



Mwangi & another v Speaker, County Assembly of Laikipia & another (Petition E019 of 2023) [2025] KEELRC 547 (KLR) (27 February 2025) (Judgment)

Neutral citation: [2025] KEELRC 547 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
PETITION E019 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 ASSEMBLY SERVICE BOARD 2ND RESPONDENT**

JUDGMENT

1. By a Petition dated 28th December 2023, the Petitioner sought the following orders:
 - a. A declaration that the decision by the 2nd Respondent to establish the position of the Deputy Clerk Administrative Service to Laikipia County Assembly is unconstitutional to the extent that the decision was made in contravention of the guiding principles provided in the [County Governments Act](#) and the County Assembly Service Act and as enshrined in Constitution of Kenya.
 - b. A declaration that the decision made by the 2nd Respondent to advertise the position of the Deputy Clerk Administrative Service to Laikipia County Assembly is unconstitutional to the extent that the decision was made in contravention of the guiding principles provided in the [County Governments Act](#) and the County Assembly Service Act and as enshrined in Constitution of Kenya.
 - c. Judicial review by way of an order of mandamus to quash the decision of the Respondents in the establishment of the office of the Deputy Clerk Administrative Services of the County Assembly of Laikipia.



- d. Judicial review by way of an order of mandamus to quash the decision of the Respondents to advertise the position of the Deputy Clerk Administrative Services 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 Petitioners' case, in a nutshell, is that the 2nd Respondent intends to establish and fill the office of Deputy Clerk Administrative Services without following due procedure, yet there exists an office of the Deputy Clerk in the County Organizational Structure. The Petitioner further contends that the actions of the Respondents contravene Articles 2(1), 10, 22, 23, 47, and 175 (a) of *the Constitution* and will cause the residents of Laikipia County injury with respect to the public funds that will be used to finance the irregularly established offices if allowed to exist.
 3. The Respondents' filed a notice of preliminary objection grounded on jurisdiction and locus standi and I rendered a ruling on 19th July 2024 dismissing the preliminary objection and allowing the Petitioner to vent the issues raised in the Petition.
 4. Subsequently, the Respondents replied to the Petition vide the affidavit of Hon. Lantano Nabaala, the County Speaker, sworn on 1st August 2024. In brief, he deposed that the County service Board is mandated by section 12(7) of the County Government Act and section 24 of the *County Assembly Services Act* to establish offices in the service and appointing occupiers as it considers necessary and expedient for its performance; that the organizational structure evaluation of the assembly was done by an independent consultant who prepared a report in 2019; and that subsequently the Board proposed the recruitment of a second deputy clerk to reduce the clerk's workload to be in charge of administration.
 5. He went on to state that the Board tasked the acting clerk to consult finance director on the accessibility of funds for recruitment in the budget and it also reviewed the manual to include the second office in the organizational structure. On 20th September 2023, the acting clerk presented the board with the revised manual which was adopted and passed and the same became operative on 23rd September 2023. The manual established the office of the deputy clerk legislative services and deputy clerk administrative services.
 6. As a result of the foregoing developments, the vacancy of deputy clerk was declared and the roles of the post were published in the 2nd Respondent's website. The roles of the deputy clerk did not overlap with those of the clerk, and the recruitment was competitive and fair. Consequently, the affiant deposed that the Petitioners have neither alleged nor proved the infringement of any rights and as such the petition ought to be dismissed with costs for it lacks merit.
 7. The Petitioners filed a further affidavit sworn on 3rd September 2024 where he deposed that the boards powers under section 24 were not absolute as they were limited by section 24(4) which requires that the board be advised by internal management committee. He stated that the Respondents have not shared the organizational structure review and job evaluation report of November 2019. He added that the position of the deputy clerk as envisaged in the proposed structure was only one and the same could not be split into many positions. Consequently, he contended that the organizational structure purporting to split the position of deputy clerk into two was illegal and ultra vires as the right procedure was not followed.
 8. The Petition was canvassed by way of written submissions which I have carefully considered in this judgment.



Submissions

9. The Petitioners submitted that the respondents' actions are in contravention of the law, especially on sections 21 and 28(2) of the CAS Act. It was submitted that the Act provides for creation of a single and not multiple offices of Deputy Clerk. It was submitted that there already existed an office of the Deputy Clerk and the creating of a second office of deputy clerk was a duplication of the same roles. Reliance was placed on the case of *Bradbury and others v Enfield London Borough Council* (1976) 1WLRP 1311 and *Githu Muigai & Another v Law Society of Kenya & another* [2015] eKLR.
10. It was further submitted that the recruitment process was corrupt and denied the Petitioners and the residents of Laikipia the benefit of residents focused county assembly services due to the misapplication of funds by establishment of unnecessary offices. It was also submitted that the Petitioners' intention is protecting the public's interest and that they have demonstrated that *the constitution* is under threat.
11. It was argued that the Respondents did not issue a public notice of the process of establishment and recruitment to fill the impugned office and as such the petitioners' right to fair administrative action was infringed contrary to Article 47 of *the Constitution* and section 5 of the Fair Administrative Actions Act (FAAA).
12. It was further argued that the County Assembly Board's mandate to review the structure of the county assembly's service is not absolute citing section 24(4) of the CAS Act. It was submitted that the 1st Respondent has not demonstrated by records or minutes that before creation of the said office the board appointed a reputable human resources firm to advise on the same.
13. It was submitted that the respondents acted without any advice from the internal advisory committee, since the committee had not yet been constituted as required under section 29 of the Act. It was submitted that the minutes annexed do not show that after the authorization by the board the 1st Respondent worked on the updated human resource manual and tabled the same before a management committee for discussion and adoption. In support of its arguments, reliance was also placed on the case of *Robert Kyalo Kimiti v Teachers Service Commission & another* [2024] KEELRC 812 (KLR).
14. In view of the foregoing the court was urged to vitiate the impugned appointment to protect the resident's right to fair administrative action.
15. The 1st Respondent raised three issues for determination: whether the establishment and advertisement of a vacancy in the office of the deputy clerk administrative services was/is irregular, illegal and unconstitutional; whether the petitioners' fundamental rights were violated and/or contravened as alleged; and whether the petitioner is entitled to the remedies sought in the petition.
16. On the first issue, it was submitted that the 2nd Respondent has the mandate and power to create offices in the county assembly service and to appoint holders including the deputy clerk. It was further submitted that the discretion to establish offices in the county assembly rests with the board under the guidance of section 24 of the Act. It was also submitted that the office of the deputy clerk is not established under statute and therefore the 2nd Respondent has the mandate to establish the office and appoint the holders.
17. It was argued that due procedure was followed by the Respondents in the establishment of the office. It was further argued that before then, the board appointed a human resource firm to advise it on the effectiveness of service delivery in the county assembly services and to review the organizational structure of the county assembly. Consequently, it was submitted that the establishment of second office of deputy clerk was recommended in order to enhance the efficiency of service delivery.



18. It was further submitted that since the establishment was lawful, the Respondents had the power to fill the office. It was also submitted that the roles of the impugned office do not clash with those of the clerk and thus the process cannot be faulted.
19. On the second issue, it was submitted that the petitioners have the burden of proof of their case on a balance of probabilities. Reliance was placed on the case of Anarita Karimi Njeru v Republic (No. 1) (1976) 1 KLR 154 and Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] EKLK where the courts underscored that the petitioner has the onus of pleading and proving the alleged constitutional violations.
20. In the instant case, it was submitted that the Petitioners have failed to plead the alleged violations with precision and also failed to demonstrate the manner in which *the constitution* and statute were infringed. For emphasis, reliance was placed on the case of Joseph Daniel Gitahi Maina v County Assembly of Nyeri Service Board & another [2018] eKLR in submitting that the same are mere allegations without any backing by evidence.
21. On the third issue, it was submitted that the reliefs sought are not merited since the petitioners have not laid any basis for granting the same. Reliance was placed on the case of Republic v Secretary County Public Service Board & Another ex parte Hulbal Gedi Abdile [2015] eKLR.
22. It was submitted that quashing the said decision without hearing the holder of the office in these pleadings will violate the rules of natural justice. The Court was therefore urged to dismiss the petition with costs to the Respondents as it lacks merit.
23. The 2nd Respondent only submitted on the issue whether it acted within the law by appointing a deputy clerk. It was submitted that the establishment of the office was a procedural and technical requirement and not a legal one. Reliance was placed in sections 21-23 of the CAS Act. It was submitted that the Petitioners' assertion that there existed an office of the deputy clerk and that the establishment of the impugned office was a duplication, was not correct and no evidence has been placed to prove the same.
24. It was argued that the functions of the County assembly service board have been outlined by statute, and the court should not interfere.
25. It was submitted that the purpose of the petition was to delay the Respondent's service delivery as it has not demonstrated what rights have been infringed. It was argued that the provisions of section 5 of the FAAA do not apply in the case as it has been demonstrated that the office of deputy clerk is recognized by law. It was therefore argued that the petition lacks merit and should be dismissed with costs.

Determination

26. Having considered the pleadings, and the rival submissions, the issues that arise for determination are:
 - a. Whether the respondents violated *the constitution* by creating the said office and recruiting a holder thereof.
 - b. Whether the Petitioners are entitled to the orders sought.

Constitutional violation

27. The petitioners averred that the respondents violated *the constitution* by illegally creating the position of deputy clerk administration contrary to the County Government Act and County Assembly Service Act as read with the Laikipia County Human Resource Manual 2015. It was argued that



the respondents violated the procedure for establishing the impugned office and for recruiting the office holder. However, the respondents maintained that the establishment of the new office and the recruitment to fill the same were done in accordance with the law and the HR Manual.

28. The County Assembly Service Board is established under section 4 of the County Assembly Service Act and the scope of its powers is set out under section 24 of the Act as follows:

- “(1) The Board shall establish such offices in the Service as it considers necessary or expedient for the efficient performance of the functions of the Service.
- (2) The offices established under subsection (1) shall be set out in the organisational structure established by the Board.
- (3) The Board may from time to time-
- (a) allocate functions to a directorate or department of the Service; and
- (b) make such arrangements as appear to the Board expedient in connection with the creation, division, amalgamation or abolition of any directorate or department of the Service.
- (4) The Board shall, for the purposes of reviewing the organisational structure under subsection (3), appoint a reputable human resource firm to advise on the effectiveness and efficiency of the intended review.”

29. The above provision, confirms that the board has the power to establish a new office in the county assembly service and place it within the organisational structure of the service. The office of the deputy county clerk is not established by a statute and as such, there is no dispute that it falls within the mandate of the board to establish, provided certain thresholds are met.

30. The legal threshold for reviewing the organisational structure is set out under sub section (4) above, to wit, the board is required to seek advice from a reputable human resource firm before reviewing its organisational structure.

31. In this case, the new office created is that of deputy clerk Administration, which is carved out of the existing office of the deputy clerk. The establishment of the two offices of deputy clerk, one dealing with administration role while the other dealing with legislative roles, would necessitate a review of the organisational structure of the county assembly service.

32. The respondents maintained that they met the legal thresholds required for creating the new office and changing the organisational structure of the county assembly service. However, the petitioners maintained that the respondents did not seek advice from a reputable HR Consultant before creating the new office.

33. I have carefully considered the material presented to the court by the two sides and noted that the respondents engaged HR Consultant in 2019 to advice on the organisational structure and a report was presented. The report recommended for an organisational structure (Annexure LN-1) with only one deputy clerk in the county service. There is no evidence to prove that the respondents sought advice of a reputable HR Consultant before coming up with the organisational structure (Annexure LN-4) with two deputy clerks in the county assembly service.



34. It follows that the respondents acted contrary to section 24(4) of the County Assembly Service Act which requires in mandatory terms that:

“(4) The Board shall, for the purposes of reviewing the organisational structure under subsection (3), appoint a reputable human resource firm to advise on the effectiveness and efficiency of the intended review.” [emphasis added]

35. In the Ugandan case of *Pastoli v Kabale District Local Government Council & others* (2008) 2 EA 300, the Court discussed the thresholds for judicial review of administrative decisions, thus:

“In order to succeed in an application for Judicial Review, the Applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety.

Illegality, is when the decision-making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires or contrary to the provision of a law or its principles are instances of illegality.

Irrationality, is when there is such gross unreasonableness in the decision taken or act done that no reasonable authority, addressing itself to the facts and the law before it would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards.

Procedural impropriety, is when there is failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice to act or to act with procedural fairness towards one to be affected by the decision – it may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislature instrument by which such authority exercises jurisdiction to make a decision. (*Al-Mehidwi...Vs... Secretary of State for the Housing Department* (1990) AC 876.”

36. The above decision has been cited with approval in many decisions of our superior courts and therefore it is a good law for our country. One of the grounds for judicial review is illegality on the part of the decision maker by acting ultra vires (in excess of its mandate) or acting contrary to express provision of the law.

37. In the instant case the respondents breached the statutory procedure for reviewing the county assembly service organizational structure by failing to, first, seek advice from a reputable HR Consultant on the effectiveness and efficiency of the intended review. Consequently, the impugned decision or actions are tainted with illegality and warrant judicial review.

38. In *John Mining Temoi & another v Governor of Bungoma County & 17 others* [2014] eKLR the court stated as follows:

“81. As a basic minimum, the Petitioners are required to not only cite the provisions of *the Constitution* which have been violated but also the manner in which they have been violated with regard to them. See the case of *Anarita Karimi Njeru* (1976-80) 1 KLR 1272 and *Trusted Society of Human Rights Alliance -v- Attorney General & Others* High Court Petition No. 229 of 2012. In demonstrating the manner in which there has been a violation of their rights



or of the Constitution, the Petitioners should present before the court evidence or a factual basis on which the court can make a determination whether or not there has been a violation...”

39. In view of the matters discussed above, I find that the Petitioners have clearly outlined their complaint, the provisions of the law that they alleged to have been infringed and the manner by which they were allegedly infringed. The said breach of the law amounts to violation of the national values and principles of good governance as enshrined under Article 10 of the Constitution.
40. The decision or actions of the respondents violates the values and principles of the public service enshrined under Article 232 of the Constitution to the extent that the respondents diverted funds meant for filling two vacancies caused by retirements in the lawfully established organizational structure, to finance the illegally created position of deputy clerk Administration.

Reliefs

41. Having satisfied myself that the petitioners have established that the respondents decisions and actions were tainted with illegality, I find that the petitioners are entitled to the declaratory and quashing orders sought in the petition. I have noted that the petitioners sought order of mandamus to quash the impugned decisions or actions in prayer (c) and (d) of the petition. However, mandamus is not for quashing decisions but compelling action. As such, I treat the use of mandamus as a non- fatal mistake since the intended relief was a quashing order. Accordingly, I enter judgment for the petitioners as against the respondents as follows:
 - a. A declaration that the decision by the 2nd Respondent to establish the position of the Deputy Clerk Administrative Service, Laikipia County Assembly is unconstitutional to the extent that the decision was made in contravention of the guiding principles provided in the County Governments Act, the County Assembly Service Act and enshrined in Constitution of Kenya highlighted above.
 - b. A declaration that the decision made by the 2nd Respondent to advertise the position of the Deputy Clerk Administrative Service Laikipia County Assembly is unconstitutional to the extent that the decision was made in contravention of the guiding principles provided in the County Governments Act, the County Assembly Service Act and enshrined in Constitution of Kenya as highlighted above.
 - c. An order of certiorari quashing the decision of the Respondents in the establishment of the office of the Deputy Clerk Administrative Services of the County Assembly of Laikipia.
 - d. An order of certiorari quashing the decision of the Respondents to advertise the position of the Deputy Clerk Administrative Services of the County Assembly of Laikipia.
 - e. No order as to costs since the suit is in the nature of public litigation.

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.



ONESMUS N MAKAU
JUDGE

