



REPUBLIC OF KENYA



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**Mwangi & another v County Assembly Of Laikipia & another (Petition
E014 of 2023) [2025] KEELRC 579 (KLR) (27 February 2025) (Judgment)**

Neutral citation: [2025] KEELRC 579 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
PETITION E014 OF 2023
ON MAKAU, J
FEBRUARY 27, 2025

BETWEEN

FRANCIS CHUBI MWANGI 1ST PETITIONER
PROACTIVE TEAM LAIKIPIA COMMUNITY BASED ORGANIZATION 2ND
PETITIONER

AND

THE SPEAKER, COUNTY ASSEMBLY OF LAIKIPIA 1ST RESPONDENT
LAIKIPIA COUNTY SERVICE BOARD 2ND RESPONDENT

JUDGMENT

Introduction

1. By a Petition dated 6th December 2023, the Petitioner sought the following orders:
 - a. A Declaration that the decision made by the Respondents to appoint a stranger in an acting capacity to the position of Clerk of the County Assembly of Laikipia is unconstitutional to the extent that it contravenes with the fundamentals of separation of power as enshrined in *the Constitution* of Kenya.
 - b. Judicial Review by way of an Order Of Mandamus, to quash the decision of the Respondents in their appointment of the acting Clerk of the County Assembly of Laikipia.
 - c. A Declaration that the Deputy Clerk of the County Assembly of Laikipia do hereby assume the duties and responsibilities of the Clerk of the aforementioned County Assembly in an acting capacity for the duration and until the appointment of a substantive clerk, to which process they shall oversee.



- d. A Declaration that the Respondent to be held jointly and severally liable for any and all funds the appointee drew down as their remuneration, or otherwise obtained by the appointee in their illegally assumed capacity as acting Clerk of the County Assembly of Laikipia.
 - e. Costs of and incidental to this Petition; and
 - f. Any other order that this Honourable court deems fit and just to grant in the circumstances.
2. The petition is supported by a Supporting Affidavit sworn by the 1st petitioner on 6th November 2023. The 1st respondent filed Replying Affidavit sworn by the 1st respondent (Hon. Lantano Nabaala) on 12th January 2024 and a Notice of preliminary objection dated 10th January 2024 which basically challenged the court's jurisdiction.

Factual background

3. The Respondents declared vacancy in the office of the clerk of the County Assembly of Laikipia vide a notice on Standard newspaper of 22/09/2023. The notice was cancelled by a subsequent notice of 05/10/2023 but re-advertised on the said paper on 19/10/2023.
4. The petitioners faulted the Respondents for appointing a stranger as acting clerk through secondment from the county executive. They averred that the said "secondment" is a clear violation of the principle of separation of powers between the executive and the legislation as enshrined under Article 175(a) and 176(1) of *the Constitution* since the stranger is supposed to be the accounting officer of the County Assembly.
5. They further averred that there was a substantive clerk in office and also a deputy clerk who is the right person under the law to act while the substantive clerk was away. Accordingly, the petitioners averred that the said stranger was illegally drawing remuneration as the acting clerk. There was apprehension that the intended recruitment of another clerk would not be done through a fair process because their stranger harbours an interest in the post.
6. They further averred that the residents of Laikipia will be at great disadvantage should the appointee continue to hold the office and draw a remuneration as they shall be deprived of a competent, capable, skilled and experienced personnel to hold the position.
7. In conclusion, the petitioners averred that the Respondents' actions are in violation of Articles 2(1), 10, 22, 23, 47, 175(a) and 176(1) of *the Constitution* and that the court should grant the orders sought in the petition.
8. The respondents averred that this court lacks jurisdiction to determine this petition because there was no employer - employee relationship between the Petitioners and the Respondents for a suit to be filed in this Court.
9. They further averred that the 2nd respondent is mandated to hire, transfer, redeploy and second its members of staff; that under section 25 of the County Assembly Service Act the board can second its officers to the county executive while under the County Assembly Human Resource Manual "the Manual", the Board has the power to second officers to other statutory boards.
10. They further averred that the Board approved a proposal by the Governor for secondment of the County Assembly Clerk to the position of acting municipal manager, and secondment of Peter Ndirangu Hinga Chief Officer in the executive to act as the Clerk to the County Assembly. Therefore, they averred that due process was followed in the appointment of the Acting clerk and he is in the office legally.



11. As regards the remuneration of the acting clerk, it was the respondents averment that there was nothing illegal as his remuneration and all other benefits were moved from County Public Service Board to the 2nd respondent upon his secondment. They averred that the acting clerk continues to receive salary as per his original contract of employment.
12. Finally, the respondents averred that the petitioners have not demonstrated that the acting clerk has misappropriated and or mismanaged county funds, nor have they produced evidence of infringement of any right guaranteed under *the constitution*. Therefore, they contended that the petition lacks merit and should be dismissed with costs to the Respondents.

Submission

13. The Petition was canvassed by way of written submissions. The Petitioners in their submissions dealt with the issues on whether they had the locus standi; whether the appointment of the clerk is unconstitutional and illegal; and whether the Respondents and the illegally appointed clerk should refund the monies used as remuneration for the illegally appointed clerk.
14. On the first issue, they relied on Articles 22 and 258 of *the Constitution* to argue that they had the locus standi to institute proceedings on violation, infringement, breach or threat to the bill of rights.
15. On the second issue, they argued that the appointment of a stranger as acting clerk was in contravention of section 21 of the County Assembly Service Act which provides that the deputy clerk shall act in the absence of clerk. They further termed the said action as null and void ab intio by dint of Article 2(4) of *the Constitution*.
16. They relied on this Court's ruling in Nyeri Petition E019 of 2023 Jasper Mwiti Mutuiri v The Speaker, Laikipia County Assembly & The Laikipia County Assembly Service Board where the court held that secondment of officers from the county executive to the county assembly and the vice versa was an affront to the doctrine of separation of powers. The court further held that the correct person to act in the absence of the clerk is the deputy clerk. Consequently, they urged that the above decision applies to the instant case.
17. On the third issue, they submitted that funds applied to pay the acting clerk should be refunded because the appointment was illegal. Reliance was placed on the case of Nicholas Rono v County Secretary County Government of Bomet & 3 others [2020] eKLR where the Court ordered a refund of all monies received in form of remuneration, allowances and benefits by an officer when he illegally served as a member of county assembly service Board.
18. In conclusion, they submitted that the impugned actions have violated their rights and the Court has the jurisdiction since they concern employment relations or labour relations. Therefore, they urged the court to grant the reliefs sought.
19. The 1st Respondent submitted on whether the appointment of the acting clerk was irregular, illegal and unconstitutional; whether the petitioners' fundamental rights were violated and/or contravened as alleged; and whether the petitioners are entitled to the reliefs sought.
20. On the first issue, it was submitted that the appointment of Mr. Peter Ndirangu Hinga as the acting clerk was lawful as it was done through secondment by the Governor vide a letter dated 30th May 2023 and the 2nd respondent approved the appointment. Besides, it was argued that the appointment was only on interim basis pending appointment of a substantive clerk.



21. For emphasis, reliance was placed on the definition of secondment under the Public Service Commission Regulations 2020 and the terms of secondment as expounded under Regulation 37. Further reliance was placed on the case of Patrick Oyugi Wakine & 2 others v County Assembly of Migori County & 3 Others [2017] eKLR where the court held that the County Government Act does not prohibit the county Assembly Service Board from requesting for temporary deployment of officers from the county public service board to work in county assembly.
22. On the second issue, it was submitted that the petitioners have onus of pleading with a high degree of specificity and then proving the alleged violation on a balance of probabilities. Further that it was not enough for them to merely state the violated Articles of the constitution without adducing evidence to show how the cited provisions were violated. Reliance was placed on the case of Anarita Karimi Njeru vs Republic (No. 1) (1979) 1 KLR 154 Mumo Matemvu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR and Joseph Daniel Gitahi Maina v County Assembly of Nyeri Service Board & another [2018] eKLR. that underscored the standard on constitutional petitions.
23. On the third issue, it was submitted that the acting clerk is not a stranger to the county government of Laikipia as he was deployed from the county executive, where hitherto, he was the Chief Officer for the County Coordination, Administration, ICT & Public service.
24. It was further submitted that, upon the secondment of the Chief Officer to the county assembly, his remuneration and all his allowances were moved from the county public service board to the county assembly service board and therefore he continued drawing benefits from the executive as per his original contract of employment. Accordingly, it was submitted that the petitioners did not adduce any evidence to prove that there was any misappropriation or mismanagement of County funds.
25. With respect to the fourth issue, it was submitted that the judicial review orders sought by the petitioners are not merited since there is no basis laid before the court for granting the same. Reliance was placed on the case of Republic v Secretary County Public Service Board & Another ex parte Hulbal Gedi Abdille [2015] eKLR and Republic v Isaack Kipyegon Koech & 4 others ex parte Kipkirui Koech [2020] eKLR.
26. It was further submitted that the prayers are overtaken by events pursuant to the decision of this court of 8th March 2024 in Nyeri ELRC Petition E012 of 2023 Jasper Mwiti Mutuiru v Speaker Laikipia County Assembly and Laikipia County Assembly which reinstated the substantive clerk to the position of Clerk. Accordingly, it was submitted that the reinstatement of the substantive clerk has rendered the judicial reliefs sought moot.
27. It was further submitted that where the court should not proceed with the suit any further since it is now overtaken by events. For emphasis, reliance was placed on the case of Christopher Ndolo Mutuku & another v CFC Stanbic Bank Limited [2016] eKLR where it was held that a matter should be dismissed if there are events that have been overtaken and rendered the relief sought not capable of being granted.

Issues for determination and analysis

28. Having considered the petition, affidavits and written submissions filed, the following issues fall for determination;
 - a. Whether the petition is overtaken by events and rendered moot case by the judgment delivered by this court on 8th March 2024 in Petition E012 of 2023.
 - b. whether the secondment of the acting clerk was unlawful and violated the Constitution.



- c. whether the Respondent should return the monies paid to the acting clerk and whether the reliefs sought are merited.

Whether the suit is overtaken by events

29. The crux of the petition is that the appointment of a Chief Officer in the County Executive as the Acting Clerk in the County Assembly was unconstitutional for violation of the doctrine of separation of powers. According to the respondents, the same issue was litigated in the said Petition E012 of 2023 and a judgment was rendered on 8th March 2024 affirming the said legal position. As such the court was urged to find that the instant petition is now overtaken by events and no orders are merited.
30. It is true that the constitutionality of appointing a Chief Officer in the county executive to act as clerk of the county assembly was determined in Petition E012 of 2023 where I held that:
 - “91. He further observed that the secondment of a Chief officer to act as the clerk of the County Assembly violated section 26 of the CAS Act which provides that:
“if the office of the Clerk is vacant, or if for any reason the Clerk is unable to exercise the functions of his or her office, the Deputy Clerk or in the absence of the Deputy Clerk, any other officer in the Service appointed by the Board may exercise all the functions, duties and powers of the Clerk”
 92. The above provision is clear that in case of the absence of the Clerk the Deputy Clerk shall act in that office and in the event of the absence of the deputy Clerk, any other officer of the County Assembly Service may be appointed by the board to act as the clerk. In this case, when the petitioner was seconded to the County executive, the right person to act as clerk of the Assembly and the secretary of the board ought to have been the deputy County clerk. It has not been shown that there is no Deputy Clerk and that he/she is absent or unable to perform the duties of the Clerk.
 93. It follows that the secondment of a chief officer from the County executive to act as the Clerk of the County Assembly was not only ultra vires but also uncalled for, illegal, irrational and outrightly unconstitutional. The decision and the action of seconding the Chief Officer to the County Assembly to act as the Clerk was intended to remove the petitioner from the office of the Clerk and create a mongrel of county Government contrary to the established doctrine of separation of powers.”
31. Having reached the above conclusion, the court went on to quash the impugned secondment and appointment of the Chief officer as acting clerk, and the advertised vacancy in the office of the clerk. In quashing the said unlawful decisions and actions, the court held that pursuant to section 21 of the County Assembly Service Act, the Deputy Clerk was the correct person to act as the clerk in case the substantive clerk was absent or unable to discharge his mandate. Consequently, I agree with the respondent that the instant petition is to a large extent overtaken by events save for consideration of prayer (c), (d) and (e).

Prayer (c) Deputy clerk to act as clerk

32. The petitioners prayed for declaration that the Deputy clerk should assume the duties and responsibilities of the clerk until a substantive clerk is appointed. The 1st respondent stated in his



written submissions that the reinstatement of the substantive clerk to his office by the judgment in Petition E012 of 2023 rendered the prayer for quashing the appointment of the acting clerk herein, moot.

33. However, I do not think so, because no evidence was adduced by the respondents to prove that, indeed, the judgment in Petition E012 of 2023 was complied with. Consequently, I grant prayer (c) as prayed since at all material times to this case there was a Deputy Clerk in office, who under section 21 of the County Assembly Service Act ought to exercise all the functions, duties and powers of the Clerk in the absence of the substantive Clerk.

Liability for remuneration paid to the acting clerk

34. The petitioners prayed for declaration that the respondents be held liable, jointly and severally, for remuneration paid to the illegally appointed acting Clerk. In answer to the second issue, I am guided by Article 226(5) of *the Constitution* which provides that:

“(5) If the holder of a public office, including a political office, directs or approves the use of public funds contrary to law or instructions, the person is liable for any loss arising from that use and shall make good the loss, whether the person remains the holder of the office or not. [emphasis added]

35. It is acknowledged that this Court made a finding that the Respondents’ actions were in contravention of *the constitution* and the law. It follows that any loss that was occasioned by the said wrong doing should be borne by the Respondents individually. The Respondents’ argument that the acting clerk did not draw any salary save for his remuneration as per his original contract fails as there no evidence was produced to support the same. The law of evidence is clear that he who alleged must prove but the Respondents have failed to discharge that burden.
36. As pointed above, Article 226(5) of *the Constitution* requires that he who approves the use of public funds contrary to law is liable for the loss arising from that action. I gather support from the case of *Nicholas Rono v County Secretary County Government of Bomet & 3 others* [2020] eKLR where the Court held that:

“In the circumstances, the misrepresentation and concealment of information by the 4th respondent for appointment as a member of Bomet County Assembly public Service Board being in breach of the *Leadership and Integrity Act* and also the *Public Officer Ethics Act* places him in bad standing to hold any public office. As set out above, having put public resources and funds into waste by deception and concealment, he does not stand in good stead.

The petition is found with merits to the extent that the 4th Respondent should refund all the monies, allowances and earnings received...”

Conclusion

37. I have found that the petition herein is to a large extent overtaken by events save for prayer (c) and (d) which I have granted. Consequently, I enter judgment for the petitioners by granting the following orders;
- a. A Declaration that the Deputy Clerk of the County Assembly of Laikipia shall assume the duties and responsibilities of the Clerk of the aforementioned County Assembly in an acting capacity for the duration and until the appointment of a substantive clerk.



- b. A Declaration that the Respondents are held jointly and severally liable for any and all funds paid to the illegally appointed acting clerk as his remuneration, or otherwise obtained by him in his illegally assumed role as acting Clerk of the County Assembly of Laikipia.
- c. Since the suit is in the nature of public litigation suit, I direct each party to bear own costs.

DATED, SIGNED AND DELIVERED AT NYERI THIS 27TH DAY OF FEBRUARY, 2025.

ONESMUS N MAKAU

JUDGE

Order

This judgment has been delivered to the parties via Teams video conferencing with their consent, having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

