



**Kaudo & another v Speaker, County Assembly of Homabay &
2 others; Nyangi & 3 others (Interested Party) (Civil Appeal
E036 of 2021) [2022] KECA 112 (KLR) (11 February 2022) (Judgment)**

Neutral citation: [2022] KECA 112 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPEAL E036 OF 2021
PO KIAGE, M NGUGI & F TUIYOTT, JJA
FEBRUARY 11, 2022**

BETWEEN

DANIEL ODHIAMBO KAUDO 1ST APPELLANT

BRIAN ODHIAMBO 2ND APPELLANT

AND

SPEAKER, COUNTY ASSEMBLY OF HOMABAY 1ST RESPONDENT

HOMABAY COUNTY ASSEMBLY SERVICE BOARD 2ND RESPONDENT

HOMABAY COUNTY ASSEMBLY. 3RD RESPONDENT

AND

MICHEAL NYANGI INTERESTED PARTY

PETER JUMA OWUOR INTERESTED PARTY

LILIAN OGONO INTERESTED PARTY

JOSEPH OKOTO INTERESTED PARTY

*(An appeal from the Judgment of the Employment & Labour Relations Court at
Kisumu (Radido, J.) dated 17th December 2020 in ELRC Petition No. 27 of 2020)*

JUDGMENT

JUDGMENT OF KIAGE, J.A

1. By this appeal, the 1st appellant challenges the judgment of the Employment & Labour Relations Court (Radido, J.) rendered on 17th December, 2020, by which the learned Judge dismissed his petition, holding that his gazettelement as Clerk of the County Assembly of Homabay was illegal and



- consequently he was not validly in office. Hinged on that reasoning, the court determined that there was no legal foundation for it examining whether the 1st appellant's suspension and removal from office was in consonance with the law governing the procedure for suspending and/or removing a County Assembly Clerk from office.
2. The 1st appellant had sought various reliefs in the petition, including declarations that; the unilateral decision by the respondents to suspend and remove him as Clerk of the County Assembly of Homabay amounted to a witch hunt and violated his right to a fair trial as envisaged under **Article 50** of [the Constitution](#), and his suspension and removal was without due process in violation of **Article 47** of [the Constitution](#).
 3. The 1st appellant disputes the judgment of the High Court on a dozen grounds which, condensed, are that the learned Judge erred in law and fact by;Failing to find that the appointment of a Clerk of a County Assembly ends with the County Assembly Service Board.Failing to find that there is no requirement for a gazette notice to issue to the appointed clerk.Holding that the appointment of the 1st appellant as Clerk was invalid by virtue of him being gazetted by the deputy speaker.Expunging out pleadings irregularly filed but still relying on them to render his judgment.Deciding the petition on unpleaded and irrelevant issues.Failing to determine the real dispute before court, which was whether the suspension of the appellant was regular, proper, lawful and legal;Failing to hold that the 2nd respondent did not sanction the removal and/or suspension of the 1st appellant.Failing to find that the subsequent disciplinary actions after the impugned suspension of the 1st appellant were null and void ab initio.
 4. He seeks a multiplicity of prayers including that, the impugned judgment be set aside and he be reinstated to the position of Clerk of the County Assembly of HomaBay.
 5. When the appeal came up for hearing, learned Counsel Mr. Makokha appeared for the 1st appellant, Mr. Onsongo appeared for the 1st respondent, while Mr. Mwamu appeared for the “interested parties” even though this Court’s Rules do not envisage the use of the phrase “interested parties”. The 1st appellant had filed his written submissions together with a bundle of authorities. On record are also further submissions for the “interested parties” even though there is no indication of another set of submissions having been filed earlier. The record does not also bear out filed submissions by the respondents.
 6. The parties’ advocates highlighted their submissions at the hearing for the appeal. For the 1st appellant, Mr. Makokha complained that the court downed its tools upon determining that the 1st appellant was improperly gazetted, yet gazettelement is not a requirement under the law. Counsel further pointed out that pursuant to section 13(1) of the [County Government Act](#), Act No. 17 of 2017 and section 18 of the [County Assembly Services Act](#), Act No. 24 of 2017**, the process of appointment of Clerk begins and ends with the County Assembly Service Board as evinced by the 1st appellant’s appointment letter. The court was thus faulted for dismissing the 1st appellant’s petition on the basis that he was gazetted as Clerk of HomaBay County Assembly by a person who was not the Speaker of the County Assembly, whereas gazettelement is not a requirement for appointment as Clerk of County Assembly under the law.
 7. Mr. Makokha further contended that the suspension and termination of the 1st appellant was unprocedural for the reasons that he was never informed of the reasons for his suspension, or offered a chance to be heard, or to cross-examine his accusers before an adverse decision was taken against him, contrary to Articles 47 and 50 of the Constitution. Counsel blamed the ELRC for downing its tools without considering the propriety or otherwise of the 1st appellant’s suspension and subsequent removal. He relied on the case of [Judicial Service Commission vs. Mbalu Mutava & Another](#) [2015]



- eKLR for the proposition that an officer cannot be dismissed without being informed of the allegations made against him and being given a fair hearing.
8. Mr. Makokha posited that the “interested parties” and the 1st respondent were undisputed members of the County Public Service Board, with four of the members swearing affidavits denying sanctioning the suspension of the 1st appellant. In the end, counsel urged us to order the reinstatement of the 1st appellant.
 9. For the interested parties, Mr. Mwamu endorsed the appeal, contending that there was no meeting and no suspension of the Clerk. Further, instead of the learned Judge determining whether there was breach of Article 47 of the Constitution, he went off on a tangent to say that the 1st appellant was not an employee. To Counsel, the suspension of the 1st appellant was an acknowledgement of his employment. Mr. Mwamu further affirmed Mr. Makokha’s assertion that there was no requirement for gazettelement of the 1st appellant by the appointing authority and neither was he given a fair hearing, yet, “Even the devil was given a hearing”. Equally, Counsel implored us to reinstate the 1st appellant.
 10. In opposition to the appeal, Mr. Onsongo, for the 1st respondent submitted that the only issue to be determined was whether the judge was right in finding that the 1st appellant was not properly in office. Counsel accused the 1st appellant of being guilty of non-disclosure and concealment of material facts, asserting that the court was not aware of the other cases that dealt with the matter before it. Mr. Onsongo further defended the decision of the learned Judge in determining whether the 1st appellant had a right to the orders sought as proper, arguing that one cannot place something on nothing and expect it to hold. To Counsel, the interested parties could not sanitise the appellant’s ascendency to the office of Clerk. Counsel urged that even though we had been beseeched by his counterpart to review the case, we could not do so because the case was not heard on merit. The most we can do is direct that the matter be heard by another judge. In answer to our questions, Mr. Onsongo conceded that the process of recruitment for the position of Clerk was open and competitive, and that, there was no statutory requirement for gazettelement.
 11. In reply to the 1st respondent’s submissions, Mr. Makokha reiterated that the process of recruitment for the position of Clerk was open and competitive, referring us to the 1st appellant’s letter of appointment, an appointment which apparently the speaker did not agree with. Counsel rejected the claim that the 1st appellant had concealed material facts, arguing that the case on the propriety of the speaker’s position had nothing to do with the 1st appellant. Ultimately we were entreated to re-evaluate the evidence and issue a proper order.
 12. I have given due consideration to the record of appeal, the submissions for and against the appeal together with the authorities cited by counsel, cognizant that as a first appellate Court we have an obligation to re-consider and re-evaluate the evidence and come up with independent conclusions. See *Selle Vs. Associated Motor Boat Co. Ltd* [1968] EA 123 . I however do pay due respect to the conclusions of the first instance court and will not lightly depart from them, but I will not hesitate to do so if satisfied that the learned Judge misapprehended the facts; or misdirected himself on law; or that he took into account matters which he should not have; or failed to take into account considerations which he should have; or that his decision was plainly wrong.
 13. I think that the sole issue for determination is whether the learned Judge erred in holding that the 1st appellant was illegally in office and so there was no legal basis for examining the question before him, namely, whether the suspension and removal of the 1st appellant from office was procedural.
 14. 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, gazettelement, 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, stating as follows;

“Despite the finding, it is obvious to the court that the parties herein did not make candid disclosure. How is it that the Respondents were purporting to suspend and/or commence a removal process for the Clerk if he did not have some form of contractual relationship with the County Assembly?”

15. 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.
16. 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.

Each party shall bear its own costs.

As Mumbi Ngugi and Tuiyott, JJ.A agree, it is so ordered.

DATED AND DELIVERED AT KISUMU THIS 11TH DAY OF FEBRUARY, 2022.

P. O. KIAGE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

JUDGMENT OF MUMBI NGUGI, JA

I am in full agreement with the judgment of my learned brother Kiage, JA and have nothing useful to add thereto.

As Tuiyott, JA is also agreed, the appeal shall be disposed of as proposed by Kiage, JA.

Order accordingly.

DATED AND DELIVERED AT KISUMU THIS 11TH DAY OF FEBRUARY, 2022

MUMBI NGUGI

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

