Siaya County Assembly Service Board & 2 others v Olwero (Civil Appeal E077 of 2022) [2023] KECA 905 (KLR) (21 July 2023) (Judgment)

Neutral citation: [2023] KECA 905 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CIVIL APPEAL E077 OF 2022

PO KIAGE, F TUIYOTT & AO MUCHELULE, JJA

JULY 21, 2023

BETWEEN

SIAYA COUNTY ASSEMBLY SERVICE BOARD ..... 1ST APPELLANT

SPEAKER, COUNTY ASSEMBLY OF SIAYA ..... 2ND APPELLANT

COUNTY ASSEMBLY OF SIAYA ..... 3RD APPELLANT

AND

ISAAC FELIX OLWERO ..... RESPONDENT

(An appeal from the Ruling and Order of the Employment and Labour Relations Court at Kisumu (Radido, J.) dated 9th February, 2022 in Petition No. 16 of 2019)

JUDGMENT

Judgment of Tuiyott, JA

1. This appeal arises from a Ruling of Radido, J. on a review application which purported to clarify certain aspects of the learned Judge's Judgment of April 14, 2021.

2. At the time material to the proceedings before the Employment and Labour Relations Court (ELRC), Isaac Felix Olwero (the Respondent or Olwero) was the County Assembly Clerk of the County Assembly of Siaya (the 3rd appellant or the Assembly). Siaya County Assembly Service Board (the 1st Appellant or the Service Board) is a body corporate established under Section 12(1) of the *County Governments Act, 2012* and section 12 of the *County Assembly Services Act, 2017* (hereinafter the Act) with the function of constituting offices in the Siaya County Assembly Service, appointing and supervising office holders. In exercise of this function the Service Board suspended the respondent for 3 months with effect from March 1, 2019 to allow for further investigations into the respondent's alleged gross misconduct arising from results of an internal audit report on the Assembly's Car Loan and Mortgage Fund.

3. In that suspension letter, the respondent was required to explain, within 21 days, the circumstances under which Cheque number 000041 amounting to Kshs 2,977,781 was withdrawn from Cooperative Bank of Kenya Siaya Branch on 1st September 2015.From an account belonging to the Assembly. The action by the Service Board triggered proceedings before the ELRC where the respondent complained that, notwithstanding several requests, the 1st and 2nd Appellants locked him out of his office and he was therefore unable to access documents which would assist him counter the allegations. This is the position that persisted on May 20, 2015 when he appeared before the disciplinary committee of the Board. There, the respondent renewed his request for the official supporting documents and, further, questioned the impartiality of two members of the committee. The respondent stated that in spite of these challenges, he responded to the allegations levelled against him.

4. On June 4, 2019, the 2nd and/or 3rd appellant set up a select committee to investigate and report on the allegations against the respondent after the Service Board concluded that the respondent had committed gross misconduct by misappropriating public funds. Things moved quickly and on June 12, 2019 the respondent appeared before the select committee but complained that his meaningful participation before the committee was restricted by the pendency of the proceedings before the ELRC and the failure by the Assembly to supply him with the documents he had sought. That notwithstanding, on June 13, 2019, the Assembly debated and adopted a report tabled by its select committee and thereby revoked his appointment. This aggrieved him and he further sought the intervention of the ELRC through an amendment to his Petition.

5. In a Judgement of April 14, 2021 the learned trial Judge made the following salient findings:

    i. The decision by the Board to suspend the petitioner was properly anchored in fact and law.

    ii. The Board did not comply with the requirements of section 23(1) (b) of the *County Assembly Services Act* and that it should at the first instance invited the respondent to make a written response before the oral hearing in terms of section 23(1) (a) of the *Act*.

    iii. The missteps by the Board were procedurally substantial and could not be cured by the fact that the respondent attended the oral hearing.

    iv. There was no procedural infringement on the part of the select committee.

    v. The proceedings before the County Assembly were not legislative in nature but were quasi-judicial and did not breach any of the respondent's right

6. Ultimately the ELRC issued the following orders:

    i. a declaration that the proceedings before the County Assembly Service Board with a view to revoking the appointment of the Petitioner as the Clerk of the County Assembly of Siaya did not comply with the requirements of section 23 (1) (a), (b) and (c) of the *County Assembly Services Act*.

    ii. An order of certiorari issue to bring into the Court to quash the recommendations of the County Assembly Service Board of Siaya to the County Assembly of Siaya to revoke the appointment of the Petitioner as Clerk of the County Assembly of Siaya"

7. None of the parties appealed against the decision but they gave a different interpretation of it. The appellants did not think the Judgment to be the end of that matter and decided that they would restart the disciplinary and removal process but within the edicts of the law. So on the same day as the Judgment, the Service Board wrote a letter to the respondent placing him on interdiction for a period

of three (3) months with effect from the date of the letter and inviting him to respond in writing, within 21 days, to the allegations against him which were framed in charges forwarded in the letter.

8. Aggrieved with this new state of affairs, the respondent filed a notice of motion dated May 10, 2021 seeking multiple prayers. Relevant for now is that the respondent requested the ELRC to review its judgement so as to clarify that the 1st and or 2nd appellants could initiate and /or preside over disciplinary proceedings against him with a view to recommending his removal from office of clerk hinged on the said bank withdrawal on or around September 1, 2015 from the 3rd respondent. In answer to the plea the trial Court held:

> " It was not legally tenable for the respondents to commence or purport to continue with the removal or disciplinary process on the same allegations or facts which had been quashed."

9. This is the holding that has triggered the appeal before this Court. While the appellants raised 5 grounds of appeal, it was clear from the arguments of Mr. Okoyo Omondi, counsel for the appellants, both in the written submissions and appearance before us that the appeal narrows to a single issue; whether the ruling of the superior court below of February 9, 2022 conforms with the that court's decision of April 14, 2021. The appellants argue that there is a disconnect.

10. It is submitted that the substratum, allegations and/or facts upon which the 1st appellant had purported to have the respondent removed from office was misappropriation of the car loan and mortgage funds of the Assembly as revealed in the audit report yet the contents of the report and/or the legality of the allegations were never an issue for determination before the superior court below and the court could not make it an issue and/or determine its legality or otherwise at a review stage.

11. Counsel Okoyo Omondi urged us to find that in its Judgment of April 14, 2021, the ELRC quashed the recommendation of the Service Board to the Assembly to revoke the appointment of the respondent as the clerk and did not quash the allegations which formed the subject matter of the proceedings.

12. Further, that in permanently restraining the appellants from commencing or purporting to continue with the removal or disciplinary process on the same allegations or facts, the ELRC contravened the legal principle that a court should be reluctant to interfere with an employer's internal disciplinary process unless it is evidently flawed and in breach of the law. The decisions in *MTM v KIE Limited & another* [2020] eKLR and *Rosemary Waitherero Mburu v Kenya Airways Limited* [2020] eKLR are cited in support of this proposition.

13. In answer to those submissions, Rayola Olel counsel for the respondent, filed submissions dated June 23, 2022. Counsel contends that the appellants have taken a selective view of the Judgment of the trial court and have chosen to ignore the court's obiter dicta observations, the basis upon which the ratio decidence was based. We are invited to find that the core issue for determination was the legality and/or validity of the appellants' action to suspend the respondent and/or proceeding to revoke his appointment. It is asserted that the Judgment of the trial court dealt at length with the legality of the disciplinary process and found that; the Service Board should have forwarded a copy of the framed charges together with a brief statement of the allegations; no charges were framed after the investigations of the audit subcommittee; the missteps were procedural and substantial and could not be cured by the fact that the petitioner attended the oral hearing. The respondent argues that the effect of the declaration issued and the order of certiorari was to invalidate the substratum upon which the appellants had purported to have the petitioner removed from office and it was no longer tenable for them to commence or purport to commence or continue with the removal or disciplinary process.

14. It is emphasized, for the respondent, that the effect of the findings by the trial Judge was to quash all the documentation and charge sheet. It was proposed that once the court quashed the recommendation of the Service Board to the Assembly then, by extension, all documents and process pertaining thereto went down the drain. Relying on the famous English decision in *Henderson v Henderson* [1843] 3 Hare 100, the appellants are criticized for attempting to restart a disciplinary process which had already been determined to be illegal by a proper court exercising its original jurisdiction.

15. On the argument that the findings of the learned trial Judge did not conform to the principle of review laid down under section 16 of the *ELRC Act* and Rule 33(1) of the *Rules* of that court and that the court sat on appeal of its own decision, the respondent responds that the Court simply clarified its own Judgment and in doing so did not offend any procedural rules of review.

16. The ruling from which this appeal stems is in respect of a review application and a proper place to begin is by considering the place and scope of a review application under the *ELRC Act*. In section 16, the *ELRC Act* simply provides:

> " 16. Review of orders of the Court
>
> The Court shall have power to review its judgements, awards, orders or decrees in accordance with the Rules."

17. The provision leaves it to the *Rules* to flesh out the scope of review and it does so in Rule 33 in the following terms:

> " 33. Review
>
> 1. A person who is aggrieved by a decree or an order from which an appeal is allowed but from which no appeal is preferred or from which no appeal is allowed, may within reasonable time, apply for a review of the judgment or ruling—
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> a. if there is discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of that person or could not be produced by that person at the time when the decree was passed or the order made;
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> b. on account of some mistake or error apparent on the face of the record;
>
> c. if the judgment or ruling requires clarification; or
>
> d. for any other sufficient reason"

18. Clearly the grounds for review under the *ELRC Rules* are broader than those set out under Order 45 of the *Civil Procedure Rules*, which for comparison I set out below:

> " Application for review of decree or order [Order 45, rule 1.]
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> 1. Any person considering himself aggrieved—
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> a. by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

b. by a decree or order from which no appeal is hereby allowed,

and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

2. A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review."

19. The respondent, in seeking review of the Judgment of the trial court moved the ELRC to invoke its power under Rule 33 (1) (d); to clarify its Judgment. The power of clarification can only invoked where the judgment or ruling is ambiguous, unclear or otherwise confusing. The power is to be exercised to make such judgment or ruling less confusing and more comprehensible. Its objective is to illuminate a hazy decision. Indubitably in providing clarity, the court simply does so in a manner that the clarification conforms with the findings in the judgment or ruling that is clarified. I do not think that the makers of the Rule envisaged that clarification would entitle a rigorous, lengthy or argumentative rendition or analysis. And certainly, it will not involve a departure or distortion of the decision. It must be one that conforms with and affirms the findings already made by the court.

20. The disciplinary process that the respondent was subjected to was four stepped; the suspension by the Service Board; the removal process before Assembly required by sections 22 and 23 of the *Act*; the proceedings before the select committee of the Assembly and; the proceedings before the Assembly itself. The learned trial Judge only faulted the removal process undertaken by the Service board as is evident in his findings below;

" 37. The letter suspending the Petitioner set out in general terms the accusations against the Petitioner but also indicated that further investigations would be undertaken....

42. Under section 23(1)(b) of the *County Assembly Services Act*, the Board should have forwarded a copy of the framed charge(s) together with a brief statement of the allegations to the Petitioner before his appearance before the Board.

43. The Respondents did not provide any evidence that the charge(s) and the brief statement were served upon the Petitioner on or before 20 May 2019.

44. The Court would have expected that precise charges against the Petitioner would have been framed after the investigation by the Audit Subcommittee. No such charges were framed, and the charge(s) in the suspension letter does not meet the charge as envisaged by section 23(1)(a) of the *County Assembly Services Act*."

21. The Judge further held;

> " 46. Apart from furnishing the Petitioner with a copy of the charge together with a brief statement to support the charges, the Board/Disciplinary Committee should have at the first instance invited the Petitioner to make a written response before the oral hearing in terms of section 23(1)(c) of the *Act*.
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> 47. The Court again finds that Board failed to comply with this further measure of procedural protection assured the Petitioner."

22. The learned Judge was then emphatic in his conclusion;

> " 48. In the Court's view, the missteps by the Board were procedurally substantial and could not be cured by the fact that the petitioner attended the oral hearing."

23. While it is true that the amended petition had also invited the ELRC to carry out a merit based inquiry of the charges brought against the respondent, a substantial part simply sought to fault the procedural rectitude of the process and it is on this latter grievance that the learned Judge rendered himself. Not once did the learned Judge comment on the merit of the allegations brought against the respondent. The trial court found that the Service Board had breached the provisions of section 23 (1) (a), 23 (1) (b) and 23 (1) (c) of the *County Assembly Service Act*. Section 23 provides the procedure for removal of the clerk and reads:

> " 23. Procedure for removal of the Clerk
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> 1. Where the Board considers it necessary to remove the Clerk under section 20, the Board shall-
>
> a. frame a charge or charges against the Clerk;
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> b. forward the statement of the said charge or charges to the clerk together with a brief statement of the allegations in support of the charges;
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> c. invite the clerk to respond to the allegations in writing setting out the grounds on which the clerk relies to exculpate himself or herself; and
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> d. invite the clerk to appear before the Board, either personally or with an advocate as he or she may opt, on a day to be specified, to exculpate himself or herself.
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> 2. If the clerk does not furnish a reply to the charge or charges within the period specified, or if I the opinion of the Board the clerk fails to exculpate himself or herself, the Board shall submit a notice of a motion to the speaker seeking that the County Assembly revokes the appointment of the clerk.
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> 3. A motion under sub-section (1) shall specify-

a. the grounds set out in section 21 in which the clerk is in breach; and

b. the facts constituting that ground.

4. Upon notice of the motion under subsection (2), the speaker shall refer the matter to a select committee of the assembly consisting of eleven members and established in accordance with the Standing Orders of the assembly to investigate the matter within ten days of receipt of the motion.

5. The select committee shall, within ten days, report to the assembly whether it finds the allegations against the clerk to be substantiated.

6. The clerk shall have the right to appear and be represented before the select committee during its investigations.

7. The assembly shall consider the report of the select committee and resolve whether to approve the motion.

8. If the assembly approved a motion filed under this section, the clerk against whom the motion was filed shall be deemed to have been removed from office from the date of the motion was approved"

24. It is common ground that both sides did not appeal against the Judgment of the court and I have to find that the respondent accepted a decision of the trial court that did not impeach the merit of the allegations brought against him. It is in this context that the manner in which the trial Judge dealt with the clarification prayer is to be examined.

25. In asking the ELRC to review its Judgment and to clarify that the 1st and 2nd appellants could not legally initiate and preside over disciplinary proceedings against him with a view to recommending his removal on the basis of allegations of the bank withdrawal on or around September 1, 2015 from the 3rd appellant's bank account, the respondent was asking the ELRC to declare that its Judgment of April 1, 2021 barred the Board from ever initiating proceedings for his removal as a clerk on the basis of those specific allegations. In effect bringing a closure to those allegations.

26. In answering this plea, the trial court, in its impugned ruling of February 9, 2022, held:

"49. The Court did not issue any order directing the Respondents to refrain from doing any particular act or compelling them to take any action.....

50. The Court merely issued a declaratory order, with an attendant order of certiorari quashing the recommendation by the Board to the County Assembly to revoke the Petitioner's appointment.

51. The effect of the declaration and certiorari was that the Court invalidated the substratum upon which the Respondents had purported to have the Petitioner removed from office."

27. The learned Judge explains the effect of the orders he made to be to invalidate the substratum upon which the respondent had purported to have the petitioner removed from office. A holistic reading

of the Judgment of April 14, 2021, leads me to the conclusion that the substratum which had been invalidated by the Court were the charges that formed the basis upon which the Board submitted the Notice of Motion to the Speaker of the Assembly revoking the appointment of the clerk. This is because, as explained in the Judgment, the charges had not been framed as envisaged by the provisions of section 23 (1) (a) of the *Act*, a brief statement of the allegations in support of the charges had not been forwarded together with the statement of charges to the respondent in breach of section 23 (1) (b) and that the Service Board had not, in the first instance, invited the petitioner to make a written response before the oral hearing as envisaged in section 23 (1) (c).

28. What seems to have caused confusion instead of clarity was the ultimate holding of the trial court that:

> " It is not legally tenable for the respondent to commence or purport to continue with the removal or disciplinary process on the same allegations or facts which had been quashed."

29. It has to be remembered that what was quashed were the charges as framed by the Service Board, the manner in which the charges were forwarded to the respondent and his invitation to appear before the Board without the invitation to make a written response. The natural effect of the order was that the notice of motion submitted by the Board to the speaker was quashed. If the ultimate holding in the clarification is construed to mean that it is those same set of charges and proceedings before the Board that could not be used to commence or continue the removal and disciplinary process then the clarification would be in conformity with the Judgment of April 14, 2021.

30. If, however, the holding is understood, as the parties have, to mean that the appellants could not commence fresh disciplinary and removal proceedings on the basis of the allegations of misconduct or impropriety surrounding the bank withdrawals on or around September 1, 2015 and the management of 3rd appellant Car Loan and Mortgage Fund, then the finding would be a departure from the decision of April 14, 2021 because its effect would be diametrically different from the decision. The learned Judge would have exceeded the power of Review granted to him by statute and, with respect, erred.

31. I would propose that the appeal be allowed, and so as to remove further confusion, a clarification be made that the Judgment of April 14, 2021 of the ELRC does not bar the appellants from commencing fresh disciplinary and removal proceedings on the basis of allegations of misconduct made against the respondent in respect to circumstances surrounding the withdrawal of funds from the assembly's Bank at Co-operative Bank Siaya Branch on or around September 1, 2015 and appropriation of those funds. I would further propose that each party to this appeal bears its own costs on this appeal.

Judgment of Kiage, JA

32. I have had the advantage of reading in draft the judgment of Tuiyott, JA. I entirely agree with his reasoning and conclusions, and have nothing useful to add.

33. As Muchelule, JA is also in agreement, the final orders in the appeal are as proposed by Tuiyott, JA.

Judgment of Muchelule, JA

34. I have had the advantage of reading in draft the judgment of Tuiyott, JA, with which I am in full agreement and have nothing useful to add.

DATED AND DELIVERED AT KISUMU THIS 21ST DAY OF JULY, 2023

F. TUIYOTT

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

A. O. MUCHELULE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR