



**Mogaru & another v Speaker County Assembly of Nyamira & 2 others;
Nyamira County Assembly Board & another (Interested Parties) (Petition
E002 of 2024) [2025] KEELRC 995 (KLR) (25 March 2025) (Judgment)**

Neutral citation: [2025] KEELRC 995 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
PETITION E002 OF 2024
NZIOKI WA MAKAU, J
MARCH 25, 2025**

BETWEEN

LEONARD OKARI MOGARU 1ST PETITIONER

EDITH NYABOKE 2ND PETITIONER

AND

SPEAKER COUNTY ASSEMBLY OF NYAMIRA 1ST RESPONDENT

NYAMIRA COUNTY ASSEMBLY 2ND RESPONDENT

DUKE SIMEON ONYARI 3RD RESPONDENT

AND

NYAMIRA COUNTY ASSEMBLY BOARD INTERESTED PARTY

AG CLERK COUNTY ASSEMBLY NYAMIRA INTERESTED PARTY

JUDGMENT

1. The Petitioners herein were appointed as members of the Nyamira County Assembly Board through Gazette Notice No. 14017 on 1st November 2022. However, their tenure faced a challenge when, on 21st November 2024, Hon. Doris Nyamanga, a member of the Nyamira County Assembly, introduced a motion seeking the revocation of their appointments. The motion was based on alleged violations of *the Constitution* and the Petitioners' inability to discharge their duties. Following this motion, the 3rd Respondent issued summons dated 26th November 2024, requiring the Petitioners to appear before the County Assembly to respond to the allegations.
2. At the same time, the Petitioners received communication from the 2nd Interested Party, stating that the 3rd Respondent lacked the authority to issue such summons as he was under suspension. Despite



this, on 28th November 2024, the 2nd and 3rd Respondents conducted a plenary hearing that resulted in the removal of the Petitioners from office. Subsequently, the Petitioners' positions were advertised. Feeling aggrieved by their removal and believing it to be unlawful and unconstitutional, the Petitioners filed this petition seeking the following reliefs:

- a. A declaration that the Respondents in purporting to summon and, ipso facto, constructively purport to revoke the appointment of the petitioners as Members of the County Assembly Service Board in the absence of any Petition in the manner pleaded herein acted in contravention of Articles 1(1), 3, 10, 22, 23, 27, 28, 41(1), 47, 48, 50, 124, 159, 165, 178(3) and 258 of *the Constitution* of Kenya, 2010; sections 3, 4, 6, 7 and 11 of the *Fair Administrative Action Act* [Cap.7 Laws of Kenya], sections 10(2) of the *County Governments Act* [Cap. 265 Laws of Kenya] and in contravention of fundamental rules of natural justice and fairness;
 - b. A declaration that the 3rd Respondents' acts purporting to summon with intention to revoke the Petitioners appointment in the manner pleaded herein violated the Petitioners' rights to due process, fair hearing and fair administrative action;
 - c. A declaration that the letter dated 26th November 2024 by the 3rd Respondent herein is illegal, unlawful, null and void and thus of no consequence and the same be and is hereby quashed as the 3rd Respondent had no capacity to issue the said notice.
 - d. A declaration that the sitting and resolution of 28th November 2024 by 2nd Respondent culminating to the purported removal of the Petitioners herein from office as the external County Assembly Service Board Members is illegal, unlawful and violates the Petitioners' rights thus void.
 - e. Orders of permanent injunction restraining the Respondents from attempting to revoke the appointment of the Petitioners from office as the County Assembly Service Board Members in a manner and procedure other than the one articulated under section 10 of the County Assembly Service Act.
 - f. An order that Respondents be condemned to pay costs of this petition.
 - g. Such other further, appropriate and consequential orders and reliefs as this Honourable court may lawfully make.
3. The Petitioners argued that the 3rd Respondent had no mandate to summon them, as he had been suspended. They also contended that Gazette Notice No. 14273 of 30th October 2024 affirmed their positions as board members. Furthermore, they maintained that the 2nd Interested Party was duly appointed as the Acting Clerk of the Assembly and as Secretary to the board via Gazette Notices Nos. 14230 of 26th October 2024 and 14273 of 30th October 2024, respectively.
 4. In response, the 2nd and 3rd Respondents filed a replying affidavit dated 13th December 2024, sworn by the 3rd Respondent. He asserted that he was the Acting Clerk of the Nyamira County Assembly and Secretary to the County Assembly Service Board by virtue of Gazette Notice No. 13376 of 9th October 2024. He further asserted that Gazette Notices Nos. 14273 and 14230, appointing the Petitioners and the 2nd Interested Party, published by Hon. Enock Okeru Ogori, the impeached former speaker, were subsequently stayed by the High Court in Nyamira through Judicial Review Case No. E007 of 2024 on 29th November 2024. The 3rd Respondent maintained that the removal process followed the law and that instead of appearing before the 2nd Respondent to respond to the motion, the Petitioners opted to file a petition before the Nyamira High Court, which was struck out in limine. It was the 3rd Respondent's contention that since there was no court order barring the debate, the motion proceeded,



and the Petitioners' removal was approved. He concluded by asserting that no constitutional rights of the Petitioners were infringed upon.

5. As for the 1st Respondent, the 1st Interested Party and the 2nd Interested Party a replying affidavit sworn by the 2nd Interested Party dated 23rd January 2025 was filed in support of the Petition. The 2nd Interested Party reaffirmed that he was the Acting Clerk of the Nyamira County Assembly as per Gazette Notice No. 14230 of 20th October 2024. He deponed that conservatory orders issued through Nyamira HC Pet. E008 of 2024 allowed Hon. Enock Okero Ogori to continue discharging his duties as speaker. The 1st Interested Party further deponed that the 2nd and 3rd Respondents' action of tabling and passing the motion to impeach Hon. Enock Okero Ogori as speaker was deemed contempt of court via a ruling of the High Court on 4th November 2024 in Nyamira HC PET E008 of 2024. Moreover, he argued that all proceedings related to the revocation of the Petitioners' appointments were null and void. The 2nd Interested Party maintained that the County Assembly had adjourned sine die on 28th November 2024, rendering any subsequent business, including the Petitioners' removal, unlawful. He also asserted that the 3rd Respondent was not authorized to issue summons to the Petitioners as he was suspended on 25th October 2024. The petition was canvassed by way of written submissions.

Petitioners' Submissions

6. The Petitioners submit that the 2nd and 3rd Respondents violated their right to a fair trial and unlawfully removed them from office in contravention of *the Constitution*, the Fair Administrative Actions Act, the *County Governments Act*, and the County Assembly Service Act. They submit that Article 10 of *the Constitution* requires the Respondents to uphold the rule of law in the removal process. Additionally, they invoke section 7 of the Fair Administrative Actions Act, which allows for the review of administrative action if it was carried out by an unauthorized person, if the affected party was denied an opportunity to present their case, or if the requisite lawful procedure was not followed.
7. They submitted that there were irregularities in their removal and that the *County Assembly Services Act* stipulates that removal must be initiated through a petition from a member of the public, not a motion by a Member of the County Assembly. They assert that the 2nd and 3rd Respondents improperly used a motion, in violation of the Standing Orders of the County Assembly. They cite Standing Order 199 which defines a petition as a written request from a member of the public asking the County Assembly to consider a matter within its authority. Additionally, the Petitioners submit that the 2nd and 3rd Respondents were barred from proceeding with the 1st Respondent's impeachment due to conservatory orders from the High Court that had halted impeachment proceedings. They refer to Standing Order 87, which prohibits the Assembly from deliberating on matters that are actively before the courts.
8. On the issue of a fair hearing, the Petitioners submit that the 1st and 2nd Respondents disregarded standing order 65(1)(a) on appearance before the County Assembly and their entitlement to legal representation. Furthermore, they assert that the 3rd Respondent's action of inviting them to appear before the 2nd Respondent while he was on suspension was ultra vires. As for Gazette Notice 13376 dated 9th October 2024, which the Respondents relied upon, the Petitioners submit that it was flawed and inconsistent with the law. They assert that it was inconceivable the Gazette Notice could be published yet the Respondents themselves admitted that the speaker was officially removed on 24th October 2024. Additionally, they draw attention to Gazette Notice 14051 of 2024 which indicated that an election for the Speaker was scheduled for 31st October 2024.
9. In further support of their case the Petitioners submit that the removal process—whether by petition or motion—requires the participation of the Speaker. They rely on Standing Order 4(2) of the



Nyamira County Standing Orders, which bars the County Assembly from conducting business in the absence of a Speaker. They emphasize that the purported election of the Speaker on 31st October 2024 never took place. To support this position, they cite the case of Michael Sistu Mwaura Kamau v Ethics & Anti-Corruption Commission & 4 others [2017] eKLR, where it was held that a body not properly constituted cannot lawfully carry out its mandate. They further submit that any entity exceeding its legally delegated powers is subject to the court's supervisory jurisdiction, relying on the decisions in Republic v Non-Governmental Organizations Coordination Board Ex-parte Evans Kidero Foundation [2017] eKLR and Law Society of Kenya v Centre for Human Rights and Democracy & 13 others [2013] KECA 172 (KLR).

10. The Petitioners submit that their removal contravened Article 41 of *the Constitution* and sections 5(3), 35, 43, and 45 of the *Employment Act*, which safeguard against unfair dismissal. They also cite Article 236(b) of *the Constitution*, which mandates adherence to due process in the removal of public officers from office. Accordingly, they assert that they have sufficiently demonstrated the unlawfulness of their removal and, therefore, urge the court to grant the petition as prayed.

1st Respondent, 1st & 2nd Interested Parties' Submissions

11. The 1st Respondent and the 1st and 2nd Interested Parties submit that the Petitioners' removal process was fundamentally flawed and legally defective. They assert that the 3rd Respondent lacked the authority to act on behalf of the 2nd Respondent or the 1st Interested Party. To support this position, they reference key documents, including the 3rd Respondent's suspension letter dated 25th October 2024, the show cause notice issued on 4th November 2024, and the handover letter of the same date. Furthermore, they cite section 7 of the Fair Administrative Actions Act, which highlights the grounds on which administrative actions may be reviewed. They submit that the Petitioners' stance is the correct one and submit that the Petitioners' removal could not lawfully occur in the absence of a speaker. They further stress that since the County Assembly had been adjourned sine die on 28th November 2024, it lacked the authority to conduct any official business. Consequently, they assert that the removal process was ultra vires and violated the Petitioners' rights. Granted the foregoing, they urge the Court to grant the amended petition as prayed.

2nd & 3rd Respondents' Submissions

12. On their part the 2nd and 3rd Respondents identify the following issues for determination:
 - a. Whether the Petitioners were validly removed as members of the Nyamira County Assembly
 - b. Who should bear the costs of the Petition.
13. On the first issue the 2nd and 3rd Respondents submit that the Petitioners were given an opportunity to present their case. They assert that by choosing to ignore the invitation and instead filing suit at the High Court in Nyamira, the Petitioners forfeited their right to claim that they were denied a fair hearing. Additionally, they assert that no court orders were in place to prevent debate on the removal motion. They submit further that in the Amended Petition, the Petitioners did not cite any specific standing orders that were allegedly violated. As such, introducing these claims at the submission stage amounted to trial by ambush and sharp practice—conduct they assert should not be condoned by the Court. Regarding the mode of removal, the 2nd and 3rd Respondents maintain that whether the Petitioners were removed through a petition or a motion is inconsequential. They emphasize that the focus should be on the substance of the document rather than its title. They assert that the notice of



proposed motion presented by Doris Nyamanga was, in substance, a petition. To support this, they reference the definition of a petition from Black's Law Dictionary, 2nd Edition as follows:

“A written address, embodying an application or prayer from the person or persons preferring it, to the power, body, or person to whom it is presented, for the exercise of his or their authority in the redress of some wrong,”

14. Concerning the status of the 3rd Respondent, the 2nd and 3rd Respondents maintain that he was the Acting Clerk of the Nyamira County Assembly. They refer to Gazette Notices 14017 of 2022 and 13376 of 2024, the latter of which retained him as Secretary of the Board. Furthermore, they submit that he was formally confirmed as Clerk on 19th December 2024. Conversely, they affirm that Enock Ogori was impeached on 24th October 2024 hence lacked the authority to suspend the 3rd Respondent after that date. Additionally, they assert that the 2nd Respondent's actions carry a presumption of legality unless proven otherwise, meaning the impeachment remains valid unless overturned by a court. To buttress this argument, they highlight Enock Ogori's attempt to run parallel County Assembly proceedings, including publishing Gazette Notices 14229, 14230, and 14273 of 2024, all of which were stayed by the Nyamira High Court.
15. On the issue of the 2nd Respondent's sittings being adjourned sine die the 2nd and 3rd Respondents submit that the adjournment was unlawful. They assert that the Gazette Notice 15844 of 2024, which purported to suspend the sittings, was issued by the impeached former Speaker, Hon. Enock Ogori. Moreover, they affirm that the notice was backdated from 29th November 2024 to 28th November 2024 in an attempt to create the false impression that the sittings had already been adjourned before the debate on the Petitioners' removal took place.
16. To substantiate their position that Hon. Enock Ogori was indeed impeached, they point out that he filed Kisii ELRC Pet No. E001 of 2024 on 25th October 2024, challenging his impeachment- a case that remains pending. Consequently, they submit that the sitting of the 28th November 2024 approving the Petitioners' removal was regular. On the issue of costs, the 2nd and 3rd Respondents urge the court to award them costs to recover expenses incurred in defending this suit. They further rely on the precedent set in *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & others* [2014] eKLR, which establishes that costs follow the event. In conclusion they urge the court to dismiss the petition with costs.
17. The Court has considered the law, the pleadings filed and the submissions made herein to come to this decision. The issues for determination are twin:
 - a. Whether this Court has jurisdiction to handle the Petition
 - b. If the answer to the above is in the affirmative:
 - i. Whether the Petitioners were validly removed as members of the Nyamira County Assembly.
 - c. Who should bear the costs of the Petition.
18. Jurisdiction is everything. Without it, a court has no power or authority to take one more step. See the celebrated case of *Owners of Motor Vessel "Lilian S" v Caltex Oil Kenya Limited* [1989] KLR 1. In the case of *Lemita Ole Lemein v Attorney General & 2 others* [2020] eKLR, Karanja JA stated that:

“In my view, jurisdiction is primordial and must exist right from the filing of a case to determination. The issue of jurisdiction need to be raised by the parties to a suit for the court to address its mind to it. It is incumbent upon every judicial or quasi-judicial tribunal or



court to satisfy itself that it has jurisdiction to entertain a matter before settling down to hear it. In essence, therefore, a court or tribunal should not wait for a party to move it on the issue of jurisdiction for it to determine the issue. The court can suo mottu determine the issue even without being prompted by a party. Just like you cannot confer jurisdiction even by consent of the parties, you cannot confer jurisdiction even by consent of the parties, you cannot confer jurisdiction by ignoring the issue or sidestepping it. It is omnipresent and cannot be wished away. Moreover, it being a point of law, the issue of jurisdiction can also be raised at any stage; in the trial court, first appeal, or even on second or third appeal.” [Emphasis supplied]

19. From the decision of the Learned Judge of Appeal, the matter of jurisdiction is very fundamental to a suit. It can be raised even by the Court itself. The issue of removal of County Assembly Service Board Members is provided for in Article 252 of *the Constitution* of Kenya. The Court of Appeal HM Okwengu, HA Omondi, JM Ngugi JJA held on 7th February 2025 in the case of Governor, County Government of Kakamega & 4 others v Omweno & 12 others [2025] KECA 190 (KLR) held that

26. We have keenly looked at the record of the superior court, the pleadings by the parties and their submissions before us. It is impossible to deny that this is not a plain vanilla employment dispute between the members of the County Service Board and the County Assembly of Kakamega. Indeed, there is a real question whether the members of the County Service Board can, strictu sensu, be said to be employees for purposes of the ELRC Act. What is readily obvious is that the dispute is about the appropriate constitutional and statutory procedures and thresholds for the removal of members of a County Service Board. Implicated in that inquiry, is the question whether, for example, the *Evidence Act* has application to proceedings for the removal of members of the County Assembly Board or any constitutional body whose removal is regulated by Article 251 of *the Constitution*. It seems obvious to us that what *the Constitution* and the Statute envisaged is not an employment disciplinary hearing in order to remove the Chair or a member of the County Assembly Board.

By making reference to Article 251 of *the Constitution*, the Statute is making clear that a constitutional process is intended. Such a constitutional process is not subject to the rules of employment law and disciplinary procedures but to rules attending to constitutional processes. Any person aggrieved by such a process – whether a participant or a public spirited individual – can seek redress – not at the Employment and Labour Relations Court but at the High Court. Differently put, the law envisages that any matters related to the appointment and removal of constitutional office holders – including holders of offices which are derivative of constitutional provisions such as County Service Board members – are to be ventilated as constitutional questions before the High Court and not as labour and employment issues before the ELRC.

Later in the same decision

30. We are of the view that by parity of reasoning, the questions presented in the consolidated appeals before us do not fall within the meaning of disputes related to employment and labour relations and that, therefore, the ELRC did not have jurisdiction to deal with the petition before it and should have allowed the preliminary objection pursued by the respondents before it. The matter should have been appropriately before the High Court which has unlimited subject matter jurisdiction. [underline for emphasis]



20. The above clearly demonstrates that the Court herein is divested of jurisdiction to handle the dispute as to do so would fly in the face of the Court of Appeal decisions which have a direct connection with this matter. The removal procedure implicated in the subject matter precipitating the appeals before the Court of Appeal were extremely similar to the one before me. My sister Keli J. held she had jurisdiction to handle the Petitions on removal of Kakamega County Assembly Chair and Members in the case of *Omwenko & 3 others v Governor, County Government of Kakamega & 4 others; Wanyama & another (Interested Parties) (Petition E008 of 2023)* [2024] KEELRC 1384 (KLR) (6 June 2024) (Judgment) prompting the determination of the Court of Appeal extensively reproduced above. As I have no jurisdiction I down my tools and will not examine any other aspects of the case including the orders previously obtained in Nyamira High Court, their import and the reliefs the Petitioners could have been entitled to. The Petition is dismissed with an order that each party bears their own costs.

It is so ordered.

DATED AND DELIVERED AT KISII THIS 25TH DAY OF MARCH 2025

NZIOKI WA MAKAU, MCIARB.

JUDGE

