



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

Onyango v Speaker County Assembly of Migori & 2 others (Cause E088 of 2023) [2024] KEELRC 376 (KLR) (29 February 2024) (Ruling)

Neutral citation: [2024] KEELRC 376 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE E088 OF 2023
CN BAARI, J
FEBRUARY 29, 2024

BETWEEN

TOM OPERE ONYANGO PETITIONER

AND

THE SPEAKER COUNTY ASSEMBLY OF MIGORI 1ST RESPONDENT

MIGORI ASSEMBLY SERVICE BOARD 2ND RESPONDENT

CLERK, COUNTY ASSEMBLY OF MIGORI 3RD RESPONDENT

RULING

1. Before Court is the Applicant/Claimant's motion application dated 18th December, 2023, brought pursuant to order 51 Rule 1, Order 8 Rule (3)(1), Order 1 Rule 10 and Order 40 of the Civil Procedure Rule (2010), Sections 1(A), 1(B) and 3(A) of the [Civil Procedure Act](#). The Applicant/Claimant seeks the following orders: -
 - i. Spent.
 - ii. Spent.
 - iii. That pending the hearing and determination of the Memorandum of Claim herein, this Honourable Court be pleased to issue an interim Order of injunction directed at the Respondents and restraining the Respondents from implementing the Resolution of the County Assembly of Migori dated 14.12.2023 revoking the appointment of the Claimant as the Clerk of the County Assembly of Migori.
 - iv. That this Honourable Court be pleased to grant leave to the Claimant to amend the Memorandum of Claim by adding the County Assembly of Migori as the 4th Respondent and consequently amend the Memorandum of Claim as per the draft amended Memorandum of Claim attached hereto.



- v. That the draft amended Memorandum of Claim be deemed as duly filed and served upon payment of the requisite Court filing fee.
- vi. That the costs of this application be provided in favour of the Claimant/Applicant herein.
2. The application is supported by grounds on the face thereof and the affidavit of Tom Opere Onyango, the Applicant/Claimant herein.
3. The crux of the application is that on 14th December, 2023, the County Assembly of Migori revoked the appointment of the Applicant/Claimant as the Clerk of the County Assembly of Migori based on a report by the 2nd Respondent recommending the removal of the Applicant as the Clerk of the County Assembly of Migori based on charges which are similar to active charges pending before Kjsumu Anti-corruption Case No. Eoo2/2020.
4. The Applicant avers that he is apprehensive that the Respondents are likely to implement the resolution of the County Assembly of Migori by recruiting a substantive Clerk of the County Assembly, and removing his name from the Pay Roll to his detriment.
5. The Applicant further avers that by inadvertence at the time of instituting the Claim herein, the County Assembly of Migori was through a bona fide mistake omitted to be included as one of the Respondents in this case.
6. It is the Applicant's assertion that the inclusion of the County Assembly of Migori as a party in this Claim, is necessary for the determination of the emerging matters in dispute herein, since on 14.12.2023, the County Assembly of Migori passed a resolution revoking the appointment of the Claimant as the Clerk of the County Assembly of Migori.
7. The Applicant avers that no prejudice shall be occasioned to the Respondents if the orders sought are granted, and if any, the same can be remedied by way of costs.
8. The Respondents opposed the motion vide grounds of opposition and a replying affidavit sworn on 22nd January, 2024, by one Hon. Charles Oyugi Owino, the 1st Respondent herein.
9. The Respondents aver that the Applicant's appointment lapsed on 14/12/2023, per Section 23(8) of the County Assembly Service Act, and consequently, the order of injunction sought is superfluous having been overtaken by events.
10. The Respondents further state that prayers 2 and 3 of the Motion are final in nature, and cannot be granted upon an interlocutory motion, as to do so will amount to nullification of the Resolution of a legislative body absent hearing.
11. It is the Respondents' position that an order of injunction cannot issue against a government either at national or county level. They further aver that an order of injunction is a private law remedy and which is untenable upon a public body.
12. The Respondents state that the Applicant has not worked as clerk of the 2nd Respondent since December, 2020, and there is no basis for reinstating him into office. It is their assertion that the existence of criminal proceedings against an employee cannot constitute a fetter against the disciplinary proceedings at the work place.
13. The Respondents aver that the resolution of the County Assembly was passed pursuant to a clear Constitutional and statutory mandate, and in exercise of a clear jurisdiction conferred on the Assembly by Section 23(7) of the *County Assembly Services Act*.



14. It is the Respondents' case that there is no prima facie case with probability of success, the basis of which can inform the grant of the order of injunction sought. Reliance was had to the case of County Executive of Kisumu & 2 Others v. Kisumu County Assembly Service Board & 5 Others CA No. 4 & 5 of 2015 for the holding that it is not in the public interest to reinstate county officials pending hearing and determination of cases or appeal.
15. The Respondents further aver that similar to national government, injunctive orders cannot be issued against a county government.
16. The Respondents further aver that the balance of convenience militates against the grant of the orders sought and will be better served in allowing the County Assembly of Migori and its organs as lawfully mandated to recruit a substantive clerk.
17. The Respondents state that the motion offends the doctrine of exhaustion premised on Article 234(2) (i) of *the constitution* read with Sections 77 of the county government Act and Section 85 and 87 (2) of the *Public Service Commission Act*, 2017, which require that a party exhausts all available remedies before approaching the court.
18. It is their position that devoid of an appeal to PSC, this court lacks jurisdiction to entertain the suit.
19. The motion was canvassed through written submissions and which have been duly considered.

Analysis and Determination

20. I have considered the application, the grounds and affidavit in support, the grounds of opposition and the replying affidavit together with the submissions by both parties. The issues for determination are:
 - i. Whether this Court has jurisdiction to determine the motion and the claim herein;
 - ii. Whether an injunction can issue against a County Government; and
 - iii. Whether the Applicant has met the threshold for grant of the orders sought.

Whether this Court has jurisdiction to determine the motion and the claim

21. On the issue of jurisdiction, the Respondents submitted that this Court lacks jurisdiction to entertain this suit, on the premise that there are available alternative dispute resolution mechanisms that the Applicant/Claimant has not exhausted, hence the suit as filed, offends the doctrine of exhaustion.
22. The centrality of jurisdiction in any matter before a court was succinctly captured in the celebrated case of Owners of Motor Vessel "Lillian S" v Caltex Oil Kenya Limited [1989] eKLR, thus: -

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

23. Section 77 of the County Government Act provides as follows: -

“(1) Any person dissatisfied or affected by a decision made by the County Public Service Board or a person in exercise or purported exercise of disciplinary control against any county public officer may appeal to the Public Service



Commission (in this Part referred to as the “Commission”) against the decision.

- (2) The Commission shall entertain appeals on any decision relating to employment of a person in a county government including a decision in respect of—
 - (a) recruitment, selection, appointment and qualifications attached to any office;
 - (b) remuneration and terms and conditions of service;
 - (c) disciplinary control.....”

24. Further, Section 87(2) of the *Public Service Commission Act* states: -

“(2) A person shall not file any legal proceedings in any court of law with respect to matters within the jurisdiction of the Commission to hear and determine appeals from county government service unless the procedure provided under this Part has been exhausted.”

25. By the foregone provisions, it is clear that disputes arising from the County Government Public Service, are by law required to be heard by the Public Service Commission in form of appeals in the first instance.

26. Section 9(2) of the *Fair Administrative Action Act*, further provides that where there exist internal mechanisms for the resolution of a dispute, the Court will not review the administrative action until the internal dispute mechanism has been exhausted.

27. The issue then, is whether the Applicant/Claimant should have first appealed to the PSC before lodging this suit. The Applicant seeks orders restraining the respondent from implementing a resolution by the Assembly to remove him from office.

28. In a recent Supreme Court of Kenya decision in *Nicholus v Attorney General & 7 others; National Environmental Complaints Committee & 5 others (Interested Parties)* [2023] KESC 113 (KLR), the Court had this to say on the doctrine of exhaustion: -

“.....the availability of an alternative remedy does not necessarily bar an individual from seeking constitutional relief. This is because the act of seeking constitutional relief is contingent upon the adequacy of an existing alternative means of redress. If the alternative remedy is deemed inadequate in addressing the issue at hand, then the court is not restrained from providing constitutional relief. But there is also a need to emphasize the need for the court to scrutinize the purpose for which a party is seeking relief, in determining whether the granting of such constitutional reliefs is appropriate in the given circumstances. This means that a nuanced approach to the relationship between constitutional reliefs for violation of rights and alternative means of redress, while also considering the specific circumstances of each case to determine the appropriateness of seeking such constitutional reliefs, is a necessary prerequisite on the part of any superior court.”

29. For starters, the matter herein is not brought by way of a Constitutional petition; and secondly, the Applicant has not alleged violation of a Constitutional right. Having said this, this Court in my view, has the mandate to establish the adequacy of an alternative remedy, even where violation of constitutional rights is not alleged.



30. The Respondents submitted that the Applicant/Claimant has been on suspension since January, 2021, pursuant to Section 62 of the [Anti-Corruption and Economic Crimes Act](#). This fact is not denied by the Applicant/Claimant.
31. The next question would be whether an appeal to the PSC will provide the litigant an adequate remedy considering the nature of the dispute and the reliefs the Applicant seeks from the Court.
32. The Applicant herein, seeks orders of injunction to safeguard his employment contract pending the determination of the main claim. In my view, the PSC cannot grant orders such as those sought by the Applicant, and hence the Public Service Commission would not be the appropriate forum for resolution of the Applicant's dispute with the Respondents.
33. In the upshot, I hold that the Applicant/Claimant's motion does not offend the doctrine of exhaustion, and this Court has the jurisdiction to hear and determine this matter.

Whether an injunction can be issued against a County Government

34. The Respondents' position is that an order of injunction cannot issue against the county government and/or any government entity either at national or county level.
35. It has been severally held that there is no absolute bar prohibiting the court from granting orders of injunction against county governments.
36. The country government Act, does not have a provision protecting the devolved governments from orders of injunction. In *Lawrence Ogaro Onyiego & Another vs Samwel Minika & Another* [2017] eKLR it was held that Section 16 (2) of the [Government Proceedings Act](#), does not apply to county governments, and so it would not bar injunctive orders against county government.
37. Further, in *James Muigai Thungu vs County government of Trans Nzoia & 2 Others* [2017] Obaga J stated:

“There is no provision in the County Government Act of 2012, which protects (county government) from injunctive orders. I do not think that it was the intention of the legislature that county governments were to enjoy the same status as the national government. If this was the intention, then the [Government Proceedings Act](#) would have been amended expressly to include county governments. I therefore do not find that the county government can come under the umbrella of the [Government Proceedings Act](#), when it comes to injunctions against them as well as their officers”

38. Additionally, Section 16 of the [Government Proceedings Act](#), read with Order 29 Rule 2 (2)(d) of Civil Procedure Rules, is clear that the protection given to the national government against orders of injunction, does not apply to County Governments.
39. I conclude by holding that nothing forecloses this court from issuing injunctive orders against county governments.

Whether the Applicant has met the threshold for grant of the orders sought

40. The final issue is whether the Applicant has met the threshold for grant of an order of injunction.



41. To qualify for grant of an order of injunction, the Applicant is under duty to show that his application satisfies the conditions set out in the celebrated case of *Giella vs Cassman Brown & Co. Ltd* [1973] EA 358 where the court held thus: -
- “The conditions for the grant of an interlocutory injunction are now well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt it will decide the case on the balance of convenience.” (followed in *Kenya Commercial Finance Co.Ltd v Afraha Education Society* (2001) IEA 86 at page 89d).”
42. The Applicant/Claimant is the Clerk of the 2nd Respondent. He was suspended from service when criminal charges were brought against him, and has since January, 2021, not exercised the functions of the office of Clerk.
43. Section 62 of the *Anti-Corruption and Economic Crimes Act* states as follows:
- “(1) A public officer or state officer who is charged with corruption or economic crime shall be suspended, at half pay, with effect from the date of the charge until the conclusion of the case”(emphasis own)
- Provided that the case shall be determined within twenty-four months.
- (2) A suspended public officer who is on half pay shall continue to receive the full amount of any allowances.
- 3) The public officer ceases to be suspended if the proceedings against him are discontinued or if he is acquitted.....”
44. It is clear to this Court that the Applicant is under statutory suspension, and the law under which he is suspended, expressly requires that he holds the office until the case is concluded.
45. I further note the proviso to the section, requires that the case is concluded within 24 months, and which I presume forms the basis for the Respondents’ action against the Applicant.
46. In my view, the Applicant/Claimant has no control over the time taken to prosecute his matter, and the fact that the same still pends two years later, cannot be visited upon him. Further, even with the proviso, the Act is silent on what happens to employees when cases drag beyond the 24 months.
47. It is trite to note that Article 10 of the Constitution binds all state and public officers to abide by the rule of law. The law as it stands, require that persons suspended under the *Anti-Corruption and Economic Crimes Act*, stay on suspension until their cases are determined. This court will no doubt send employees out of the world of work and go against the principle of presumption of innocence, if employers are allowed to dismiss persons suspended under this law,
48. For the reasons foregone, I find that the Applicant has established a prima facie case with a probability of success, and stands to suffer irreparable injury if the orders sought are not granted.
49. The Applicant’s prayers for leave to amend the claim was not opposed, and is allowed as prayed.
50. In the end, I grant orders as follows: -



- a. That pending the hearing and determination of the Claim herein, an Order of injunction be and is hereby issued restraining the Respondents from implementing the Resolution of the County Assembly of Migori dated 14th December, 2023, revoking the appointment of the Claimant as the Clerk of the County Assembly of Migori.
- b. That the Applicant/Claimant is granted leave to amend his Memorandum of Claim by adding the County Assembly of Migori as the 4th Respondent.
- c. That the draft amended Memorandum of Claim be and is hereby deemed as dully filed upon payment of the requisite Court filing fee.
- d. That the costs of the application shall be in the cause.

51. Orders accordingly.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 29TH DAY OF FEBRUARY, 2024.

C. N. BAARI

JUDGE

Appearance:

Mr. Oyuko present for the Claimant/Applicant

Ms. Achieng present h/b for Mr. Okong'o for the Respondents

Erwin Ongor - C/A

