



**IN THE COURT OF APPEAL**

**AT KISUMU**

**CORAM: MARAGA , AZANGALALA & KANTAI, JJ.A**

**CIVIL APPEAL NO. 51 OF 2014**

**BETWEEN**

- 1. THE SPEAKER OF THE COUNTY ASSEMBLY - KISII COUNTY.....1<sup>ST</sup> APPELLANT**
- 2. THE COUNTY ASSEMBLY SERVICE BOARD - KISII COUNTY.....2<sup>ND</sup> APPELLANT**
- 3. DANIEL MBAKA OMWOYO.....3<sup>RD</sup> APPELLANT**

**AND**

**JAMES OMARIBA NYAOGA..... RESPONDENT**

Appeal from judgment and decree of Hon. Justice Byram Ongaya (judge) Dated and delivered at Nakuru on the 23<sup>rd</sup> day of May 2014

in

**KISUMU INDUSTRIAL COURT PETITION NO. 88 OF 2014**

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**JUDGMENT OF THE COURT**

The appellants, the Speaker of the County Assembly of Kisii County ("the 1<sup>st</sup> appellant"), the County Assembly Service Board of Kisii County ("the 2<sup>nd</sup> appellant") and Daniel Mbaka Omwoyo ("the 3<sup>rd</sup> appellant") were the respondents in Kisii Constitutional Petition No. 88 of 2014, filed by James mariba Nyaoga ("the respondent"). In that petition, the respondent sought various declarations including:- that he was the duly appointed and constituted Clerk of Kisii County Assembly, and that the 1<sup>st</sup> and 2<sup>nd</sup> appellants had committed unfair labour practices, had mistreated the respondent and were guilty of gross abuse of office; that the 1<sup>st</sup> appellant had violated and/or acted in contravention of the provisions of the County Government Act No. 17 of 2012. The respondent further sought a permanent injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> appellants from appointing and/or constituting the 3<sup>rd</sup> appellant as the interim Clerk and Accounting Officer of Kisii County Assembly. A further permanent injunction was sought to restrain the 3<sup>rd</sup> appellant or any other person, fronted by and/or at the instance of the 1<sup>st</sup> appellant from assuming and/or purporting to act as the interim Clerk and

Accounting Officer of the Kisii County Assembly. The petition was supported by the respondent's affidavit.

When served, the appellants resisted the petition by way of a replying affidavit sworn by one Samwel Kerosi Ondieki who held the office of Speaker of Kisii County Assembly. It was also deposed, in that replying affidavit, among other things, that the respondent was never constituted as the Clerk of the Kisii County Assembly and that the letter of appointment which purported to say so had no legal effect as section 13 of the County Government Act and Articles 74, 77 (1), 232(1)(g) of the Constitution were not complied with. The appellants further denied breach of any provision of the Constitution.

Eventually the petition came up for hearing, before Ongaya J., who, after considering the affidavits filed and submissions of counsel for the parties, allowed the petition and all the reliefs sought in the petition, thus provoking this appeal premised upon seven (7) grounds of appeal. In our view however, those grounds raise the following issues: whether the respondent had been validly appointed the Clerk of Kisii County Assembly even though Sections 8, 12, 13, 14 and 77 of the County Government Act had not been complied with; whether the petition should have been stayed as matters canvassed therein were caught by the subjudice rule and whether it was open to the learned Judge to consider integrity issues when the same had not been canvassed before him.

When served with the appeal, the respondent lodged a cross-appeal citing five (5) grounds in the cross-appeal. In our view however, there is only one issue in the cross-appeal namely, whether the learned Judge should have found that the 1<sup>st</sup> appellant committed acts of perjury by swearing to falsehoods and in failing to so find the learned Judge misconstrued the applicable standard of proof to demonstrate perjury.

Mr. Otieno O.M, learned counsel for the appellants, relied upon written submissions which had been filed with the leave of the court. In highlighting the same before us, learned counsel emphasized that the respondent at all material times remained an officer of the Transition Authority and the Chairman of that Authority had confirmed that position in a letter which was produced before the learned Judge, yet the letter was ignored. It was also learned counsel's contention that notwithstanding letters of appointment addressed to the respondent, for his appointment to be valid, the procedure for appointment laid down in Section 13 of the County Government Act had to be strictly adhered to which procedure had not been followed before the said letters were addressed to the respondent. In learned counsel's view, the letters of appointment addressed to the respondent upon which the learned Judge relied to find for the respondent were limited in time and purpose as the 1<sup>st</sup> appellant had explained in his affidavit in opposition to the petition of the respondent. Learned counsel further contended that in finding in favour of the respondent, the learned Judge gave effect to an illegality. Learned counsel further submitted that there was no warrant to refer alleged integrity issues to the Ethics and Anti-Corruption Commission as the same had not been sought.

On the cross-appeal, learned counsel supported the findings of the learned judge and submitted that there was indeed no evidence of perjury.

In response to the submissions made on behalf of the appellants, Mr. Oguttu, learned counsel for the respondent, also filed written submissions which he highlighted as follows: that the respondent had initially been seconded to Kisii County Assembly as its interim Clerk but was subsequently appointed as the substantive Clerk of Kisii County Assembly; that the appointment was communicated to the respondent in two letters addressed to him by the 2<sup>nd</sup> appellant which letters were signed by the 1<sup>st</sup> appellant; that before the delivery of the said letters the Kisii County Assembly approved the appointment; that the subjudice rule did not apply; and that no illegality had been demonstrated by the appellants.

On the cross-appeal, learned counsel submitted that the affidavits sworn by the 1<sup>st</sup> appellant clearly contained falsehoods which were deliberately made given that the 1<sup>st</sup> appellant is himself an advocate of the High Court and knew or ought to have known the consequences of making falsest statements under

oath. In learned counsel's view, a finding that the 1<sup>st</sup> appellant committed perjury should have been made.

We have considered the record, the grounds of appeal, the submissions of learned counsel, the authorities cited and the law. Having done so, we think a determination of this appeal turns on whether the provisions of Section 8, 12, 13 and 14 of the County Government Act applied in the circumstances which obtained before the learned Judge.

The undisputed fact is that the respondent was initially seconded to Kisii county Assembly as the latter's interim Clerk by the Transition authority. The deployment was conveyed to the respondent in a letter dated 25<sup>th</sup> February, 2013. The opening paragraph stated:

***" This is to convey the decision of the Public Service commission of Kenya (PSC(K)) vide their letter Ref. No. PSC/ADM/91 dated 25<sup>th</sup> February, 2013 that you be deployed to the Transition Authority with effect from 12<sup>th</sup> February, 2013 as an interim Clerk of County Assembly. You are therefore deployed to Kisii County and you should report to the County commissioner. "***

The respondent accepted the deployment and embarked upon his duties as such interim Clerk.

Also undisputed is the fact that the County Assembly of Kisii at a later stage required the services of a substantive Clerk rather than an interim one. In that regard, the 1<sup>st</sup> appellant on 30<sup>th</sup> April, 2013 wrote to the respondent stating as follows:-

**"RE: APPOINTMENT**

***I am happy to convey the decision of Kisii County Assembly to approve your appointment on 29/4/2013. The County Assembly Service Board accordingly appoints you as the Clerk of Kisii County Assembly with effect from 29/4/2013.***

***your terms of service will be:***

***(a) Basic salary of Kshs.180,000/= per month***

***(b) House allowance Kshs.46,250/= per month***

***(c) Commuter allowance Kshs. 18,500/= per month***

***your incremental date will be determined in accordance with available regulations. I take this opportunity to congratulate you on your new appointment Please signify in writing your acceptance of this offer of appointment.***

***Yours faithfully,***

***KEROSI ONDIEKI***

***FOR: KISII COUNTY ASSEMBLY SERVICE BOARD***

There is no dispute that the respondent accepted the new appointment. Another undisputed fact is that on 10<sup>th</sup> July, 2013 the 1<sup>st</sup> appellant addressed another letter to the respondent in the following terms:-

**" RE: APPOINTMENT**

***Following the decision of the County Assembly Service Board at its meeting held on 9<sup>th</sup> July, 2013, I am pleased to inform you that you have been appointed to the position of CLERK OF THE ASSEMBLY with effect from 29<sup>th</sup> April, 2013.***

*The salary attached to this post is in Scale 15 Kshs.156,000 x 9000 – 176,000 x 9500- 198,500 x 10000 – 222,500 x 10,500 – 24,800 x 20,000 – 286,000 per month. You will enter scale at the rate of Kshs.198,500 per month and your incremental date will be April,2013.*

*You shall be entitled to the following allowances:-*

*1. House Allowance - 90,000 2. Extraneous Allowance 40,000 3. Domestic Staff Allowance - 20,000 4. Entertainment Allowance - 40,000 5. Transport Allowance 30% of basic salary 6. Responsibility. Allowance- 35% of basic salary.*

*Please note that this appointment is subject to verification of your academic and professional qualifications.*

*Yours Faithfully,*

**HON. SAMWEL KEROSI ONDIEKI**

**CHAIRMAN COUNTY ASSEMBLY SERVICE BOARD “**

There is no gainsaying also that the respondent performed his duties at Kisii County Assembly as its Clerk until the month of December, 2013 when the smooth sailing hit troubled waters. On 27<sup>th</sup> December, 2013 the 1<sup>st</sup> appellant wrote to the Chairman Transition Authority complaining about the performance of the respondent and ultimately concluded as follows:-

*"On behalf of the County Assembly Service Board, I hereby request that the interim Clerk Mr. James O. Nyaoga be recalled and replaced with another officer who may be well conversant with the operations and mandate of the County Assembly. Thanking you in advance.*

**HON. KEROSI ONDIEKI**

**SPEAKER KISII COUNTY ASSEMBLY"**

The Chairman Transition Authority did not disappoint. On 7<sup>th</sup> January, 2014 he addressed a letter to the respondent in the following terms:-

**"RE: DEPLOYMENT BACK TO THE TRANSITION AUTHORITY**

*The transition authority has received communication from the County Assembly - Kisii, indicating that there are issues emanating from your office that are causing disharmony and, therefore hampering the operations of the Assembly.*

*Regrettably, therefore, we have to recall you back to the Transition Authority with effect from the date of this letter, for re -deployment. This should enable the Kisii County Assembly to operate smoothly.*

*Consequently, do a comprehensive handing over report to the Deputy Clerk of the Assembly - Kisii and thereafter, report to the undersigned for further instructions.*

*I wish to thank you for the ,support you have given to the Transition process while serving the County Assembly of Kisii.*

**KINUTHIA WAMWANGI**

**CHAIRMAN"**

The respondent replied to that letter in the following terms:-

**“RE - DEPLOYMENT: JAMES OMARIBA NYAOGA P/N0.201003258**

*Your letter dated 7<sup>th</sup> January, 2014 refers.*

*I reported to Kisii County Assembly as an interim Clerk on 5/3/2013. Upon the recommendation of the County Assembly Service Board on 24/4/2014 that I be confirmed as a substantive Clerk, I was presented before the County Assembly debating Chambers on 29/4/2013 where elected members unanimously approved my appointment as a Clerk of Kisii County Assembly. Thereafter, I was given an appointment letter by the Speaker Mr. Kerosi Ondieki. I did not inform the Transition Authority immediately because structures that could make it possible for transfer of service to County Assembly were not in place. Being a substantive clerk therefore, the said differences between me and the speaker are minor and can be handled through the County Assembly Service Board.*

*Yours faithfully,*

*James Omariba Nyaoga*

*Clerk, Kisii County Assembly.”*

The respondent must have underestimated the dispute between him and the 1<sup>st</sup> appellant and by extension the 2<sup>nd</sup> appellant because, he thereafter claimed his office was on 9<sup>th</sup> January, 2014, closed by hooligans who were in the company of the 1<sup>st</sup> appellant. Eventually, according to the respondent, on 28<sup>th</sup> April, 2014 the 1<sup>st</sup> appellant chased him from his office after purporting to constitute the 3<sup>rd</sup> appellant as an interim Accounting Officer.

Those actions prompted the respondent to lodge the petition which was heard by Ongaya J., as already stated.

The appellants' stand- point before Ongaya J., and also before us was summarized in the submissions made on their behalf as follows:-

***" That for one to be approved as the Clerk to a County Assembly, there must be an appointment first by the County Assembly Service Board. Secondly, the appointee must be approved by the County Assembly and this approval must have a vetting process with involvement of the public through a committee of the County Assembly and whereby the report of the Committee is finally tabled on the floor of the house for the County Assembly to debate on the approval or not. And if the County Assembly approves the appointee then his name is duly gazetted whereby he officially takes office by taking an oath of office under Section 12(2) and the first schedule (OATH OF OFFICE FOR COUNTY ASSEMBLY CLERK) of the County Government Act.***

So, the appellants contended that notwithstanding the letters of appointment dated 30<sup>th</sup> April, 2013 and 10<sup>th</sup> July, 2013 the respondent could not be considered as the substantive Clerk of Kisii County Assembly on the ground that he had not gone through a vetting process of a committee of the Kisii County Assembly where the public had participated and a report of such process tabled on the floor of Kisii County Assembly, debated and approved or otherwise, before gazettement. The appellants further argued that the respondent had not taken the oath of office.

In our view, if these contentions were made by concerned and patriotic members of the public or persons interested in good governance, they would deserve sympathetic appreciation. The reasons why we say so will become apparent from what follows.

That the respondent was initially seconded to Kisii County Assembly as its interim Clerk by the Transition Authority is plain beyond peradventure. The letter of that Authority addressed to him saying so has already been reproduced in this judgment and the respondent's status at that time was clear to all concerned. The learned Judge of the lower court took the view that the respondent "*had long time ago before the transitional circumstances been engaged in the public service; he was competitively recruited by the Public Service Commission for deployment to the County Assembly as interim Clerk; and it cannot be said that the subsequent substantive appointment as Clerk did not meet the constitutional and statutory tests of meritocracy and inclusion because the relevant constitutional and statutory provisions carefully provided for the kind of the petitioners appointment as clerk during the unique transitional season.*"

The appellants did not seriously challenge the Learned Judge's finding that the respondent even before being seconded to Kisii County Assembly had gone through a vetting process. In our view, given that uncontested finding, the mischief which the aforesaid provisions of the County Government Act intended to cure did not exist when the respondent was substantively appointed Clerk to Kisii County Assembly. We say substantively appointed because the letters addressed to the respondent by the 1<sup>st</sup> appellant in that regard were unequivocal. The contents of those letters have also been reproduced above. The letter of 30<sup>th</sup> April, 2013 announced that Kisii County Assembly had, on 29<sup>th</sup> of the same month approved the respondent's appointment which appointment, Kisii County Assembly Service Board effected from the 29<sup>th</sup> April, 2013 on terms Clearly spelt out in the letter. Those terms were somewhat altered in favour of the respondent in the second letter of appointment dated 10<sup>th</sup> July, 2013. The second letter, again without any ambiguity, stated that Kisii County Assembly Service Board had, at its meeting held on 9<sup>th</sup> July, 2013 appointed the respondent to the position of "CLERK OF THE ASSEMBLY" with effect from 29<sup>th</sup> April, 2013.

Significantly, the two letters of appointment were signed by Kerosi Ondieki who at the time, held the position of Speaker of Kisii County Assembly. In the first letter of 30<sup>th</sup> April, 2013, he signed for Kisii County Assembly Service Board whilst in the second letter of 10<sup>th</sup> July, 2013 he signed as Chairman of Kisii County Assembly Service Board. It is also significant that in the first letter he stated that he was conveying the decision of Kisii County Assembly and in the second letter he was conveying to the respondent the decision of Kisii County Assembly Service Board of which he was the Chairman. It is illustrative that those letters conveyed to the respondent the results of a process. In the first letter reference was made to a decision of the Kisii County Assembly which the County Assembly Service Board was implementing and the second letter made reference to the decision of Kisii County Assembly Service Board.

It was not suggested that the respondent dishonestly or unlawfully instigated the process leading to his appointment nor was it alleged that the two letters were forgeries or otherwise fraudulently obtained. The 1<sup>st</sup> appellant in fact in his replying affidavit in answer to the respondent's petition deposed, in part, as follows:

***" 13. THAT besides, the letter(s) of appointment dated the 30<sup>th</sup> day of April 2013 and 10<sup>th</sup> day of July 2013, are of no legal effect in so far as the Petitioner did not comply with the requirements in the subject letters and the same are of no legal effect as the same did not constitute appointment of the same, as clerk as mandatorily provided for under Section 13 of the County Government Act 2012 and Articles 74, 77(1) and 232(1)(g) of the Constitution of Kenya 2010."***

The 1<sup>st</sup> appellant did not challenge the authenticity of those letters. He did not deny signing them either. He only discredited them because, in his view, section 13 of the County Government Act and the cited Articles of the Constitution were not complied with in the appointment of the respondent. But why did it take him more than eight (8) months to discover that the appointment of the respondent contravened the said provisions of the County Government Act and the Constitution? The answer, in our view, is not difficult to find. On 20<sup>th</sup> December, 2013 the respondent claimed he received an internal memo from

the Director Legal and Legislative Services of Kisii County Government which stated:

***“SUBJECT: APPLICATION FOR RENEWAL OF PRACTICING CERTIFICATE 2014***

***Under the provision of the Advocates Act and Law Society of Kenya Act, we are supposed to renew our practicing Certificate for the year 2014 starting the 1<sup>st</sup> of January, 2014***

***"Kindly approve funds for me and the Hon. Speaker each as follows:-***

- i) Professional indemnity cover .....Kshs.100,000.00***
- ii) Practicing Certificate.....Kshs. 18,000.00***
- iii) Advocates benevolent fund .....Kshs. 60,000.00***
- iv) Accountants Certificate rules.....Kshs.10,000.00***
- TOTAL .....Kshs.178,000.00***

***Gideon M. Nyambati***

**DIRECTOR, LEGAL AND**

**LEGISLATIVE SERVICES"**

This internal memo was endorsed by the 1<sup>st</sup> appellant with remarks:

*"process for both"* which remarks carried his signature.

The respondent deposed that he declined to authorize payment of the above sums since the same related to private matters of the Director of Legal Services , Litigation and Corporate Affairs and those of the 1<sup>st</sup> appellant.

To this charge, the 1<sup>st</sup> appellant said nothing in the replying affidavit he filed in answer to the petition. One would have expected some form of rejoinder in his supplementary affidavit which he filed in order to clarify matters he claimed were unclear in the replying affidavit, petition and supporting affidavit. However, no single paragraph of the supplementary affidavit was devoted to denying the clear and specific charge of abuse of office made by the respondent.

The date of the internal memo is significant i.e 20<sup>th</sup> December, 2013. The respondents refusal to authorize the illegitimate payments requested for by the director Legal Services, Litigation and Corporate Affairs and the 1<sup>st</sup> appellant must have stung the 1<sup>st</sup> appellant as it elicited immediate response which took the form of the letter dated 27<sup>th</sup> December, 2013 addressed to the Chairman, Transition Authority by the 1<sup>st</sup> appellant. By refusing to act illegally, the respondent in the eyes of the 1<sup>st</sup> appellant became incompetent overnight and had to be got rid of hence the request in the said letter made to the Chairman of the Transition Authority to recall the respondent. The 1<sup>st</sup> appellant, in his hurry, forgot that he had authored the letters of appointment referred to above

It is significant that in the said letter to the Chairman of the Transition Authority, the 1<sup>st</sup> appellant did not allude to the recruitment of the respondent without complying with the provisions of the County Government Act and the Constitution. He also did not suggest in the said letter that the respondent had been issued with letters of appointment which were limited in time and purpose.

But were the letters indeed limited in time and purpose as the 1<sup>st</sup> appellant claimed? In the said

supplementary affidavit the 1<sup>st</sup> appellant deposed, inter alia, as follows:-

**" 11. THAT besides, I know of my own knowledge that whereas the petitioner continued to serve as the interim County Assembly Clerk by virtue of his aforesaid secondment to the County Assembly of Kisii the same was still facing the challenges of inability to transact financial transactions and deal with the County Assembly accounts, it was agreed that the same be issued with letters which could assist him to present to the Bank or any financial institution so as to enable the subject institutions to deal with the Petitioners (sic) as a result of which two letters of appointments (sic) were informally issued to the Petitioner, that is the letters dated the 30<sup>th</sup> day of April 2013 and 10<sup>th</sup> day of July 2013, for limited purpose of allowing the petitioner to carry out financial transactions as an interim Clerk."**

Unfortunately, the 1<sup>st</sup> appellant did not exhibit the agreement he claimed led to the issuance of the two letters of appointment and as the contents of the two letters of appointment reproduced above are clear, the allegation that the appointment was limited is plainly unsupported. The 1<sup>st</sup> appellant did not also attempt to explain why two letters of appointment containing different remuneration packages had to be issued if the sole purpose they served was to be used as facade in transactions with financial Institutions.

The 1<sup>st</sup> appellant's attempt to vary the terms of the letters of appointment, in our view, offends the provisions of Sections 97 and 98 of the Evidence Act, Chapter 80 Laws of Kenya, which attempt we must reject. This is not the first time we are doing so. In the case of **John Onyancha Zurwe v Oreti Atinda alias Olethi Atinda [Kisumu Civil Appeal No. 217 of 2003] (UR)**, we cited, with approval, Halisbury's Laws of England 4<sup>th</sup> Edition vol. 12, on interpretation of deeds and non Testamentary Instruments paragraph, 1478 as follows:-

**" Extrinsic evidence generally excluded:**

**Where the intention of parties has been reduced to writing it is in general not permissible to adduce extrinsic evidence whether oral or contained in writing such as instructions, drafts, articles, conditions of sale or preliminary agreements either to show that intention or to contradict, vary or add to the terms of the document.**

**Extrinsic evidence cannot be received in order to prove the object with which a document was executed or that the intention of the parties was other than that appearing on the face of the document."**

Heavy weight was made of the failure to comply with the provisions of Section 13 of the County Government Act. However, non-compliance demonstrated by the appellants. We think not. With regard to the office of Clerk of a county assembly the section reads:-

**" 1) There shall be a clerk of the County Assembly, appointed by the County Assembly Service Board with the approval of the County Assembly"**

The letters of appointment issued to the respondent referred to a decision of Kisii County Assembly which had approved the respondent's appointment. The letters were also unequivocal that the appointment was made by Kisii County Assembly Service Board. Those were the express words used by the 1<sup>st</sup> appellant in the letters of appointment. In the said letters the 1<sup>st</sup> appellant was clear beyond peradventure that the respondent, had been appointed by Kisii County Assembly Service Board and approved by Kisii County Assembly. In our view, in the absence of any other document stating the contrary, the letters of appointment demonstrated that there was compliance with the provisions of Section 13 of the County Government Act in appointing the respondent as the Clerk of Kisii County Assembly.

The appellants further complained that the provisions of Section 14(3) (a)(b) and (c) of the same Act were

not complied with in appointing the respondent. The subsection reads:

**"14....."**

**(3) In considering any appointment for which approval of the county assembly is required under the Constitution, an Act of Parliament or County legislation -**

**(a) the appointment shall be considered first by a committee of the county assembly;**

**(b) The Committee's recommendation shall be tabled before the county assembly for approval; and**

**(c) The proceedings of the committee and the county assembly shall be open to the public"**

On the face of the letters of appointment, there cannot be any gainsaying that the provisions of the above sub-section were fully complied with. We are not at liberty to go behind the plain language of those letters as we are alive to the fact that documents speak for themselves as already observed. However, even if we were to go behind the letters of appointment, we would see a copy of the proceedings of Kisii County Assembly of 29<sup>th</sup> April 2013. At paragraph 9, the proceedings read:-

**"9 MOTION (Leader of majority). THAT, this House adopts Min.2/4/2013 of the County Assembly Service Board on the retention and appointment of the interim Clerk of the County Assembly pursuant to the provisions of the County Government Act No.17 of 2012 Section 13(1)....."**

On the same day, ie 29<sup>th</sup> April, 2013 the first letter of appointment was issued to the respondent which letter, in no uncertain terms, stated that Kisii County Assembly had approved the appointment of the respondent as the Clerk of Kisii County Assembly and the appointment of the respondent as such Clerk was made by the 2<sup>nd</sup> respondent. As already observed both letters were authored by the 1<sup>st</sup> respondent. How could he later say that he attended the said proceedings as the presiding speaker and no approval of appointment of the respondent as substantive Clerk to the Assembly happened? What is that statement worth compared with his written word? Do we detect want of condor here? We say no more.

On our part we go with the letter of appointment authored by the 1<sup>st</sup> appellant following the proceedings of Kisii County Assembly of the same date. We further accept as representing the true position, the 2<sup>nd</sup> letter authored by the same 1<sup>st</sup> respondent on 10<sup>th</sup> July, 2013. That being our view of the matter, we agree with the finding of the learned Judge of the lower court that the respondent was duly appointed by Kisii County Assembly Service Board with the approval of Kisii County Assembly and that there was full compliance with the provisions of Sections 8, 13, and 14, of the County Government Act. Our analysis further shows that the learned Judge of the lower court did not offend the provisions of Sections 107, 108 and 109 of the Evidence Act Cap 80 Law of Kenya with regard to burden of proof.

Having found that the respondent's appointment did not offend the provisions of Sections 8, 13, and 14 of the County Government Act, there could not be any infringement of the provisions of Article 232 (l)(g) of the Constitution as alleged by the appellants. We are also of the view that nothing turns on Section 77 of the County Government Act which makes provision for appeals to the Public Service Commission for specified officers challenging any process or decision deemed irregularly carried out. In our view, that section is not exclusive and cannot prevent enforcement of a constitutional right in the manner the respondent did.

In view of our analysis, we are unable to find, as the appellants invited us to find, that the learned Judge sanctioned any illegality when he found that the respondent had indeed been appointed as the substantive Clerk of Kisii County Assembly. The authorities cited by the appellants on illegality are therefore unhelpful.

With regard to alleged failure to gazette or swear the respondent into office, our view is that the respondent was already a state officer when he joined the service of the County Government and could not have been such officer without subscribing to the oath of office.

With regard to the complaint that the learned Judge was in error in finding that the subjudice rule could not apply as the parties had by consent decided to proceed with the petition, the short answer is in the consent order recorded on 15<sup>th</sup> May 2014 by the learned Judge, which reads:-

**" COURT - I have considered the issues as submitted by the parties. By consent of the parties:-**

- 1. Parties at liberty to file and serve further affidavits as necessary by close of Friday 16.5.2014.**
- 2. Parties to file and serve written submissions and relevant authorities before the time scheduled for hearing.**
- 3. Hearing of the petition Monday 19.5.2014 at 9.00 am for one hour, 30 minutes for each Advocate."**

Given this clear agreement of the parties, we cannot appreciate how the issue of subjudice could arise. The appellant's complaint in that regard is without merit and we reject the same.

With regard to the last issue as to whether the learned Judge should have, on his own motion, considered whether the 1<sup>st</sup> and 2<sup>nd</sup> appellants had integrity and leadership lapses, we find the answer in Article 10 of the Constitution which reads-

**" 10. National values and principles of governance**

**1) The national values of governance in this Article bind all state Organs, State Officers, public officers and all persons whenever any of them -**

- a) Applies or interprets this Constitution;**
- b) Enacts applies or interprets any law; or**
- c) Makes or implements public policy decisions"**

The above provisions obligate, among others, judicial officers who have the mandate under the Constitution to interpret the Constitution and any law, to ensure compliance with the said Article. And those values include-

**"10.....**

**(2)**

**(a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;**

**(b) human dignity, equity, social justice, inclusiveness, equality, human rights, nondiscrimination and protection of the marginalized;**

**(c) good governance, integrity transparency and accountability; and**

**(d) sustainable developments"**

In our view if integrity and good governance issues came to the notice of the learned Judge during the hearing of the petition, he was duty bound to give effect to the above Article of the Constitution

irrespective of whether the same had been specifically framed as issues before him. In the matter before the learned Judge however, the respondent had specifically attributed his trouble with the 1<sup>st</sup> appellant to the former's refusal to comply with illegitimate financial demand made by the latter. So, the direction made by the learned Judge to the Ethics and Anti-Corruption Commission was proper and should not have been the basis of any complaint, after all the 1<sup>st</sup> and 2<sup>nd</sup> appellants have nothing to fear if they have nothing to hide as the Ethics and Anti-Corruption Commission must operate within the law whilst investigating whether both Article 10 and Chapter six of the Constitution have been infringed.

The upshot is that, we find no merit in this appeal which we hereby dismiss.

Turning now to the cross-appeal which challenges the findings of the learned Judge on perjury which had been alleged by the respondent, we have no hesitation in agreeing with the 1<sup>st</sup> appellant that the threshold had not been met for such finding. The learned Judge stated:-

***"The court has considered the exceptionally high standards and burdens of evidence prescribed of the "beyond reasonable doubt" scale for a finding of criminal liability and find that the same did not apply in the present proceedings. "***

In our view, and having considered what was before him, the learned Judge cannot be faulted. The learned Judge had before him what amounted to conflicting affidavit evidence and he believed one set of the affidavits on a balance of probabilities. None of the parties applied to cross-examine any of the deponents of those affidavits on the averments in them. As a perjury finding attracts penal consequences, we think the decision arrived at by the learned Judge was inevitable.

In the premises, the cross appeal also has no merit and we dismiss it. Given the relationship between the parties, we order that each party bears its own costs in this court and the court below.

Those then are the orders of the court.

**DATED and DELIVERED at KISUMU this 21<sup>ST</sup> day of MAY 2015.**

**D.K.MARAGA**

.....

**JUDGE OF APPEAL**

**F.AZANGALALA**

.....

**JUDGE OF APPEAL**

**S. ole KANTAI**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**