APPEAL

H. A. OMONDI



.....
JUDGE OF APPEAL

JOEL NGUGI

.....
JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

