



Kaudo v Speaker, County Assembly of Homa Bay & 6 others (Civil Appeal E295 of 2022) [2024] KECA 1679 (KLR) (22 November 2024) (Judgment)

Neutral citation: [2024] KECA 1679 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPEAL E295 OF 2022
HM OKWENGU, HA OMONDI & JM NGUGI, JJA
NOVEMBER 22, 2024**

BETWEEN

DANIEL ODHIAMBO KAUDO APPELLANT

AND

SPEAKER, COUNTY ASSEMBLY OF HOMA BAY 1ST RESPONDENT

HOMABAY COUNTY ASSEMBLY SERVICE BOARD 2ND RESPONDENT

PETER JUMA AWUOR 3RD RESPONDENT

HON MICHAEL NYANGI 4TH RESPONDENT

COMM LILIAN OGONO 5TH RESPONDENT

COMM JOSEPH OKOTO 6TH RESPONDENT

FAITH APUKO 7TH RESPONDENT

(Being an appeal from the Judgement of the Employment and Labour Relations Court at Kisumu (Baari, J.) dated 29th September, 2022 in ELRC Petition No. 27 of 2020 As Consolidated With Petition No. 32 of 2020)

JUDGMENT

1. This appeal finds its way to this Court for the second time. This time round, the appeal is from the judgment of the Employment and Labour Relations Court (Christine Baari, J.) delivered on 29th September, 2022 in Kisumu ELRC Petition No. 27 of 2020 as consolidated with Petition No. 32 of 2020. The main issue in the case was whether the suspension and eventual removal of the appellant as the Clerk of the County Assembly of Homabay was lawful; and if not, whether the appellant was entitled to reinstatement. The learned Judge concluded that the appellant was not legally and regularly



employed as a substantive Clerk of the County Assembly anyway, and so the question of his lawful suspension and removal from office was moot; as was the question of his reinstatement to that office.

2. The learned Judge had heard and disposed of the consolidated petitions pursuant to a judgment by this Court in Kisumu Civil Appeal No. E036 of 2021 dated 11th February, 2022. In that judgment, this Court reversed an earlier decision of the ELRC and remanded the matter back to the ELRC for rehearing. The terms upon which this Court directed the ELRC to re-hear the matter are contained in the lead judgment by Kiage, JA thus:

“The upshot is that I will allow the appeal, set aside the judgment dated 17th December, 2020 and direct that Petition No. 27 of 2020 as consolidated with Petition No. 32 of 2020 be remitted to the Employment and Labour Relations Court and heard by a Judge thereof, other than Radido J.”

3. This is how Baari, J. found herself seized of the consolidated petition which forms the subject of this appeal. When it was remitted, the appellant, who was the petitioner at the ELRC, filed an amended petition. In the amended petition, the appellant sought the following orders:
 - a. A declaration that the unilateral decision by the Respondents to suspend and/or remove the Petitioner amounts to witch hunt and violates the Petitioner’s right to a fair trial as envisaged under Article 50 of the Constitution.
 - b. A declaration that the decision of the Respondents to suspend and/or remove the Petitioner as the Clerk of the County Assembly of Homabay without due process was in violation of the Petitioner’s rights under Article 47 of the Constitution.
 - c. A declaration that the action of the Respondents, or any other person acting under them, in proceeding to hold a meeting and pass resolutions to suspend the Petitioner as the Clerk of the County Assembly of Homabay in the absence of a quorum was/is null and void ab initio.
 - d. A declaration that the action of the 1st Respondent in purporting to act on the decision of the 2nd Respondent made on 24th July 2020, to suspend the Petitioner is illegal, biased and void.
 - e. An order of judicial review in the nature of certiorari to remove in to the Employment and Labour Relations Court and quash the decision of the 2nd Respondent to suspend the Petitioner on 24th July 2020.
 - f. This Honourable Court be pleased and do hereby grant judicial review order of certiorari to remove into this Honourable Court and quash the decision of the 2nd Respondent purporting to dismiss the Petitioner through a letter dated 30th December 2020.
 - g. An order of permanent injunction do issue restraining the Respondents from illegally or unfairly suspending, terminating and/or otherwise removing the Petitioner from office.
 - h. A declaration be and is hereby issued that the purported appointment of Ms. Faith Adhiambo Apuko, the 5th Interested Party herein, as the new substantive Clerk of Homabay County Assembly by the 2nd Respondent was illegal unprocedural, unlawful, null and void.
 - i. This Honourable Court be pleased and do hereby issue an order reinstating the Petitioner to the Position of Clerk of the County Assembly of Homabay as due process was not followed during the alleged process of removal.



- j. A conservatory order do issue prohibiting the Respondents, their members or any other person acting at their behest and directions, from interfering with the execution of the Petitioner of his duties as the Clerk of the County Assembly of Homabay or interfering with his remuneration and privileges.
 - k. An order to issue directed at the O.C.S Homabay Police Station to provide security to the Petitioner within the offices of the 2nd Respondent.
 - l. The costs of and incidental to this Petition.
 - m. An interest on (l) above at court rates from the date of filing this Petition to the date of full and final settlement; and
 - n. Any other further incidental or alternative reliefs as the Honourable Court may deem just and expedient.
- In the alternative
- o. This Honourable Court be pleased and do hereby grant judicial review order of mandamus to remove into this Honourable Court and compel the 2nd Respondent to redeploy the Petitioner to work in any other position of equal status within the County Assembly of Homabay.
4. The appellant, through a Supporting Affidavit dated 13th April 2022, deponed that after an open and competitive recruitment process which took place on 25th March 2019, he was lawfully appointed as the Clerk of the County Assembly of Homabay in terms of section 18(3) of the [County Assembly Services Act, 2017](#), vide a letter dated 26th March 2019.
 5. However, through an Internal Memo dated 24th July 2020, to the Members of the Homabay County Assembly and Staff, the 1st respondent purported to suspend him following a Board meeting of the 2nd respondent which allegedly took place on 24th July 2020. The appellant claimed that the 3rd to 6th respondents, who were at the time members of the 2nd respondent, denied any such meeting took place, and even swore affidavits denying making any such decision. Further, the said 3rd to 6th respondents issued an Internal Memo dated 26th July 2020, to the members of the Homabay County Assembly and staff countering the alleged suspension issued by the 1st respondent and termed it as illegal, irregular, null and void.
 6. The appellant complained that he was never informed of the reasons for his suspension, and neither was he given a fair hearing and a chance to cross-examine his accuser(s) before an adverse decision was taken against him which, he argued, was contrary to Article 47 and 50 of the [Constitution](#). Additionally, the appellant averred that the decision to suspend him was not a decision of the 2nd respondent as required by the law. Rather, it was a decision by a Select Committee that was mandated by the County Assembly to investigate, inquire into and make a report within twenty-one (21) days; and which report was published on 1st September, 2020.
 7. The 1st respondent did not file any response to the amended petition but filed written submissions pursuant to the learned Judge's directions. While factually taking a position which was adverse to that of the 2nd respondent, she claimed that the 5th Interested Party to the amended petition (who is the 7th Respondent herein) irregularly interfered with her right to timeously respond to the amended petition, by filing a replying affidavit. Had she been given that opportunity, the 1st respondent submitted, she would have informed the court that the appellant was regularly employed; and his removal was unprocedural and unlawful.



8. On its part, the 2nd respondent submitted that there was no evidence in the appellant's pleadings that he was ever recruited and appointed as Clerk of the County Assembly of Homabay, even though the appellant submitted that the issue of his appointment was settled by this Court in Civil Appeal No. E036 of 2021. According to the 2nd respondent, Radido J. had, in the judgment which was reversed, determined that appellant was not a valid appointee as Clerk on the ground that his gazettelement was done unlawfully; and that this Court in Civil Appeal No. E036 of 2021 interfered with that finding on the basis that gazettelement was not a requirement for appointment; and not on the basis that the appellant was lawfully appointed. In this regard, it was their contention that the appellant's appointment was still a live matter which had not yet been concluded.

Therefore, without proving that he was ever lawfully appointed, the appellant's amended petition was stillborn.

9. Further, the 2nd respondent submitted that though the appellant relied on the said appointment letter dated 26th March, 2019, as proof that he was appointed as the Clerk of the County Assembly of Homabay, there was no Hansard of proceedings before the County Assembly that were availed to prove that the County Assembly approved the appellant as Clerk.

10. The learned Judge delineated three issues for determination:

- a. Whether the appellant was lawfully appointed as a Clerk to the Homabay County Assembly;
- b. Whether the appellant's removal was procedural and lawful; and
- c. Whether the appointment of the 7th respondent as a Clerk of the Homabay County Assembly was legal and procedural.

11. On the first question, as aforesaid, the learned Judge concluded that the appellant was not lawfully appointed as a Clerk. In pertinent part, the learned Judge ruled:

“ 32. The evidence before court indicates that the petitioner served the 2nd respondent in various capacities, including as Director Information and Technology and acting clerk, before his disputed appointment as the Clerk of the Assembly vide an appointment letter dated March 26, 2019.

.....

35. The petitioner's case is that he was interviewed for the position of clerk of the 2nd respondent on the March 25, 2019, and appointed to the position on March 26, 2019.

36. Upon nomination by the board of the County Assembly, it is by law expected that the name of the nominee will be submitted to the county assembly for approval before the nominee is appointed to the position.

37. The process of appointment as espoused in section 18 of the County Assemblies Services Act, as read with section 13 of the County Government Act, does not, and cannot in my view be one that can be concluded in a record two days.

38. This leads me to the conclusion that the petitioner's appointment to the office of clerk of the 2nd respondent, did not meet the statutory requirements and is therefore null and void.



39. I find and hold that the petitioner was not validly appointed to the position of clerk of the County Assembly of Homabay.
12. Having reached this consequential finding, the learned Judge's determination of the second issue was predictably succinct:
41. Having made a determination that the petitioner's appointment was a nullity, the reliefs sought are not available on account of the fact that the petitioner did not validly and lawfully hold the position of clerk of the 2nd respondent.....
42. The petitioner's appointment to the position of clerk is void for having fallen short of the statutory requirement. The court cannot therefore declare the petitioner's suspension and subsequent dismissal unlawful nor order his reinstatement, premised on the fact that the appointment itself is void, as to do so, would amount to putting something on nothing.
43. I hold that the petitioner not having been lawfully appointed, is not deserving of the relief of reinstatement.
13. On the question of the appointment of the 7th respondent as a Clerk of the County Assembly of Homabay County, the learned Judge held thus:
- Whether The 5th Interested Party Should Be Removed From Office
47. The petitioner sought that one Faith Apuko, the 5th interested party herein, be joined in the petition as an interested party, and proceeded in his amended petition to seek her removal from office on the basis that she was not properly appointed to the position.
48. Parties had earlier sought to consolidate this petition with petition numbers E010 of 2022 and E08 of 2022, filed before this court, and which challenge the recruitment of the 5th interested party to the position of clerk of the Homabay County Assembly.
49. The court in a ruling rendered on June 21, 2022, declined the prayer for consolidation and directed that each of the three petitions be heard and determined on their own merits.
50. The issues surrounding the recruitment of the 5th interested party being a subject of other suits pending before this court, will be dealt with and resolved within the suit where she is sued as a respondent.
51. I will therefore not determine the validity or lack thereof of the 5th interested party's appointment in this petition, and the prayer to declare her appointment unlawful is dismissed.
14. The appellant is aggrieved by the judgment. He has raised a whooping, if prolix, twelve grounds of appeal as follows:
1. The learned judge erred in law and in fact in deciding the petition on unpleaded and irrelevant issues.
2. The learned judge erred in law and in fact by failing to consider the evidence and pleadings presented before arriving at her conclusion.



3. The learned judge erred in law and in fact in relying on pleadings illegally, irregularly and unlawfully filed to render her judgment.
4. The learned judge erred in law and in fact in finding and holding that the entire process of appointment of the appellant as a Clerk of the County Assembly of Homabay was conducted in a record two days thereby not meeting requirement of section 18 of the [County Assembly Services Act](#) of 2017 as read with section 13 of the County Government Act of 2012, and hence null and void.
5. The learned judge gravely erred in law and in fact in finding and holding that the Appellant was not validly appointed to the position of Clerk of the County Assembly of Homabay by virtue of him having been interviewed on 25th March 2019, and appointed on 26th March 2019.
6. The learned judge gravely erred in law and in fact in finding and holding that the appointment of the appellant was invalid by virtue of it being done within seven days as stipulated in law.
7. The learned judge gravely erred in law and in fact in ignoring to determine the real dispute before the court, which was whether the suspension and subsequent termination of the appellant was regular, proper, lawful and legal.
8. The learned judge gravely erred in law and in fact in failing to find and hold that the purported suspension and subsequent termination of the appellant was irregular, unlawful, illegal, null and void.
9. The learned judge gravely erred in law and in fact in failing to find that the subsequent purported disciplinary actions after the impugned suspension of the appellant were null and void ab initio.
10. The learned judge gravely erred in law and in fact in ignoring to determine the dispute before the court which was whether the appointment of the 7th respondent as a Clerk was regular, proper, lawful and legal.
11. The learned judge erred in law and in fact in failing to find and hold that the appointment of the 7th respondent as Clerk was illegal, unprocedural, unlawful, null and void.
12. The decision of the learned judge is against the weight of evidence and principles of equity and natural justice.
15. The appeal was canvassed by way of written submissions by the parties. During the virtual hearing, the appellant appeared in person, whereas learned counsel, Mr. Obiero appeared for the 1st, 2nd and 7th respondents. The said parties relied on their submissions. There was no representation for the 3rd, 4th, 5th and 6th respondents; and neither did they file their submissions.
16. On the first ground, the appellant submitted that the issue of his appointment was not in dispute as it was not raised by any of the rightful parties to the suit in their pleadings. He contended that his Amended Petition entirely challenged his suspension, subsequent termination from employment and recruitment of the 7th respondent. Therefore, the learned judge erred when she relied on unpleaded and irrelevant issues like whether he was an acting or substantive Clerk of the County Assembly, without giving him a chance to be heard on the same. For this proposition, he relied on this Court's decision in *Kenya Airports Authority vs. Mitu-Bell Welfare Society & 2 Others* [2016] eKLR, which cited with approval, the decision in the case of *Malawi Railways Ltd vs. Nyasulu* [1998] MWSC 3 wherein it was held that the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties; as to do so would be to enter upon the realm of speculation.



17. On the second and third ground, the appellant contended that the issue of his appointment was vaguely and without specifics, introduced through the Replying Affidavit of one Dorcas Osuri dated 29th June 2022; who purported to have been acting for the 1st respondent and stated that she could swear on her behalf, but ignored to state whether she had the authority of the 1st respondent to swear an affidavit on her behalf. Additionally, the said affidavit was drawn and filed by the firm of S.M Onyango & Associate Advocates who were not on record for the 1st respondent, as they had been replaced vide a Notice of Change of Advocates dated 27th June 2022. Thus, the firm was a stranger to the proceedings. Furthermore, the said illegally filed pleadings by the firm were conveniently not served, hence the appellant was not given a chance to respond to the issues raised therein and on which the Petition was decided on.
18. He submitted that the pleadings and submissions filed by S.M Onyango & Associate Advocates were null and void for being illegally and lawfully filed by ghosts/strangers and in utter contempt of several court orders. Therefore, since the judgment of the trial court was founded on the pleadings and submission made by the said firm, the judgment must collapse.
19. As regards grounds four, five and six, the appellant submitted that the 1st and 2nd respondents conceded when questioned by this Court in Civil Appeal No. 36 of 2021, that the recruitment of the appellant was open and competitive. Thus, by reason of the doctrine of judicial estoppel, they could not claim otherwise in this matter. In addition, the appellant submitted that the process of his appointment satisfied the requirements under section 18(1) of the *County Assembly Services Act*, since an advertisement was done; which was followed by shortlisting and finally the interviews. As such, the nomination process exceeded two days contrary to what the learned judge stated in her judgment. The appellant argued that approval of the nominee of the office of the Clerk of the County Assembly and the appointment thereof should be done within seven days; which statutory requirement was adhered to, and therefore the County Assembly Service Board cannot be faulted for the same. For this reason, the appellant urged this Court to find that the learned judge erred in law and in fact in finding and holding that the appointment of the appellant was null and void.
20. Turning to grounds seven, eight and nine, the appellant argued that the fact that he was not given any notice before his suspension or termination, was not in dispute. He also argued that the respondents failed to prove reasons for his termination as required under section 43 of the *Employment Act* hence, rendering his termination unfair as stipulated under section 45 of the same Act. According to the appellant, he was never informed of the reasons for his alleged suspension and/or termination; nor was he offered a chance to be heard or to cross examine his accusers (if any) before an adverse decision was taken against him, in violation of Article 47 and 50 of the *Constitution*. To buttress his argument, he relied on the case of Judicial Service Commission vs. Mbalu Mutava & Another [2015] eKLR and George Kingi Bamba vs. National Police Service Commission [2019] eKLR, and argued that unfortunately, the trial court downed its tools without considering the propriety or otherwise of the appellant's purported suspension and subsequent termination, which was both wrongful and unfair.
21. The appellant further argued that the 2nd respondent did not sanction his suspension and/or removal through an alleged Board meeting that took place on 24th July 2020. According to the appellant, the 3rd to 6th respondents, who were the undisputed members of the Board, denied any such meeting and even swore affidavits denying making any such decision. He added that the 3rd to 6th respondents issued an Internal Memo dated 26th July 2020 to the members of the County Assembly of Homabay and Staff countering the alleged suspension issued by the 1st respondent and termed it as illegal, irregular, null and void. To this end, the appellant submitted that by dint of section 22 and 23 of the *County Assembly Services Act*, it is only the County Service Board that can suspend or remove a Clerk from



- office. However, in this matter, this was not the case and no evidence to the contrary has been adduced. Instead, a procedure unknown in law was adopted where the County Assembly resolved to form a Committee to investigate the appellant; which Committee recommended that the services of the appellant be terminated without giving him a hearing. After which a letter of summary dismissal was written. The appellant submitted that in this instance, the respondents behaved as if the law did not exist; and called upon this Court as the custodian of the Constitution to overrule the respondents and find that his suspension and termination were not done by the 2nd respondent as required by the law; and as such was irregular, illegal, null and void.
22. On grounds ten and twelve, the appellant submitted that he exhaustively challenged the recruitment of the 7th respondent. However, the learned judge in giving her determination, ignored determining the same; and yet it is trite that every litigant before the court is entitled to a decision with respect to their pleadings. In this regard, he argued that his constitutional rights to a fair hearing and equity before the law were sacrificed at the altar of convenience and relied on this Court's decision in the case of Kenya Power and Lighting Company vs. Benzene Holdings Limited t/a Wyco Paints [2026] eKLR. He urged that this Court is clothed with inherent powers to right the wrongs committed by the trial court and relied on the decision by the Supreme Court in *Bia Tosha Distributors Limited vs. Kenya Breweries Limited & 6 Others* (Petition No. 15 of 2020) [2023] wherein the court observed that whereas the issue before them may have not been articulated at the Court of Appeal, the inherent jurisdiction of the Supreme Court to right jurisdictional wrongs committed by the superior courts in executing their constitutional mandates would necessitate that the court should assume jurisdiction and interrogate the alleged wrongs.
23. Lastly, with regard to ground eleven, the appellant submitted that the appointment of the 7th respondent as a Clerk of the County Assembly of Homabay was unprocedural, improper, illegal, null and void for reasons that her appointment did not conform with the provisions of section 18(2) of the County Assembly Services Act; she was never nominated for appointment as the Clerk by the 2nd respondent and especially in the wake of the court orders and ruling issued in Kisumu ELRC Judicial Review No. E016 of 2021 on 20th December 2021 and 9th February 2022, respectively restraining Hon. Jeff Ongoro who was illegally in office as a Vice Chairperson of the 2nd respondent, from acting as Chair of the 2nd respondent in the absence of the 1st respondent; and the orders issued in Nairobi PPDT No. 7 of 2020.
24. The appellant submitted that these facts have been affirmed by the 1st respondent who was the chairperson of the 2nd respondent, through her sworn affidavit dated 27th June 2022, at paragraphs 8 and 9. According to the appellant, the 2nd and the 7th respondents did not attach any evidence in terms of minutes allegedly conducted by the 2nd respondent to nominate the 7th respondent as Clerk of Homabay County Assembly. Thus, the 7th respondent was nominated in meetings that were unlawfully convened under the provisions of section 18(2) of the County Assembly Services Act. In the circumstance, the appellant urged this Court to invalidate the purported appointment of the 7th respondent as Clerk of the County Assembly of Homabay.
25. The appellant further submitted that the 7th respondent did not meet the requirements of Chapter Six of the Constitution for appointment as the Clerk; that the 2nd respondent was not properly constituted at the time to nominate the 7th respondent as the Clerk.
15. Opposing the appeal, the 1st, 2nd and 7th respondents condensed the twelve grounds of appeal into the following issues of determination:



- a. Whether the learned judge erred in law and in fact in deciding the petition based on unpleaded issues.
 - b. Whether the learned judge erred in law and in fact by relying on pleadings which were irregularly on record.
 - c. Whether the learned judge erred in law and in fact in finding that the appointment of the appellant was irregular and illegal.
 - d. Whether the learned judge erred in law and in fact in failing to find that that the appellant was unfairly terminated.
 - e. Whether the learned judge ignored the issue of appointment of the 7th respondent.
 - f. Whether the 7th respondent was legally, regularly and procedurally appointed as the Clerk of the 2nd respondent.
 - g. Whether the appellant is entitled to the orders sought.
16. On the first issue, contrary to the appellant’s submissions that his appointment was never an issue before the trial court, as it was not raised by any party, the 1st, 2nd and 7th respondents argued that the appellant’s appointment was the central issue before the trial court as he admitted that one Dorcas Osuri challenged the process leading to his appointment. It was also submitted that the 1st respondent averred that the appellant was never appointed as the Clerk of the County Assembly of Homabay and if he was, then the appointment was not made by the proper entity. Additionally, it was submitted that the process through which the appellant became the alleged Clerk of the Assembly was at the center of his suspension. For these reasons, it was argued that the appellant’s appointment was a central issue before the trial court and the learned judge was therefore bound to pronounce herself on the same, since she could not grant the appellant orders based on an appointment that was tainted with illegalities and irregularities. In addition, the said respondents submitted, that in the event that the issue relating to the appellant’s appointment did not directly emanate from the parties, then the court could raise the same suo moto.
17. For this proposition, the respondents relied on Civil Case No. 227 of 2001, Grandways Ventures Limited vs. Reliance Bank Limited (in Liquidation) & Another [2004] eKLR wherein it was held that the trial court has power to frame additional issues or strike out issues before passing a decree. They also relied on the case of Mwanasokoni vs. Kenya Bus Services (1985) KLR 1931 which decision was affirmed by the court in Grandways Ventures Limited vs. Reliance Bank Limited (in Liquidation) & Another (supra). They further relied on the case of Jones Brooks Consulting Ltd vs. Co-operative Bank (2007) eKLR. The respondents argued that the trial court could not have countenanced and rubber stamped a process that was laden with irregularities just because parties did not raise it. They argued that the finding of the court was even more proper on public interest grounds – and that the appellant could not have been allowed to continue earning from public coffers by virtue of a position that he acquired illegally.
18. On the second issue, the 1st, 2nd and 7th respondents argued that the appellant was not candid with regard to the allegation that the learned judge relied on documents which were drawn by the firm of S.M. Onyango & Associate Advocates, who were not on record as they had been replaced vide a Notice of Change dated 27th June 2022. In this regard, the respondents submitted that the appellant filed an application dated 16th February 2022, in which he sought that the documents filed by the said firm be expunged from the record; to which the trial court delivered a ruling on the same on 4th April 2022 and dismissed the said appellant’s application. The trial court further found that the 1st respondent



was represented by three law firms including the firm of S.M. Onyango & Associates Advocates, but the appellant has conveniently omitted the said ruling from the Record of Appeal; and which ruling the appellant did not appeal against. Subsequently, the said firm continued to participate in the proceedings and drew and filed documents on behalf of the 1st respondent; and thereafter appellant did not challenge the appropriateness of the documents of the said firm filed subsequent to the ruling of 4th April 2022, since the issue was now *res judicata*. As such, the respondents submitted that the appellant cannot litigate that issue afresh on appeal and urged this Court to dismiss it.

19. With regard to the third issue, the 1st, 2nd and 7th respondents submitted that the procedure to be followed in appointing the Clerk of the County Assembly could be collapsed into six stages, that is, advertising, shortlisting, interviews, nomination, approval by the Assembly and appointment by the 2nd respondent. However, in the case of the appellant, these steps were concluded within two days. But from a logical point of view, the respondents opined that this could not have been the case; and that the same should be contrasted with the appointment of the 7th respondent which took about one month. They submitted that the illegalities that tainted the appellant's appointment are bare from the report recommending his removal from office; one being that he had not been in public service for at least five years and his academic credentials were also in doubt. Thus, the learned judge could only find that his appointment was illegal and void *ab initio*, based on the ground that it was questioned by the 1st respondent and was a central issue before the trial court.
20. Turning to the fourth issue, the 1st, 2nd and 7th respondents submitted that the procedures laid down in the *Employment Act* only apply to employer-employee relationships. Therefore, since the learned judge found that the appellant was not properly appointed as Clerk, he could not allege that he was unfairly terminated and urged this Court to equally find so. They however submitted that if this Court finds that the appellant was an employee of the County Assembly of Homabay, then it should find that he was fairly terminated for the reasons that the 2nd respondent suspended and removed the appellant from office as provided for under section 22 of the County Assembly Service Act. According to the respondents, contrary to the appellant's allegations, he was provided with reasons for his suspension/termination and given an opportunity to defend himself. Thereafter, a Select Committee was constituted to investigate the charges levelled against him in line with section 23(4) of the *County Assembly Services Act*, whereby it deliberated on those charges and prepared a report dated 29th December 2020, and recommended his dismissal from service.
21. Additionally, the respondents submitted that the appellant's termination was sanctioned by 2nd respondent in accordance with section 44 of the *Employment Act*, and not the 1st respondent as alleged by the appellant. Thus, the appellant's termination was legal and procedural.
22. On the fifth, the 1st, 2nd and 7th respondents urged that the learned judge did not ignore the issue of appointment of the 7th respondent. The respondents submitted that it was worth noting that there were two other substantive suits pending (Kisumu Petition No. E10 of 2020 and Kisumu ELRC No. E08 of 2022) which challenged the appointment of the 7th respondent; and which the appellant sought to have consolidated but the learned judge, vide a ruling dated 21st June 2022, dismissed the application and directed that the same be heard separately. This ruling, the respondents submitted, was not challenged by the appellant, and neither did he disclose it to this Court. In which regard, the issue of consolidation cannot be re-opened on appeal. In the circumstances, the respondents submitted that the learned judge was right in not determining the issue of the appointment of the 7th respondent as Clerk, even though the appellant amended his Petition and sought to challenge it.
23. Sixth, the 1st, 2nd and 7th respondents urged that based on the fact that the appointment of the 7th respondent was still pending determination, this Court should not delve into that matter. However,



if this Court finds that the learned judge should have dealt with the matter, then it should find that the 7th respondent's appointment was proper since the recruitment process was open, transparent and competitive as provided for under section 18(1) of the County Assembly Services Act and adhered to all laws and regulations.

24. Lastly, the 1st, 2nd and 7th respondents argued that the appellant is not entitled to the orders sought since: the conduct of the appellant contributed to his dismissal; the relationship between the appellant and his former employer is now acrimonious and issuing an order of reinstatement would be tantamount to specifically requiring parties to perform a contract of services; and such orders would be impractical as the office now has a substantive holder. In this regard, they relied on the case of *Kenya Airways Limited vs. Aviation & Allied Workers Union Kenya & 3 Others* (2014) eKLR and *Josephat Alusioal Musambayi vs. Vihiga County Assembly & Another* (2016) eKLR.
25. We have perused and analyzed the record as we should as the first appellate court, whereby our mandate is to review issues of both facts and law afresh and come to our own independent conclusions. (See *Selle vs. Associated Motor Boat Co. Limited* (1968) EA 123).
26. We have also keenly read the filed submissions and the very useful case digests provided by the parties. In our view, the appeal raises three issues for consideration which are: whether upon the case being remitted to the ELRC for re-hearing, the issue of the appellant's appointment as Clerk of the County Assembly was still live for the learned judge to make holding on it; whether the appellant was lawfully suspended and removed from office; and whether the learned Judge was correct in declining to make a finding on the legality or otherwise of the appointment of the 7th respondent as the Clerk of the County Assembly.
27. For all the voluminous arguments made by the parties on the main question – whether it was open to the learned Judge to consider and make findings on the question of the legality and lawfulness of the appointment of the appellant as a Clerk of the County Assembly of Homabay – we think the answer is provided, not by the dueling parsing of the pleadings to urge one conclusion or the other, but by the doctrine of stare decisis. It would be recalled that this matter had reached this Court before (although before a different bench). In its earlier iteration, the ELRC Judge had reached the conclusion that the appellant was not lawfully employed as a Clerk of the County Assembly. Upon considering that question in light of the parties' submissions, the lead judgment of Kiage, JA ruled as follows:

“It is evident from the judgment that the reason for the learned Judge's finding the 1st appellant's appointment invalid, was that he was gazetted as Clerk by the acting speaker of the County Assembly when the court had reinstated the substantive Speaker. However, gazettement, as asserted by the 1st appellant and the “interested parties” is not a legal requirement for appointment to the position of Clerk of County Assembly, a position that was conceded by the 1st respondent. Patently then, the determination of the learned Judge on that basis alone, that the 1st appellant was not validly in office, was erroneous. Indeed, even in concluding his decision, the Judge seemed doubtful that there was no contractual relationship between the 1st appellant and his employer.....

I am inclined to interfere with the impugned decision, as there existed no valid reason for invalidating the appointment of the 1st appellant to the office of Clerk. In the result, the Learned Judge ought to have delved into and made findings on the merits of the case before him, notably, the question of whether the suspension and removal of the 1st appellant from office was in accordance with the law.



The upshot is that I will allow the appeal, set aside the judgment dated 17th December, 2020 and direct that Petition No. 27 of 2020 as consolidated with Petition No. 32 of 2020 be remitted to the Employment and Labour Relations Court and heard by a Judge thereof, other than Radido J.’

28. These are the ultimate directions contained in the lead judgment of Kiage, JA and concurred to by the other two judges on the bench, upon which the case was remitted to the learned Judge of ELRC. They are binding on the learned Judge. The narrow holding in the case is that the Court concludes that there was no lawful reason for invalidating the appointment of the 1st appellant; and that the ELRC should make a determination only on the question of the lawfulness or otherwise of the suspension and removal of the 1st appellant as a Clerk of the County Assembly. However, when the learned Judge was seized of the matter on remand, she re-opened the question of the lawfulness or otherwise of the appointment of the appellant as a Clerk of the County Assembly; and then, based on the learned Judge’s finding that the same was unprocedural, she declined to reach the second question – which was the very question remitted to the ELRC by this Court. In our view, this is a reversible error.
29. The question that arises – especially since this is the second time this matter is before us – is what action this consequential finding should trigger on our part. Since the learned Judge did not make any findings on whether the suspension and removal of the appellant was lawful or not, it would not be prudent for this Court to do so for the first time on appeal. This Court has a strong policy to allow the trial court to make factual and legal findings in the first instance, so that the record can be fully developed and the reasoning of the trial court discerned. This is the only proper way parties can truly enjoy the benefits of an appellate bench. For this reason, we are inclined to remit the case back to the ELRC for due determination of this question.
30. Even as we so remit the case, we think it is important to make a finding on the third issue presented before this Court: whether the learned Judge was correct in her refusal to make any findings on the lawfulness or otherwise of the 7th respondent. We think, with respect, the learned Judge was eminently correct in that regard. What the record makes clear is that there are at least two other suits where the question of the appointment of the 7th respondent was the central question. It is unclear if those suits have been finally determined by this time. However, the appellant made an application for these suits to be consolidated with the present one; the learned Judge declined – holding that the issues presented were materially different, and that the interests of justice required the suits be tried separately. If the appellant was dissatisfied with that ruling or direction, he should have appealed against it. He did not. He cannot subsume arguments about the benefits of consolidation in this appeal. We, therefore, explicitly hold that this aspect of the appellant’s appeal fails. This aspect of the case will not be re-tried upon remand.
31. Consequently, this appeal partly succeeds. The case is remitted back to the trial court for rehearing. However, the only aspect of the case remitted for rehearing is a determination whether the suspension and removal of the appellant as the Clerk of the County Assembly of Homabay was lawful; and if not, what reliefs he is entitled to.
32. In view of the outcome of this appeal, each party will bear its own costs.
33. Orders accordingly.

DATED AND DELIVERED AT KISUMU THIS 22ND DAY OF NOVEMBER, 2024.

HANNAH OKWENGU

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JUDGE OF APPEAL

H.A. OMONDI

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JUDGE OF APPEAL

JOEL NGUGI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

