



**IN THE COURT OF APPEAL**

**AT KISUMU**

**(CORAM: KARANJA, AZANGALALA & GATEMBU, JJ.A)**

**CIVIL APPEAL NO. 84 OF 2015**

**BETWEEN**

**PETER KINGOINA.....APPELLANT**

**AND**

**THE COUNTY ASSEMBLY OF NYAMIRA.....RESPONDENT**

*(Being an appeal from the Judgment and Decree of Employment and Labour Relations Court of Kenya at Kisumu(Maureen Onyango, J.) delivered at Kisumu on 25<sup>th</sup> June, 2015)*

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**JUDGMENT OF THE COURT**

1. The appellant is aggrieved by, and has appealed against the judgment of the Industrial Court (now the Employment and Labour Court) at Kisumu (M. Onyango, J) delivered on 25<sup>th</sup> June 2015 dismissing his suit in Dispute Number 148 of 2014. In that suit, the appellant complained that he was unlawfully, unprocedurally and unfairly removed (impeached) as the Speaker of the County Assembly of Nyamira. He sought a declaration to that effect and an order to quash his impeachment. In the alternative, he sought monetary compensation in the amount of Kshs. 22,645,625.00 as particularized in his memorandum of claim. He also claimed general damages.

**Background**

2. The appellant was elected as Speaker of the County Assembly of Nyamira in March 2013 in accordance with Article 178 of the Constitution of Kenya, 2010. He took the oath of office for that office on 22<sup>nd</sup> March 2013. As the Speaker, he was to preside over sittings of the County Assembly of Nyamira. He did not last long in that position.

3. On 5<sup>th</sup> May 2014, one Keneth Nyameino, a member of the County Assembly, presented a motion to the County Assembly for the removal of the appellant as speaker for misuse of office. The basis of that motion was that the appellant had been implicated “*in the fraudulent procurement process*” in a report tabled before the County Assembly on 30<sup>th</sup> April 2014 by the Public Accounts and Investment Committee of the Assembly on the procurement and award of insurance cover for members of the Assembly.

4. On 12<sup>th</sup> May 2014, the acting Clerk of the County Assembly of Nyamira issued a notice of meeting calling for a special sitting of the County Assembly at 2.30 on the same day. The notice indicated that the order of business would be prayers and the motion dated 5<sup>th</sup> May 2014.
5. The “Minutes of the County Assembly special sitting held on 12<sup>th</sup> May 2014 at 4.30 pm in the Assembly Chambers” contained in the main record of appeal<sup>[1]</sup> indicate under Minute 02 that Hon. Kenneth Atuti Nyameino read the motion dated 5<sup>th</sup> May 2014 “*concerning the removal of the Speaker Hon. Peter King’oina reason being that the procurement procedure to do with the insurance broker Johnceller was not done appropriately*”; and that his sentiments were seconded by Hon. Fred Omayio who informed the Assembly that “*the process of the insurance should have been done in a fair and transparent manner.*”
6. With particular reference to the appellant’s complaint, the Minutes record as follows:

*“The Speaker Hon. Andrew Magangi guided the house according to standing order number 58 that time should be given for the Speaker to come and defend himself. He asked the chief whip Hon. Maroro to look for the Speaker Hon. Peter King’oina.*

*After ten minutes were over, the Chief whip, under the direction of the Speaker Hon. Andrew Magangi, informed the House that he couldn't trace Hon. Mong'are King'oina and further confirmed that the said Hon. Mong'are King'oina had been notified of the day's 2:30pm Session at 11:45am that same day. .”*
7. The Minutes also record that a member of the Assembly stated that the appellant “*should not be given more time, his absence states that he accepts the motion.*” Thereafter the debate proceeded, the motion was adopted and 31 out of 33 members resolved that the appellant be removed as the Speaker after which Hon. Andrew Magangi “*guided the house, that Hon. Speaker Peter King’oina is no longer the Speaker of the House...*”
8. On 14<sup>th</sup> May 2014 the appellant moved the High Court at Kisii through constitutional petition No. 8 of 2014 seeking leave to apply for an order of judicial review in the nature of certiorari to, inter alia, quash the proceedings and decision of the Assembly to impeach him or remove him from office of Speaker. In a ruling delivered in that matter on 5<sup>th</sup> June 2014, the High Court (R. N. Sitati, J) dismissed that application on the grounds that the matter was “*between an employee and his employer*” and that, “*it is only the Industrial Court which can enquire into it.*”
9. On 26<sup>th</sup> June 2014, the appellant instituted proceedings in the Industrial Court at Kisumu that culminated in the impugned judgment that was delivered, as already stated, on 25<sup>th</sup> June 2015.
10. The gravamen of the appellant’s complaint in that suit was that there was no merit in the allegation that he was involved in the alleged fraudulent procurement on the basis of which he was purportedly impeached; and that in any event the process used to remove him did not accord with the law and the rules of natural justice.
11. After considering the memorandum of claim, appellant’s verifying affidavit and documents in support, the respondent’s memorandum of response and documents, and the submissions by the advocates for the parties, the Industrial Court was not persuaded that there was any merit in the appellant’s claim. The court found that the respondent had good reasons for removing or impeaching the appellant as the Speaker of the Assembly. The court also held that the appellant had “*notice and ample opportunity to defend himself against the impeachment*” and proceeded to dismiss the appellant’s claim in its judgment delivered on 25<sup>th</sup> June 2015, the subject of this appeal.

### **The appeal and submissions by counsel**

12. The appellant’s grievances with the judgment of the court as articulated in his memorandum of appeal

are that: the finding by the judge that he was served with a notice of the meeting to impeach him on 12<sup>th</sup> May 2014 and that he did not deny receiving the notice is erroneous; that the finding by the judge that the appellant had ample opportunity to defend himself is erroneous; that the Judge erred in holding that the respondent's impeachment process complied with the Constitution, the County Governments Act and relevant standing orders of the County Assembly; and that the judge erred in finding that the appellant had a role in the award of the insurance tender on the basis of which he was purportedly impeached.

13. During the hearing of the appeal, Mr. E. Z. Ongoya learned counsel for the appellant began by urging the Court to disregard, and to expunge from the record, the respondent's supplementary record of appeal filed on 16<sup>th</sup> November 2016. He submitted that the documents the respondent is seeking to introduce through the supplementary record are new in the sense that they were not part of the documents before the lower court; and that the respondent is in effect seeking to adduce additional evidence without heeding the requirements of Rule 29 of the Rules of the Court.

14. Turning to the grounds of appeal in the memorandum of appeal, Mr. Ongoya submitted that the process of removal of a Speaker of a County Assembly is a quasi-judicial process requiring observance of due process. In that regard, counsel referred us to numerous authorities in the appellant's list and bundle of authorities including the decision of this Court in **County Assembly of Kisumu & 2 others vs. Kisumu County Assembly Public Service Board & 7 Others [2015] eKLR**.

15. In this case, counsel argued, there was a total failure by the respondent to follow the procedure laid out in the Constitution, the County Government Act and the Standing Orders of the County Assembly for the removal of a speaker; that under Article 178(2) of the Constitution for instance the sitting of the County Assembly should have been presided over by "*another member of the assembly elected by the assembly*"; that instead, the sitting was presided over by a person unknown by relevant law and who was referred to as 'deputy speaker'.

16. Regarding the notice of the meeting purportedly served on the appellant, counsel pointed out that the alleged notice was dated 12<sup>th</sup> May 2014, the very date on which the sitting to impeach the appellant was to take place; that on the face of the alleged notice itself, the appellant is not one of the addressees; that even under the County Assembly's own standing orders, in particular Standing Order No. 26, the process of convening a special sitting of County Assembly was not heeded.

17. On the substance of the complaint before the County Assembly, counsel pointed out that the appellant as the Speaker was not involved in, and had no role to play in the procurement processes of the County Assembly.

18. In his address, Mr. F. Walukwe, learned counsel for the respondent began by urging that the documents contained in the supplementary record of appeal do not constitute additional evidence; that indeed the appellant referred to the impeachment motion in his judicial review application; and that the Judge in the lower court also makes reference to the Hansard and to the minutes.

19. On the appeal itself, Mr. F. Walukwe maintained that the Judge was right in holding that the provisions of the Constitution, the County Governments Act and the Standing Orders relating to the removal of a Speaker of the County Assembly were duly complied with; that the Deputy Speaker who presided over the sitting is indeed the person envisaged under Article 178(2) of the Constitution; that the Deputy Speaker was elected by the members of the County Assembly the same day the Speaker was elected; and that the notice of meeting for impeachment was served on the appellant and the appellant acknowledged having received it.

20. As to the reasons for impeachment, counsel submitted that there were good grounds for doing so; that the report of the Public and Investment Committee of the County Assembly implicated the appellant in an irregular award of a tender for procurement of insurance; that despite a recommendation for re-advertisement of the same, a tender in favour of an entity known as Johncele Insurance was approved on recommendation of the service board where the appellant was chair.

21. As regards the reliefs sought, counsel argued, the position of Speaker has already been filled and the reinstatement of the appellant as Speaker is not viable. With that, counsel urged us to dismiss the appeal.

### **Analysis and determination**

22. We have considered the appeal and submissions by counsel. The principal question in this appeal is whether there was due process in the impeachment or removal of the appellant as the Speaker of the County Assembly of Nyamira. Before we deal with that question, there is the preliminary issue whether the supplementary record of appeal is properly on record.

23. The documents contained in the supplementary record of appeal comprise the motion dated 5<sup>th</sup> May 2014 for the removal of the appellant as speaker presented to the County Assembly by Kenneth Nyameino; an undated notice of motion to remove the appellant as speaker signed by numerous members of the County Assembly of Nyamira; and a copy of Hansard report of the County Assembly for Monday 12<sup>th</sup> May 2014. A copy of the motion dated 5<sup>th</sup> May 2014 by Kenneth Nyameino also appears in the original record of appeal at page 488 except that the copy of the motion in the supplementary record bears stamps of the County Assembly and of the Legal counsel of the County Assembly that do not appear in the copy in the original record.

24. The undated motion signed by numerous members of the County Assembly does not appear in the original record and is not mentioned either in the proceedings or the judgment in the lower court. The Hansard report of the special sitting of the County Assembly of Monday 12<sup>th</sup> May 2014 is at variance, materially, with the Minutes of the County Assembly special sitting of the same date appearing at page 464 of the original record of appeal. The stamp date by the Hansard Editor in the Hansard record of 12<sup>th</sup> May 2014 is 26<sup>th</sup> July 2016. That was well after the proceedings in the lower court had been concluded. That report could not, therefore, have formed part of the record that was before the lower court.

25. It was incumbent upon the respondent, if it wished additional evidence to be taken, to apply to the court under Rule 29 of the Rules of the Court. It did not do so. The supplementary record filed on 16<sup>th</sup> November 2016 was therefore irregularly introduced to the prejudice of the appellant who did not have an opportunity to interrogate those documents in the lower court. We accordingly decline the invitation to make reference to the supplementary record of appeal and order the same to be, and is hereby expunged from the record.

26. Turning to the appeal itself, the central issue, as already indicated is whether there was due process in the impeachment or removal of the appellant as speaker of the County Assembly. The complaint that there is no provision in law for a deputy speaker of a county assembly was not a matter that was canvassed before the lower court and neither did it form the basis of the impugned decision. It is not necessary to address it in this appeal. Furthermore, the issue not having arisen in the lower court, there was no material to show that the 'deputy speaker' was not duly elected by the members of the county assembly in accordance with Article 178(2) of the Constitution.

27. Article 178(2) of the Constitution provides that a sitting of the County Assembly shall be presided over by the Speaker, or in his absence, another member of the assembly elected by the assembly. Under Article 178(3) of the Constitution, Parliament was enjoined to enact legislation providing for the election and removal from office of speakers of the county assemblies. It did so by enacting the County Governments Act, Act No. 17 of 2012. Section 11 provides:

***“(1) A speaker of a county assembly may be removed from office by the county assembly through a resolution supported by not less than seventy five percent of all the members of the county assembly.***

***(2) A notice of the intention to move a motion for a resolution to remove the speaker shall be given in writing to the clerk of the county assembly, signed by at least one third of all the members of the county assembly stating the grounds for removal.***

***(3) A motion for a resolution to remove the speaker shall be presided over by a member of the county assembly elected under section 9(4).***

***(4) Before the debate and voting on a motion under subsection (3), the speaker shall be accorded an opportunity to respond to the allegations on the floor of the county assembly.”***

28. In response to the appellant’s complaint before the lower court that he was not accorded an opportunity to be heard, the respondent pleaded in paragraph 8(i) of its memorandum of response that “proper notices calling for a County Assembly sessions were issued including but not limited to the meeting to impeach the [Appellant]. They all complied with existing standing orders.”

29. The notice of the meeting convening the special sitting of the assembly in which the motion dated 5<sup>th</sup> May 2014 was an order of business is dated 12<sup>th</sup> May 2014. It was addressed to the Deputy Speaker and all members of the County Assembly of Nyamira and reads as follows:

***“The Deputy Speaker***

***All Members, County Assembly of Nyamira***

***RE: NOTICE OF MEETING***

***Notice is hereby given that there shall be a County Assembly Special sitting on Monday 12<sup>th</sup> May, 2014 at 2.30pm.***

***ORDER OF BUSINESS***

***1. Prayers***

***2. Motion dated 5<sup>th</sup> May, 2014***

***(By Hon. Kenneth Atuti Nyameino)***

***Mr. DUKE ONYARI***

***AG. CLERK,***

***COUNTY ASSEMBLY OF NYAMIRA***

***DISTRIBUTION***

***All Members***

***IN ATTENDANCE***

***Interim Clerk***

***Accountant***

***Human Resource Officer***

***Hansard***

***Administrative Officer***

***Sergent-At-Arm***

## ***Legal Counsel***

30. Quite apart from the fact that the notice made no specific reference to the appellant or that the appellant was an intended recipient of that notice, it was issued on the same day the special sitting of the County Assembly was to take place to debate the removal of the appellant as the Speaker. The minutes of the meeting of the County Assembly to which we have already made reference indicate that the appellant was notified at 11.45 am of the sitting that was scheduled for 2.30 pm on the same day.

31. That cannot, in our view, be sufficient time for purposes of Section 11(4) of the County Governments Act, within which the appellant would have been expected to prepare and respond meaningfully to a motion for his removal as speaker. As this Court held in County Assembly of Kisumu & 2 others vs. Kisumu County Assembly Public Service Board & 7 Others (above):

***“Whereas the right to a fair hearing varies from one case to another depending on the subject of the matter in issue, its irreducible minimum is now well settled. In granting that right, the court or the administrative body or person concerned should not make it a charade by taking perfunctory actions for the sake of running through the motions to be seen to have complied with it. The person charged is entitled to what, in legal parlance is referred to as the right to “notice and hearing.” That means he must be given written notice which must contain substantial information with sufficient details to enable him ascertain the nature of the allegations against him. The notice must also allow sufficient time to interrogate the allegations and seek legal counsel where necessary.” [emphasis]***

32. The learned Judge of lower court proceeded on the basis that the appellant had appeared before the Public Investments and Accounts Committee when that committee was investigating the irregular award of insurance tender and was aware of the adoption of the report that recommended his impeachment. According to the Judge therefore, the appellant had notice and ample opportunity to defend himself against the impeachment but instead of “going to plead his case at the County Assembly on 12<sup>th</sup> May 2014... [he]...opted to forego the sitting and go to court.” With respect, that is misdirection.

33. The fact that the appellant appeared before the Public Investments and Accounts Committee that interrogated the irregular tender did not lessen the need for the County Assembly to respect the appellant’s rights under Section 11(4) of the County Governments Act by according him a meaningful opportunity to respond. What Section 11(4) requires is for the appellant to have an opportunity, “on the floor of the County Assembly” to respond to the allegations. An opportunity to appear before the committee could not have been a substitute for an opportunity to appear before the County Assembly on which the fate of the appellant as Speaker lay. It was also within the appellant’s right to “go to court” as he did to seek redress and the adverse inference drawn by the court against the appellant for doing so is regrettable.

34. We have said enough to demonstrate that we must interfere with the decision of the lower court. We accordingly allow the appeal and set aside the judgment and decree of the Employment and Labour Relations Court dated 25<sup>th</sup> June 2015. We substitute therewith judgment for the appellant against the respondent in terms of prayers 24(a) and (b) of the memorandum of claim dated 24<sup>th</sup> June 2014. Prayers 24(c) and (e) of the memorandum of claim are declined.

35. Considering that the suit before the lower court was determined on the basis of the pleadings and affidavits without viva voce evidence, we are unable to determine prayer 24(d) of the memorandum of claim as there is no material before us on the basis of which to consider that prayer. In the circumstances, we order that prayer 24(d) of the memorandum of claim be, and is hereby remitted back to the Employment and Labour Relations Court (before any judge of that court other than M. Onyango, J) to determine whether the appellant is entitled to any of the heads of reliefs sought thereunder and to assess the quantum of compensation payable to the appellant under any of those heads, if any.

36. The appellant shall in any event have the costs of this appeal.

Orders accordingly.

**Dated and delivered at Kisumu this 10<sup>th</sup> day of February, 2017.**

**W. KARANJA**

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**JUDGE OF APPEAL**

**F. AZANGALALA**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, FCI Arb**

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**JUDGE OF APPEAL**

I certify that this is a true

copy of the original.

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**DEPUTY REGISTRAR**

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[\[1\]](#) We have declined to make reference to the minutes and other documents contained in a supplementary record of appeal filed in this Court on 16<sup>th</sup> November 2016 for reasons given later in this judgment.