



**Omondi v Ochola & 5 others; County Public Service Boards'  
National Consultative Forum & another (Interested Parties) (Petition  
E003 of 2025) [2025] KEELRC 1098 (KLR) (3 April 2025) (Judgment)**

Neutral citation: [2025] KEELRC 1098 (KLR)

**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISII**

**PETITION E003 OF 2025**

**NZIOKI WA MAKAU, J**

**APRIL 3, 2025**

**(FORMERLY KISUMU ELRC PET. E033 OF 2024)**

**IN THE MATTER OF AUTHORITY AND ENJOINER CONFERRED BY**

**ARTICLES 3(1), 20(1), 23, 159(2)(A) & (E), 162(2)(A), 165(3)(D)**

**(II), AND 258(1) & (2) OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF INTERPRETATION, APPLICATION AND**

**ENFORCEMENT OF THE CONSTITUTION IN RELATION TO THE**

**UNLAWFUL DECLARATION OF VACANCIES AND INVITATION FOR**

**RECRUITMENT IN MIGORI**

**AND**

**IN THE MATTER OF A VIOLATION AND ABROGATION OF THE**

**CONSTITUTION OF KENYA 2010: ARTICLE 3(1); 10(1)&(2)(A)**

**(B)&(C) 27 (1),(2)&(4); 29(D); 41(1)&(2); 47; 50 (1); AND 236(B)**

**AND**

**THE COUNTY GOVERNMENTS ACT SECTIONS 57, 58(1), 59(1),**

**59A, 60, 61, 62, 63 AND 66**

**AND**

**PAGE 1 OF 16**

**THE FAIR ADMINISTRATIVE ACTIONS ACT, 2011: SECTIONS 3(1)**

**(A) & (B), 4(1) & (3)(B), 7(2)(A)(I) & (II), (B), (D), (E), (G), (H), &**

**(M) AND ALL OTHER ENABLING PROVISIONS AND PROCEDURES**



**OF THE LAW**

**BETWEEN**

**MARVIN NGEI OMONDI ..... PETITIONER**

**AND**

**DAVID ODHIAMBO OYUGI OCHOLA ..... 1<sup>ST</sup> RESPONDENT**

**DORCAS ADHIAMBO OYUGI ..... 2<sup>ND</sup> RESPONDENT**

**AZARIAH ENOSH GOWA ..... 3<sup>RD</sup> RESPONDENT**

**MENGE WILLIAM SULLY ..... 4<sup>TH</sup> RESPONDENT**

**OLGA AUMA DEDE ..... 5<sup>TH</sup> RESPONDENT**

**JABANDO GEORGE ONYANGO ..... 6<sup>TH</sup> RESPONDENT**

**AND**

**COUNTY PUBLIC SERVICE BOARDS' NATIONAL CONSULTATIVE  
FORUM ..... INTERESTED PARTY**

**MIGORI COUNTY PUBLIC SERVICE BOARD ..... INTERESTED PARTY**

**JUDGMENT**

1. The Petitioner filed this petition seeking the following orders:
  - a. A declaration be and is hereby issued that the Respondents' invocation and continued exercise and discharge of functions of the Migori County Public Service Board under sections 59(1), 60, 62, 63, 66, 69, 70 and 74 of the County Government Act, whereas no such power, authority or mandate is lawfully reposed in them, amounts to a gross violation of the Constitution and the enabling statutory law.
  - b. An order of Judicial Review of Certiorari, be and is hereby issued calling-up and quashing the Respondents' action, invocation and continued exercise and discharge of functions of the Migori Public Service Board under sections 59(1), 60, 62, 63, 66, 69, 70 and 74 of the County Government Act; particularized through
    - i. extra-legal creation of various offices within Migori County Public Service,
    - ii. irregular declaration of vacancies in various public offices,
    - iii. suspension and termination of various public offices;
    - iv. suspension and termination of various public officers from employment,
    - v. redesignation, demotion and promotion of various public officers including subjecting more to disciplinary action and
    - vi. variously inviting unsuspecting members of the public for recruitment and appointment into the Migori County Public Service Board - whereas no such power,



authority or mandate is lawfully reposed in them, and any action or decision howsoever undertaken thereon, for being in gross violation of the Constitution and the enabling statutory law.

- c. An order of judicial review of prohibition, be and is hereby issued restraining and permanently injunctioning the Respondents, either jointly and/or severally, directly or otherwise howsoever from invoking and or exercising the exclusive power, mandate and authority of the Migori County Public Service Board including purporting to create various public offices, suspend and terminate from the employment, redesignate, demote and promote county public officers including undertaking disciplinary action and inviting members of the public for recruitment and appointment into the county public service.
  - d. That the costs of the Petition be borne by the Respondents in any event.
2. Attached to the petition is a supporting affidavit sworn by the Petitioner, who deposed that he is a resident of Migori suing in the public interest on behalf of himself and the larger public. He asserted that the petition arises from gross violations of the rights of numerous employees of the Migori Public Service Board, including their rights to fair labour practices, protection from discrimination, fair administrative justice, freedom of association, and protection from psychological torture. The Petitioner asserted that he is empowered by Articles 3(1) and 258(2)(c) of the Constitution, read together with section 5(2)(b) & (c) of the Fair Administrative Actions Act, to commence proceedings in defence of the Constitution against contraventions or threats thereof. In support of the petition, the Petitioner averred that the Respondents have unlawfully usurped the roles of the Migori Public Service Board under sections 59(1) & (4), 60, 61, and 66 of the County Governments Act.
  3. He further asserted that the Respondents had not lawfully assumed office and lacked the legal mandate to engage in the statutory functions of the Migori Public Service, rendering their actions manifestly unlawful. Additionally, he contended that the Respondents' actions not only violated the Constitution but also posed a risk of emboldening unauthorized officeholders and misusing public resources. The Petitioner asserts there was illegal assumption of office by the Respondents and cited the following irregularities:
    - a. The selection panel that appointed them was constituted in contravention of a court order issued in HC JR E003 of 2023.
    - b. The nominees of the selection panel were appointed without vetting and approval by the County Assembly.
    - c. The Respondents failed to take the requisite oath of office.
    - d. Their appointment process was executed hastily, indicating premeditated malice.
  4. The Petitioner asserts that given the illegality of the Respondents' assumption of office, the Court should intervene to ensure the orderly functioning of public agencies and uphold the Constitution and the rule of law.
  5. In response, the Respondents filed a replying affidavit dated 1<sup>st</sup> October 2024, sworn by the 1<sup>st</sup> Respondent, asserting that they were rightfully and lawfully in office. The petition was canvassed by way of written submissions.

### **Petitioner's Submissions**

6. The Petitioner submits that the Respondents' illegal assumption of office bars them from carrying out the functions of the Migori County Public Service Board. He asserts that they have contravened the



Constitution and statute by usurping the powers of the 2<sup>nd</sup> Interested Party, citing sections 57, 58(1), 59(1) & (4), 61, 62, 63, 68, 68A, and 69 of the County Governments Act. He further submits that, given the irregularity of their assumption of office, the Respondents lack any lawful premise to exercise the exclusive authority of the Migori County Public Service Board. He urges the court to rein in the clear abuse of discretion, malice, arbitrariness, and disregard for natural justice. He cites the case of *Fleur Investment v Commissioner of Domestic Taxes & another* [2018] eKLR, where the court held, that courts being the bastions of justice, must not allow institutions to violate citizens' rights unchecked. The Petitioner submits that all state organs must operate within the confines of the Constitution, citing the decision in *R v Public Procurement Administrative Review Board & another ex-parte Selex Sistemi Integrati* [2008] eKLR which cited the case of *Hugh Glenister v President of the Republic of South Africa & Others* Case CCT 41/08: [2008] ZACC 19 at para 33 as follows:

“In our constitutional democracy, the courts are the ultimate guardians of the Constitution. They not only have the right to intervene in order to prevent the violation of the Constitution, they also have the duty to do so ... It is a necessary component of the doctrine of separation of powers, that courts have a constitutional obligation to ensure that the exercise of power by other branches of government occurs within constitutional bounds.”

7. Highlighting specific violations in the Respondents' assumption of office, the Petitioner asserts that the selection panel's appointment contravened a subsisting court order in HC JR E017 of 2023. That the selection panel was not vetted by the County Assembly of Migori and was constituted while a previous selection panel was still in place. That the Respondents failed to take the oath of office, violating Articles 74 and 80(c) of the Constitution and section 52(1) of the Leadership and Integrity Act. That the selection process was suspiciously expedited within a single day, indicating premeditated malice. In support of this he cites the case of *Mwende Maluki Mwinzi v Cabinet Secretary, Ministry of Foreign Affairs & 2 others* [2019] eKLR, which held that the office of ambassador though not a state office was still subject to Chapter Six of the Constitution. The Petitioner also relies on the case of *Wamukota v Kenya Electricity Transmission Company Limited & 2 others* (Petition E213 of 2023) [2024] KEELRC 796 (KLR)(8 April 2024) Judgment and the case of *Kibuka v Meru University of Science & Technology (Employment and Labour Relations Petition E001 of 2023)* [2024] KEELRC 298 (KLR) (16 February 2024) Judgment where the courts stated that non-state officers holding senior and important offices should take an oath of office. The Petitioner submits that the Respondents' continued unlawful exercise of Migori County Public Service Board functions, including the redesignation of Ward Administrators, has severely impacted affected officers' family lives and psychological well-being. Additionally, their arbitrary declaration of vacancies has resulted in wrongful terminations and suspensions. Further, the creation of unauthorized offices, such as the Principal Administrative Officer, contravenes Article 10(2)(a)-(c) of the Constitution regarding adherence to the rule of law, public participation, human dignity, good governance, and transparency. In conclusion, the Petitioner submits that it is in the public interest that the administration of employment and labour relations within the Migori County Public Service strictly conforms with the law. He submits that the issues concerning the Respondents' unlawful assumption, exercise of the 2<sup>nd</sup> Interested Party's statutory mandate, and their violations of the Constitution and statute law—alongside their impact on fundamental rights and freedoms—have not been previously litigated or determined elsewhere.
8. The Respondents and the 2<sup>nd</sup> Interested Party submitted that the Court does not have jurisdiction. This submission was despite the previous Ruling of this Court on account of a challenge to the viability of the Petition. They cite the case of *Governor, County Government of Kakamega & 4 others v Omweno & 12 others* [2025] KECA 190 (KLR) which held that the Employment Court has no



jurisdiction in the appointment and removal of constitutional office holders. The Respondents and 2<sup>nd</sup> Interested Party submit that this court is devoid of jurisdiction to hear the matter. They also cite the case of *Dina Management Limited v County Government of Mombasa & 5 others* (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR) (Constitutional and Human Rights) (21 April 2023) (Judgment) where the Supreme Court held

The doctrine of *res judicata* was founded on public policy and was aimed at achieving two objectives namely, that there must be finality to litigation and that the individual should not be harassed twice with the same account of litigation. The doctrine of *res judicata* may be pleaded by way of estoppel so that where a judgment had been delivered, subsequent proceedings were estopped. Where *res judicata* was pleaded by way of estoppel to an entire cause of action, rather than to a single matter in issue, it amounted to an allegation that all the legal rights and obligations of the parties were concluded by the earlier judgment, which may have involved the determination of questions of law as well as findings of fact, that was a form of action estoppel.

9. The Respondents and 2<sup>nd</sup> Interested Party submit that the determination by a higher court is binding on all courts below and that the decisions must be deferred to notwithstanding the misgivings other judges and judicial officers may have. They reference the case of *Wakhungu & 2 others v Republic* [2024] KECA 1426 (KLR). They submit that the decisions being challenged were made by persons who are not before the Court and that any decision made against their actions as the lawful appointing authorities would not stand as it would amount to condemning a man unheard and not in consonance with the natural justice principle of *audi alteram partem*. They cite the case of *Andrew Cheruiyot v Anyoka Rogito* [2016] KECA 662 (KLR). The Respondents and the 2<sup>nd</sup> Interested Party submit that the removal of the chairperson and member of the county public service board is set out under the *County Governments Act* per section 58(5) and that it is incumbent only upon the County Assembly to remove the members of the County Public Service Board subject to Article 251(1) of the *Constitution*. They submit this authority is not shared with any other person or institution. They urge the dismissal of the Petition with costs to the Respondents and 2<sup>nd</sup> Interested Party.
10. The Court has considered the Petition, the reply thereto, affidavits and documents filed as well as the submissions of parties and the law in coming to this conclusion. The very first challenge is to the jurisdiction of this Court. It is trite that jurisdiction is everything. Without it a court of law has no authority to take any step. The Respondents and the 2<sup>nd</sup> Interested Party raise this in their submissions. A challenge to jurisdiction can be made at any time before final judgment is given. They therefore were within their rights to raise it in their submissions despite the determination by Court on the issue prior. They cite in aid the case of *Governor, County Government of Kakamega & 4 others v Omweno & 12 others* (supra) where the Court of Appeal in a recent decision held that the removal of the Chairperson and Members of the County Public Service Board can only be challenged before the High Court as it impacts a process that is guided by Article 251(1) of the *Constitution*.
11. The Petition herein seeks to halt the operations of the Migori County Public Service Board, members of which are the 1<sup>st</sup> to 6<sup>th</sup> Respondents. The Petition asserts the Respondents have not assumed office properly. The Petition includes the Migori County Public Service Board as an interested party yet the orders that would ensue materially affect the 2<sup>nd</sup> Interested Party. The Petitioner should have impleaded the 2<sup>nd</sup> Respondent as the principal party with the 1<sup>st</sup> to 6<sup>th</sup> Respondents being Interested Parties. That said, what is the outcome herein?
12. The Petition asserts that 1<sup>st</sup> to 6<sup>th</sup> Respondents are usurping the role of the 2<sup>nd</sup> Interested Party – Migori Public Service Board. The Respondents are members of the 2<sup>nd</sup> Interested Party and in line



with the decision of the Court of Appeal in Governor, County Government of Kakamega & 4 others v Omweno & 12 others (supra), this Court is now devoid of jurisdiction to determine whether the orders herein can be granted as by their reading and implication will result in the removal of the members of the Migori County Public Service Board. As jurisdiction is being settled and is also evolving, I find no wriggle room in this case to distinguish or offer any meaningful divergent views on the issue of removal of the Respondents herein. The Petition is hereby dismissed and the Court declines the invitation to issue any orders as proposed by the Petitioner. As the Petition was mounted in the public interest, I will order that the parties each bear their own costs.

It is so ordered.

**DATED AND DELIVERED AT KISUMU THIS 3<sup>RD</sup> DAY OF APRIL 2025**

**NZIOKI WA MAKAU, MCIARB.**

**JUDGE**

