



REPUBLIC OF KENYA



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**Onudi v Okuro & 7 others (Civil Appeal 79 of 2018)
[2023] KECA 272 (KLR) (17 March 2023) (Judgment)**

Neutral citation: [2023] KECA 272 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPEAL 79 OF 2018
K M'INOTI, S OLE KANTAI & F TUIYOT'T, JJA
MARCH 17, 2023**

BETWEEN

DR. OLANGO ONUDI THE ACTING COUNTY SECRETARY APPELLANT

AND

SAMUEL OKURO 1ST RESPONDENT
SAMWEL ONDOLA 2ND RESPONDENT
JACOB MUGA 3RD RESPONDENT
GEORGE AKONGO 4TH RESPONDENT
CEPHAS KASERA 5TH RESPONDENT
DEREK OBURA 6TH RESPONDENT
GEORGE KOYIER 7TH RESPONDENT
SELINE ODHIAMBO BONYO 8TH RESPONDENT

(Being an Appeal from the Judgment of the Employment and Labour Relations Court at Kisumu (M. Nduma Nderi, J) Dated 12th April, 2018 in ELRC PET No. 5 of 2018)

JUDGMENT

JUDGMENT OF TUIYOT'T, JA

1. By the time we heard this appeal on July 19, 2022, the contracts of all the parties herein with the County Government of Kisumu (the County Government) had come to an end and while the respondents took the view that the appeal was a mere academic discourse unworthy of consideration by this Court, the appellant insisted that we hear it.



2. All the 8 respondents previously held the position of Chief Officers in various departments with the County Government. On the other hand, Dr. Olang'o Onudi (the appellant or Onudi) was the acting County Secretary to that Government. The genesis of the dispute giving rise to this appeal are letters dated November 29, 2017 written to each of the officers which close with this sentence;

“In view of the foregoing, you are hereby suspended forthwith to allow for investigation”

3. The letters triggered the filing of a petition before the Employment and Labour Relations Court (ELRC) at Kisumu in which the respondents, then petitioners, stated that while they were under the assumption that Dr. Onudi had acted at the instance and behest of the Kisumu County Public Service Board (the Service Board), upon inquiry from the Board, the Service Board through its Chairman wrote a letter on February 5, 2018 in which he informed the respondents that the Board did not sanction their suspension. The Service Board further stated that it did not authorise the appellant to withhold the respondents' salaries nor to issue the show cause letters. Moreover, that the Service Board had only learnt of the disciplinary process from the respondents' enquiry and that it was not party to the disciplinary process.
4. Citing violation of rights under articles 28,35,47,50 and 236 of the Constitution, the respondents sought the following intervention from the ELRC:

“I. “A declaration that the respondent's action of commencing and exercising disciplinary control over the petitioners through the suspension letters dated November 29, 2017 or thereabout and the show cause letters dated January 23, 2018 without the authority and sanction of the Kisumu County Public Service Board is a violation of the petitioners' right under article 2, 3, 10, 28, 35, 47, 50 and 236 of the constitution and section 59 of the County Government Act and the same is illegal, null and void.

II. A declaration that the actions of the respondent of suspending the petitioners and further asking the petitioners to show cause to charges, the basis of which documents have not been supplied to the petitioners, and without the express authority and consent of the Kisumu County Public Service Board amounts to illegal usurpation of the power and functions and interference with the statutory powers and functions of the Kisumu County Public Service Board, the same is unlawful by dint of sections 59 of the County Government Act and that the petitioners are not entitled to go through such as unlawful disciplinary process. The suspension letters and letters of show cause are hereby nullified.

III. Damages for violation of the petitioners' constitutional rights and costs of and incidental to this suit.

5. In resisting the petition, the appellant made the following answer. The County Government has power and authority to institute and commence a disciplinary process against its employees with a view to making recommendations to the Service Board for its final decision; the Service Board exercises delegated powers from the County Government and hence acted on recommendations of the County Government; he served the petitioners with show cause letters in line with the law; the County Government was within its lawful mandate when it suspended the petitioners to allow for investigations as they would interfere with investigations as one cannot be investigated while in office; and the matter had not been escalated to the Service Board which would at the appropriate time consider the recommendations of the County Executive as to whether or not to retain the officers.



6. He also contended that in so far as he was a public officer and carried out his functions as the Secretary to the County Executive Committee, no suit could be brought against him in his individual capacity without joining the County Government and that the matter being a disciplinary process, no action could be brought before the decision is made or before the process is complete.
7. At trial, the matter was heard by way of affidavit evidence and the trial Judge Mathew N. Nderi, J, in a judgement delivered on April 12, 2018 held in favour of the petitioners.
8. The decision aggrieved the appellant who is before us on the following seven grounds that:
 - a. The learned trial judge erred in law and fact in finding that the entire petition was properly instituted as the appellant being a public officer cannot be sued or sue in his own name as all public servants are insulated for actions done or carried out in that capacity.
 - b. The trial judge erred in law and fact in finding that the appellant as the head of the public service in the County government has no power to recommend any disciplinary action against any public servant as provided for in the human resource manual.
 - c. The learned judge failed by completely misinterpreting sections 36, 44, 44(3), 45(1), (2) and (3), 56, 57, 58, 59, 76 and 86 of the County Government Act and thereby coming to a wrong decision which is against the law.
 - d. The learned judge failed to interpret the provisions of section 5(1) of the Interpretation & General Provisions Act Cap 2, Laws of Kenya.
 - e. The learned judge erred and failed to understand and analyze the duties and functions of the appellant as the head of Public Service within the County Government as provided for under the County Government Act thereby coming to a wrong decision.
 - f. The learned judge erred in law in failing to interpret the powers, functions and duties of the Executive Committee as provided for under the County Government Act.
 - g. The learned judge failed to interpret the law placed before him in a way that provides for progressive justice that is for the public good as was intended in the objects of the County Government Act.
9. When this matter came up for plenary hearing, Mr. Yogo representing the appellant and Mr. Nyamweya appearing for the respondents chose to rely on their respective written submissions without highlights.
10. In support of ground 1 of the appeal, counsel for the appellant argued that article 236 of the Constitution insulated public officers from victimization for acts performed by virtue of them holding a public office. It is urged that the appellant issued the suspension and show cause letters in his capacity as the County Secretary and in line with his statutory duty as outlined in section 44 (3)(c) of the County Government Act (the Act) and it was improper for the respondents to institute a suit against him on his individual capacity. Citing the decision of Omollo J in Rodah Atemo Amukhuma & another v Executive Officer, Roads Bungoma County Government [2014] eKLR, it is submitted for the appellant that it is the County Government, a body corporate, which ought to have been sued.
11. The appellant combined the arguments for grounds 2 and 5. The appellant contends that while section 59 of the Act mandates the Service Board to exercise disciplinary control, the County Secretary as the head of the county public service is in charge of administering the officers in the county public service and administration includes, establishing and abolishing offices in the county public service,



appointing persons to hold or act in those offices as well as exercising disciplinary control over such persons. In pressing this point, the appellant states that pursuant to Part 4.1 of the [Human Resource Policies and Procedure Manual for the Public Service](#), 2016, the power to exercise disciplinary control and termination of public officers is vested in the Public Service Commission as stipulated in the [Constitution](#) and [Public Service Commission Act](#) and regulations. That nonetheless the role can be delegated to an authorized officer and among the powers that can be delegated is the power to suspend officers in job group 7 and below.

12. The appellant asserts that by virtue of section 45 (3), the County Chief Officer is responsible to the County Executive Committee for administration of a County department. In their supervisory capacity, the executive members can handle disciplinary issues in their administrative level before forwarding the same to the appropriate body. The appellant argues that an administrative action to allow for investigation should not in any way be construed to be part of the substantive disciplinary process.
13. Grounds 3 and 6 touch on the interpretation of section 36, 44, 44(3), 45 (1)(2) and (3) of the [Act](#). We are told that in its supervisory functions donated by section 36 of that statute, members of the County Executive Committee have authority to exercise disciplinary measures on public officers reporting to them, among them, chief officers. While pursuant to section 44 (3) one of the functions of the County Secretary is to convey the decision of the County Executive committee to the appropriate persons or authority, we were urged to find that, when read together, the two provisions could only mean that the County Executive exercises disciplinary powers as an administrative function through the County Secretary. Regarding section 59, the appellant submits that by dint of those provisions, the functions of the Board which can be delegated to authorized officers pursuant to section 86 includes to the County Secretary who may exercise the delegated power to issue suspension and show cause letters as an administrative process pending investigation.
14. In arguing ground 4, the appellant proposes that by virtue of section 51 of the [Interpretation and General Provisions Act](#), the Governor who has power to appoint Chief Officers has power to suspend them. The appellant cites the decision in [Republic v Kombo & 3 others ex parte Waweru](#) [2008] 3KLR (EP) 478 in support of that proposition. In the end, the appellant submits that he communicated the suspension of the respondents on behalf of the Executive Committee as an administrative process prior to recommending disciplinary action to the Board.
15. The appellant beseeches us to interpret the law in a manner that breathes life to the objectives of the [Act](#) as set out in section 3 among them to provide for the promotion, evaluation and reporting on the compliance by a county public officer with the values and principles in articles 10 and 232 of the [Constitution](#).

It is argued that public officers ought to administer their functions with integrity, transparency and accountability, and that if we take into consideration the subject matter of the suspension and show cause letters, then we ought to interpret the law in a way that provides for progressive justice and public good.
16. Counsel Nyamweya starts from the point that since all the parties have left the service of the Service Board, the appeal is mere academic discourse and is of no practical purpose.
17. On the substance of the appeal, counsel submits that the Service Board is a creature of statute and is the sole employer of all the public officers in the executive wing of the County Government. Its only mandate is to employ, deploy, promote, demote and generally exercise disciplinary control over all public officers in that wing of the County Government. Counsel asserts that nobody can purport to act on behalf of the body except with its written and minuted permission. Reference is made to the



decision of this Court in Civil Appeal No. 139 of 2017 *Kisumu County Public Service Board & another v Samuel Okuro & 7 others* [2018] eKLR. We are asked to find that the appellant did not have any written document to show that the Service Board had delegated any disciplinary power and control over the respondents to the appellant.

18. In this first appeal, the facts are not involved and are common ground. We are only called upon to resolve controversies regarding the interpretation of the law which, in our view, crystalizes in the following issues:
- a. Could the appellant be sued in his personal capacity?
 - b. Was the action of the appellant in suspending the respondents and withholding their salary part of the disciplinary process?
 - c. If so, was this a matter within the remit of the delegated authority of appellant and if so, had such authority been delegated to him?
19. As I turn to consider and determine the substantive issues, it needs to be said that in deciding to hear this appeal, this Court was not persuaded by the argument of the respondents that the appeal was moot merely because the contracts of all parties herein with the County Government had come to an end. The trial court had made certain adverse findings against the appellant and it was perfectly within his right to test those findings before us. That in itself was sufficient reason for him to persist with the appeal and for this Court to determine it on merit.
20. The appellant was sued in his personal capacity. This aggrieves him because from his standpoint, he issued the letters on behalf of the County Government and in line with his statutory duty. The nature, responsibility and functions of the office of the County Secretary are spelt out in section 44 (3) of the *Act* to be as follows:

“The County Secretary shall_

- a. be the head of the county public service;
 - b. be responsible for arranging the business, and keeping the minutes, of the county executive committee subject to the directions of the executive committee;
 - c. convey the decision of the county executive committee to the appropriate persons or authorities; and
 - d. perform any other functions as directed by the county executive committee.”
21. The law is that public officers do not enjoy immunity from litigation in respect to acts, which though done in the name of the office, are overtly outside the remit of their offices. If there is need for support of this now well settled proposition, is the decision of this Court in *Ethics and Anti-Corruption Commission v Judith Marilyn Okungu & another* (2017) eKLR where the Court held as follows;

“... There is ample authority to the effect that a person against whom fraud or illegality is alleged cannot escape personal liability (should the fraud or illegality be proved) on the basis that he was acting as an agent or servant of another. Indeed, government functionaries of whatever seniority are not immune from personal liability for unlawful acts such as deceit, fraud or contempt of court. See *Standard Chartered v Pnsc (supra)* and *M. v Homes Office &*



Anor (supra). The latter case locates this personal liability at the heart of the rule and quotes Prof. Dicey in the following terms;

“When we speak of the rule of law as a characteristic of our country,[we mean] not only that no man is above the law. But (what is a different thing) that here every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals. In England the idea of legal equality, or the universal subjection of all classes to one law administered by the ordinary courts, has been pushed to its utmost limit. With us every official, from Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen. The reports abound with cases in which officials have been brought before the courts, and made, in their personal capacity, liable to punishment, or to the payment of damages, for acts done in their official character but in excess of their lawful authority. A colonial governor, a secretary of state, a military officer, and all subordinates, though carrying out the commands of their official superiors, are as responsible for any act which the law does not authorize as is any private and unofficial person. (See *Introduction to the Study of the Law of the Constitution* (10th edn, 1965) pp193-194.)”

22. As I understand it, the case put forward by the respondents in the superior court below is that the conduct of the appellant was usurpation and interference with the functions of the Service Board. It is a proposition that the appellant was acting outside the confines of section 44 (3) of the *Act* which delineates his role, functions and responsibilities and therefore in his personal capacity. It does seem to me however that if what the appellant was doing was simply conveying a decision of the County Executive Committee, then that decision, even if ultra vires the powers of the Committee, would be a decision of the executive committee and not of the appellant. If on the other hand the appellant was acting on a frolic of his own, then the appellant could attract an action in his personal capacity. Whether or not the appellant could properly be sued in his own name has to be a question of fact on which I shall return to shortly.
23. The next issue presents yet another opportunity for our Courts to draw the line between the functions and powers of the Service Board *vis- a- vis* the County Government Executive Committee in regards to disciplinary control over persons holding offices in the county public service. In *Kisumu County Public Service Board (supra)* this Court held that the Service Board has wide powers to act on behalf of the County Government in dealing with appointments, confirmation, promotion, discipline and removal of persons holding county public service offices.
24. The provisions of section 59A of the *statute* highlights an important architecture in the relationship not just between the County Public Service Board and the Executive Committee, but indeed with other arms of the County Government and third parties outside the County Government. Section 59A recognizes the independence of the Service Board in performing its functions and exercising its powers by unequivocally providing:

“In the performance of its functions under this *Act*, the county public service board shall-

- a. be independent and shall not be subject to the directions or control of any other person or authority; and
- b. adhere to the *Constitution*, this Act and any other relevant law.”



25. An argument has been made by the appellant that when he wrote the letters suspending the respondents he was simply communicating an administrative process on behalf of the executive committee prior to recommending disciplinary action to the Board. This Court is asked not to construe this action as part of the substantive disciplinary process.
26. With respect, this tortured attempt to remove the suspension process from the disciplinary process by characterizing it as a non-substantive act does violence to Labour law. The action of suspending an officer from employment to pave way for investigation and, possibly, further disciplinary action is not peripheral to the overall disciplinary process because it has significant implications not just to the employee and employer relationship but also on both parties. Some possible implications come to mind. In this instance, the suspension of the officers meant that they stopped holding those offices during the suspension period and so the County Government could no longer benefit from all or some of their services. The suspension significantly affected their remuneration, even if in the interim, as their salaries were withheld. I have little doubt that the act of suspending the officers was an integral part of the disciplinary process which, unless delegated under the provisions of section 86, was the exclusive remit of the Public Service Board.
27. This leads me to the next discussion. The appellant makes an argument, and this is an alternative argument, that the power to suspend the officers was a function delegated to the County Secretary and relies on the Human Resource Policy and Procedures Manual for the Public Service, 2016. In support of this argument, counsel cites the following passage from the decision of Maureen Onyango, J in *Grace Kavinya Muimi v The Governor, Kitui County & 2 others* (2018) eKLR.

“The petitioner having been in Job Group S, her disciplinary control fell under the “authorized officer” in this case, the County Secretary... The procedure for discipline of the petitioner is therefore that set out under the Human Resource Policies and Procedures Manual for officers in Job Group Q and above: Regulation K5 provides for a constitution of a special committee to investigate and submit a report of its findings to the Authorised Officer but is specific that “The report shall not contain any recommendation on the form of punishment to be inflicted on the accused officer.” Refer to K5 (3). Being in Job S the Authorised Officer being the County Secretary had delegated power to exercise disciplinary control over the petitioner as provided under Regulation K (1) as read with K(2).” (Emphasis ours)

28. I have read that decision and understand the learned Judge of the superior court below as holding that the manual applied to the circumstances of that specific case. The manual is a document of the Public Service Commission and the decision in *Grace Kavinya Muimi* (*supra*) cannot be authority that the *manual* applies to human resource policies and procedures of every County Government in Kenya. For the manual to apply to a particular County Government then it has to be domesticated and duly adopted by the relevant County Public Service Board. The appellant needed to prove that the manual had been duly adopted by the Kisumu County Public Service Board and was therefore part of its policy and procedures. Only then could he rely on its contents. Needless to say, the appellant fared poorly on this aspect.



- 29. One can quickly see the wisdom in the power to delegate granted to the County Public Service Board by the provisions of section 86 (1) of the Act which reads:

“The County Public Service Board may delegate, in writing, any of its functions to any one or more of its members and the county secretary, county chief officer, sub-county or Ward administrator, village administrator, city or municipal manager and town administrators.”
- 30. Circumstances can arise in the relationship between an officer and a County Executive which requires that an officer be placed on suspension without delay pending investigation and further disciplinary process. Delayed suspension can give room for possible retaliation, sabotage, intimidation of fellow employees or interference with intended investigation. These call for immediate suspension which may not be able to await the action of the Service Board. There is much to be gained by delegating some disciplinary powers to the officers’ named in section 86(1) of the Act. Part K.2 of the Public Service Commission manual makes for a good template of how such delegation can be achieved within the framework of law.
- 31. In the end I come to the conclusion that the appellant acted without power and that as he failed to demonstrate that the action was that of the County Executive and not his personal one, then liability attached to him in person and the respondents were entitled to bring proceedings against him in his name.
- 32. The inevitable outcome is that the appeal is without merit and I would propose that it be dismissed with costs.

JUDGMENT OF M’INOTI, JA

33. I have had the advantage of reading in draft the Judgment of my brother, Tuiyott, JA. I agree with his reasoning and proposed outcome. As Kantai, JA is also of the same view, the Judgment of the Court is that this appeal is dismissed with costs to the respondents. It is so ordered.

JUDGMENT OF KANTAI, JA

34. I have had the benefit of reading in draft the Judgment my brother Tuiyott, JA. I am in full agreement and I have nothing useful to add.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF MARCH, 2023.

F. TUIYOTT

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JUDGE OF APPEAL

K. M’INOTI

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JUDGE OF APPEAL

S. OLE KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.



signed

DEPUTY REGISTRAR

